

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

PHEKO JOSEPH MAFATLE	1st Accused
LIKOTSI VICTOR LESETELI	2nd Accused
TUMAOLE JOHANNES TANYELE	3rd Accused
MOETI JOHANNES MOTHIBA	4th Accused

H U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 18th day of April, 1989

The accused are summarily charged before this Court with the crime of robbery, it being alleged that upon or about the 31st January, 1988 and at or near Maluti Retailers Supermarket in the district of Quthing the accused robbed one Vernon William Holder and other Maluti Retailers staff of M47,501-94 (Cash and cheques); motor car with Reg. No. G00 28 and its keys; door keys and safe, black executive brief case; document and letters; the property or in the lawful possession of Vernon William Holder. To this charge all the accused pleaded not guilty.

The complainant, V.W. Holder (P.W.1) is the manager of Maluti Retailers Supermarket situated within the township of

/Monyeni.....

Monyeni in the district of Quthing. It is not disputed by the defence that on the night of the 31st January, 1988 five men came to the house of V.W. Holder. They held him and his family at gunpoint and demanded money from him. He told them that the keys of the shop and the safe were kept by his assistant and cashier respectively. The men forced him to convey them in his car to the homes of his assistant and cashier. Having found the keys they went to the shop accompanied by the assistant manager, the cashier, the manager and the nightwatchman. On their arrival at the shop the manager was ordered by one of the men to open the doors of the shop, then the office and finally the two safes in which the money was kept. The men then took the money and items mentioned above. They used the manager's car as their get away car.

The vehicle was driven in the direction of Mafeteng. By the time the car came to Mafeteng, Quthing police had already alerted Mafeteng police who mounted a roadblock. The car eventually came to the roadblock and there was exchange of fire but it managed to go through the roadblock. On the following morning A2 and A3 were arrested by the police at or near Mathebe village heading for Maseru. The manager's car was found abandoned at or near Ramokoatsi's village and the police allege that it was pointed out by A2 and A3. This allegation is vehemently denied by A2 and A3.

A few days later the brief case and part of the stolen money together with some letters were found in a "house" built of masonite in which A1 and A4 were present when the police arrived.

/Later the.....

Later the police allege that A1, A2 and A3 led them to a donga in the area of Ramokoatsi's and pointed out a certain spot and dug out part of the stolen money contained in nineteen (19) bank money bags. The accused deny this allegation.

Identification parades were held and various witnesses pointed A1, A2 and A3. The accused's defence is that of alibis.

I shall now attempt to give a summary of evidence of each of the Crown and defence witnesses. Paulosi Mafefoane Sethotha (P.W.6) testified that he is employed as a nightwatchman at the home of P.W.1. On the night in question he was on duty when two young men came to him, one of them was wearing a camouflage uniform similar to the one used by soldiers. The man in uniform explained that they were Government employees and that he wanted to see the manager (P.W.1) because he had problems in his office. He agreed to lead the two men to the manager's house. After taking only a few steps towards the house he saw other two young men joining them and the man in uniform explained that they were his subordinates. He said his name was Thabang. When they came to the house he knocked at the window of the manager's bedroom and then blew a whistle. P.W.1 woke up and asked who was there. He explained that a certain Government employee named Thabang wanted to see him. P.W.1 went to the back door and opened it. As soon as he opened the door they jumped at him and ordered him to face the wall with arms raised up.

P.W.6 says that at the same time some of the men caught hold of him and pushed him into the house and ordered him ^{to} face the wall with his arms raised up. One man remained guarding them while the others rushed into the bedroom of P.W.1. After some time they

/called P.W.1.....

called P.W.1 leaving him (witness) guarded by one man. Eventually they went to the house of Julia Thakalekoala (.P.W.3). He does not know what happened there because he remained in the car in the company of one of the men. After a short time the men came back accompanied by Julia. From there they drove to the house of the manager, the man in uniform alighted and went into the house. He came back with the two men who had remained in the house. They then went to the house of 'Maustin Lilian Thakalekoala (P.W.5); she joined them in the car and they then went to the shop.

Paulosi says that he remained in the car when they arrived at the shop. The men went into the shop and later came out carrying bags of money in baskets and put them in the car. They then pushed him out of the car into the shop and warned him not to make any noise. They locked the door of the shop and he heard that the car was being driven away. At the identification parade held a few days after the robbery he did not identify any of the suspects.

William Holder testified that on the night in question he was already in bed when the night-watchman knocked at the window of his bedroom and told him that he had visitors from Government offices and that one of them was Thabang. Although he did not know Thabang he opened the back door because he often helped civil servants when they urgently required things like petrol. After opening the door a man holding a pistol in his hand suddenly jumped at him and ordered him to face the wall and to raise up his arms. He complied. The same order was given to the night-watchman. One of the men searched him while others went to his bedroom where they found his wife. After some time they came back and they told him that they

/wanted the keys.....

wanted the keys of the shop. He told them that the keys of the shop were kept by one Julia Thakalekoala, the assistant manageress (P.W.3) and that the keys of the safe were kept by one 'Maustin Thakalekoala, the cashier (P.W.5). After about an hour they took him to his bedroom and one of the men who had his face covered with a scarf leaving only his eyes, ordered him to take him to his (witness's) car.

P.W.1 describes this man whose face was covered with a scarf as tall but not very tall and a light complexion. He saw his complexion because the scarf kept on getting loose and falling thus exposing his face for a very short time. As they left for the garage they were joined by two men. One of them wore a camouflage uniform and a cap but his face was not covered with anything. He was short but well built; he had a dark complexion and pimple holes on his face. This is the man who took command.

The other man was small and short; his face and head were covered with a pantyhose leaving only his eyes. P.W.1 says that he did not see this man well because he was in the bedroom with his wife for most of the time. When they got to the garage he was given the car keys and ordered to take the group to Julia's home. The group consisted of himself, the man in camouflage uniform, the man whose face was covered in pantyhose and the night-watchman. Two men remained with his wife and mother-in-law. They got into the car and he drove to Julia's place. When they arrived there the man in camouflage uniform ordered him to call Julia and tell her that he (witness) wanted to see her. During this episode the man was pointing a pistol at him. He called Julia and she opened the door. As soon as

/she opened.....

she opened the man in uniform entered and asked her if she had the shop key. She said she had them and the man ordered her to give them to him. She complied. From there they drove to 'Maaustin's place but before they arrived there they stopped at his (P.W.1's) house and picked up the two men who had remained there.

On their arrival at the home of 'Maaustin P.W.1 was ordered to call her in the same manner as he did when they were at the home of Julia. 'Maaustin produced the safe keys and was ordered to join the group in the car. P.W.1 was ordered to drive to the shop. On their way to the shop he passed a vehicle which was parked between his house and the shop. He was ordered to stop in front of the shop. They alighted; he was given the keys and ordered to open the door. Having opened the door he and the ladies i.e. 'Maaustin and Julia entered into the shop accompanied by the man in camouflage uniform and the tall man with a scarf partially covering his face. One man remained at the door while another remained in the car. P.W.1 states that the nightwatchman accompanied them but the latter says that he remained in the car. The door of the office was opened and 'Maaustin was ordered to open the safes. There were two safes in that office - one was built into the wall and another was on the floor. There was electric light in the office as well as in the shop.

After the opening of the safes the man in camouflage uniform took bags full of change money and put them in a basket and gave them to the tall man who was standing at the door of the office. The tall man handed the basket over to the man who stood at the door of the shop and the latter carried it to the car. Because there were many bags Julia was asked to help in the carrying of the money.

/P.W.1 says.....

P.W.1 says that he saw the man in uniform very well and at very close range while they were both in the office for about half an hour. The man had pimple marks or holes on the cheeks. That man was A1. Before the men left A1 sort of wielded his pistol and ordered them not to move. He locked the door of the office and left. Immediately after he had left they heard that the car was moving away. They called the nightwatchman who was left in the shop and asked him to break the door of the office.

P.W.1 estimates that the money stolen amounted to M47,501-95 and included cheques; the keys of the shop and the car were taken; the registration number of his car used by the robbers to get away is G00 28, it is a Datsun Skyline 1984 model; the robbers also took a black brief case into which they packed bank notes. When he returned to his house after the robbery, P.W.1 found that his wardrobes had been opened and all his clothes were scattered on the ground. His 6.35 pistol together with its holster were missing as well as M400 which was in the drawer.

On the 10th February, 1988 two identification parades were held at Quthing police station. In the first one the people who participated wore camouflage uniforms. William Holder, Julia Thakalekoala and 'Maaustin Thakalekoala pointed out A1. Paulosi Sethotha and Vera Holder failed to point out anybody. In the second parade the participants wore private clothes. Vera Holder (P.W.2) pointed out A2 and A3; William pointed out A3; 'Maaustin pointed out A1. Paulosi and Julia failed to point out anybody, however William Holder and Julia explained that A1 was there in the second parade but they did not point ^{him} out because they

/had already.....

had already done so in the first parade. The Crown witnesses who identified A1 in the first parade denied that he was dirty and that his shoes were unpolished as compared to other people in the parade.

The evidence of Julia Thakalekoala (P.W.3) and 'Maustin Thakalekoala (P.W.5) is the same as that of William Holder regarding the manner in which they were picked up from their homes on the night of the 31st December, 1988 and taken to the shop and how the robbers took the money from the two safes.

Sergeant Thamae (P.W.7) was on duty at Mafeteng charge office when he received a message from Quthing police station that a robbery had been committed there. He mounted a roadblock at the Mafeteng traffic circle and put a police stop sign about thirty paces from the traffic circle. He was assisted by another policeman. At about 3.30 a.m. he saw a vehicle speeding towards the stop^{sign} and as soon as it passed it he heard a gun report coming from the vehicle. He fired back with his rifle but the vehicle passed him. Its registration number was G00 28. He rushed back to the charge office and got a police vehicle and gave chase. Unfortunately when they were at Lithabaneng their vehicle broke down. He walked back to the charge office and got another vehicle. He was accompanied by Trooper Ntsapi (P.W.8) and a driver. They resumed the chase. When they passed Mathebe village two men stopped their vehicle and asked for a lift to Maseru. They said they worked at the brewery in Maseru and had to report at work at 6.00 a.m.

At that time he noticed that their shoes were covered with mud. He asked them where they came from and why they did not go to

/Maseru on the.....

Maseru on the previous day. The two men were A2 and A3. After some questions were put to them, they said they came from Mathebe village and that they sold dagga. They failed to explain the presence of the mud on their shoes. Sergeant Thamae says that he introduced himself to them and told them that he was investigating a case of robbery committed at Quthing and that he suspected them. He searched A2 and found a .38 special revolver with five bullets and M75-00. A2 said he was a soldier in the R.L.D.F. Trooper Ntsapi searched A3 and found M40.00. After some interrogation A2 and A3 volunteered to lead the police officers to a spot at Ramokoatsi's where they would point out a motor vehicle. They got into the vehicle and it turned towards Mafeteng. When they came to Ramokoatsi's main bus stop the accused directed the driver to turn and drive towards Koranta's village. On the way they asked the driver to stop the vehicle. They all alighted and the accused led them to a spot where they pointed out a vehicle with registration number G0028.

Sgt. Thamae examined the vehicle and found that it had a bullet hole on the right near mudguard and its left rear window glass was broken and missing. The back seat had a hole and there was blood on it. He found two driver's licences belonging to William Holder and his wife. He ordered A2 and A3 to undress and he found that A3 had a very fresh open wound at the back between the shoulders. The dustcoat A3 wore had blood on it but it was not torn. The vehicle was left where it was found and he took the two accused to Mafeteng police station.

Following the explanations given by the two accused Sgt Thamae came to Maseru with them. They were joined by a team of

/Maseru C.I.D.....

Maseru C.I.D. men and the accused led them to Tsosane's village and pointed out a blue Mazda car parked in a yard. It was later towed to the C.I.D. offices in Maseru. On the 2nd February, 1988 A2 and A3 were handed over to Quthing police. Under cross-examination Sgt. Thamae denied that after arresting the accused near Mathebe they took them to a nearby dam and assaulted them.

Detective Trooper Ntsapi's evidence confirms all the material aspects of Sgt. Thamae's version. There are some variations on minor details. Trooper Ntsapi says that he found M50.00 when he searched A3 and not M40.00 as alleged by the sergeant. According to him the firearm licence found at the home of A2 was checked and left behind, its serial numbers tallied with the numbers on the revolver. On the other hand Sgt. Thamae said that they seized it but he could not find it amongst the exhibits.

Detective Sergeant Mokeretla (P.W.9) is stationed at Maseru C.I.D. office. He testified that on the 1st February, 1988 he accompanied Mafeteng police and A2 and A3 to various places in Maseru township. At the home of A2 he noticed that a firearm permit was found but the police did not take it. At Tsosane's they found a blue Mazda car with Reg. No. B0560 which was eventually towed to Maseru C.I.D. premises. On the 3rd February, 1988 he received a report at about 7.00 p.m. As a result of that report he made arrangements to raid a certain masonite house situated at Tsosane's on the following morning.

/At about.....

At about 6.00 a.m. on the 4th February he left for Tsosane's accompanied by Trooper Sekamo and Private Sebeso and three other policemen. When they arrived at the house in question he posted his men at various places around the house. He then knocked at the door and a person inside asked who was there. He told him it was Makeretla and ordered him to open the door. After about ten minutes the door was opened. He entered and found A1 and A4 standing in the house and already fully dressed. In the house there was a bed, a wardrobe and a cooker. The mattress was on the floor. Having introduced himself to the two accused, he searched A4 and found an amount of R300 in his pocket together with a piece of paper on which was written M300 and the name Webber Newdigate. A4 explained that it was the money with which he intended to pay bail for his brother who was detained at Mafeteng. He searched A1 and found nothing.

He suddenly saw a black brief case on the side of the mattress. He asked the accused whose bag it was. A4 said it belonged to A1, the latter denied and said "it belongs to you Weary." (Weary is A4's nickname). He took the bag and opened it in the presence of the accused. It contained money in bank notes and coins, there were some cheques as well. He also found some letters addressed to Lilian Thakalekoala (P.W.5). The money was counted in the presence of the accused and it totalled M5 052-53. He arrested the accused and took them to his office together with the brief case and its contents including the M300 he found when he searched A4. On the 5th February the accused and the exhibits were handed over to Warrant Officer Mara (P.W.12) of Quthing police.

/In cross-examination.....

In cross-examination Sergeant Mokeretla admitted that they were armed with guns when they raided the house and that Trooper Sebeso (P.W.11) was wearing a blanket and that Trooper Sekamo stood at the doorway during the search. He denied that the black brief case was brought into the house by the police and that Private Sebeso wore a blanket so that he could hide it. He denied that they assaulted the accused with tree branches after they found them in the house. He says that he did not get time to apply for a search warrant and that he did not seek the assistance of a chief when he raided the house. A4 said that he was sleeping there and not at his home because he had heard that police were looking for him.

Warrant Officer Mara testified that after A1, A2 and A3 had been arrested he interrogated them. As a result of the explanation they gave he put them in a vehicle and drove to Mafeteng. When they came to Ramokoatsi's A1 said that the vehicle should stop. They all alighted and the three accused led them to a donga, there was a pit in that donga and the accused put their hands in that pit and took out bags full of money. Nineteen bags were taken out and they were all moist. Warrant Officer Mara denied that when they approached the spot where the bags of money were unearthed there were two women standing there who moved away when they saw them. From there they came to Maseru where the former A5 produced his camouflage uniform and gave it to the police.

Naleli Papa Sello (P.W.4) is an accomplice. He testified that A1 and A4 were his friends. He first met A2 and A3 on the day they went to Quthing to carry out the present robbery. On the

/evening of the.....

evening of the 29th or the 30th January, 1988 A1 came to his home at Sea-Point and told him that there was a "job" to be done at Quthing and that he would come to see him with A4. A1 explained that the "job" was to steal money at Quthing. The two men came to his house and explained everything about the "job" to be done at Quthing.. A4 said that the tip was from his father-in-law. After that he rushed into the house and took the top part of his track suit and wore it over his T-shirt. They went to A4's home where A2 was waiting for them outside the house. It was explained to him that he was a soldier. A4 entered into the house and came out with A3. A1 objected that they were too many but A4 said A3 knew the place where the robbery was going to be committed. They all got into A4's Datsun car and drove straight to Quthing. It was A4 who drove. A3 led them to shop owner's home. When they arrived there he (the witness), A1, A2 and A3 alighted while A4 drove to the shop. Before A4 drove away he told them that there were guns and a uniform under the car seat. He took a gun, A1 took a gun, A3 took a knife and A2 took a gun. A1 wore the camouflage uniform.

When they came near the house A1 and A3 went to the night-watchman and spoke to him. They all went to the house accompanied by the night-watchman who knocked at the door and also blew a whistle. He explained to P.W.1 that some Government officials wanted to see him. As soon as P.W.1 opened the door they all pointed guns at him and he (witness) pushed him into the kitchen and told him that they wanted money. He searched him and found that he had no gun. The others had rushed to the other rooms. After some time they called him and asked him to bring the man. P.W.1 explained to them that he had no money in the house,

/the money was.....

the money was in the shop. He explained that keys of the shop were kept by a certain lady.

It was decided that A1 and A2 should fetch the keys from the lady and that P.W.1 should accompany them. Sello says that he and A3 remained with the wife of P.W.1 and another older lady. While he was still trying to calm the two ladies who appeared to be very frightened, he heard the sound of a hooter outside. He went to the door. His colleagues called him and said they should go. He called A3 and they both joined their colleagues in the car. From there they went to the home of another lady who kept the safe-keys. A1, A2, the whiteman (P.W.1) and the lady alighted and went to the house. While they were away he felt uneasy and decided to walk to the shop. The car passed him on the way. When he arrived there heavy money bags were being carried from the shop to the car. He assisted his colleagues.

After all the money was put into the car they all boarded the car. A1 drove at high speed back to Maseru. When they came to Mafeteng they saw a "police stop" signboard. They ignored it and passed it. The police fired at them but A1 continued driving at a high speed. After the shooting they became frightened and decided to abandon the car and to walk to Maseru. The car was stopped at Ramokoatsi's. They took out all the bags and buried them in a donga. While they were burying the bags they saw A4's car passing. A1 tried to stop it but in vain. They took the pistols, the uniform and the money in bank notes and started walking to Maseru. They arrived at Mathebe at sunrise. Because A2 had to report for duty at 8.00 a.m. they agreed that he must go to a bus

/stop and.....

stop and board a taxi to Maseru. They gave him some money. A3 complained of pain at the back. It was discovered that his shirt appeared as if it had been burnt with acid and it had many holes. There was some blood on the shirt. The witness gave his top of his track suit. The shirt was thrown into a donga.

Sello says that he ordered A3 to go with A2 so that he could tell A4 to come and fetch them. After the departure of A2 and A3 he and A1 continued on their journey. When they came to Toloane's they noticed that a road block had been set up. They changed direction and went up a plateau overlooking Morija. They sat on the plateau for a long time and while they were sitting there was a call of nature. He went further up the hill and relieved nature. When he came back A1 had left and he never found him till he came down to the bus stop and boarded a taxi to Matsieng and alighted at Masianokeng, From there he walked to Maseru. He looked for A1 but failed to get him. On the 4th day A1 came to him and took him to his house where they found A4. They went to Tsosane's at the home of A4 and shared the loot. They each got R3000-00. An amount of M6000-00 was set aside for A2 and A3.

On the following morning he was intending to go to Roma. When he was at Mohalalitoë he saw a group of people in a passing van. He saw A1 and A4 amongst them. He assumed that they were under arrest. He fled to the Republic of South Africa and remained there for several months. He returned to Lesotho in August and surrendered himself to the police because he had been on the run for a

/very long time.....

very long time and was home sick. He wanted this matter to come to an end so that he can be free again.

A1, Pheko Joseph Mafatle, has denied that on the night of the 31st January, 1988 he went to Quthing and committed robbery at Maluti Retailers Shop. During the day (31st) he was busy repairing motor vehicles at his home because he is a mechanic. He did not even go to church. During the night he slept at his home and never went to Quthing. He denies very emphatically that Baba Sello, the accomplice is his friend. The car with Reg. B0560 belongs to one Dhlomo Monaphathi. It had been in his possession for a long time because he was to repair it. On the 29th January, 1988 he took it to a garage near the home of A4. As there were many vehicles the yard of the garage was full. He then asked the wife of A4 to allow him to park it in her yard. She agreed. At that time A4 was not at home.

On the 4th January, 1988 he went to Tsosane's to check whether the car had been repaired. The wife of A4 told him that the police had taken the car and that A4 was sleeping in the masonite house about 200 yards away. He went there and A4 allowed him to come into the house. A4 was wearing a trunk and a T-shirt and went to the other side of the curtain saying he was going to dress. At that time someone kicked the door open and five policemen entered. Two of them were wearing blankets while the rest were in uniform. One of the two who were wearing blankets took out a black brief case and put it on the table. They opened it and showed them the money and asked them whose money that was.

/They said

They said they did not know it. The policemen broke branches from the trees and thrashed them very severely. They were taken to the C.I.D. offices where the assaults continued.

During the evening of the same day police from Quthing arrived and took them to Quthing. On Sunday he was taken out of the cell and found A2, A3 and A5 outside. He did not know them. Warrant Officer Mara ordered them to get into a police van. He brought them to Ramokoatsi's. He stopped the vehicle and ordered them to follow him to a small donga. There were two women in that donga and W/O Mara led them to those women. When they approached them the women went away. W/O Mara pointed out a spot and ordered them to dig and nineteen bank bags were unearthed. From there they came to Maseru where A5 produced a camouflage military uniform.

Regarding the identification parade held at Quthing police station A1 says that he was made to wear an unironed uniform and unpolished boots while the other people in the parade wore clean and well ironed uniforms and polished shoes.

A2, Likotsi Leseteli, testified that he visited a relative at Mathebe on the night of the 31st January, 1988. On the following morning he went to the bus stop where he was met by A3. They were both going to Maseru. They waited there for some time during which no taxi came. They decided to walk to Motsekuoa where the chances of getting transport were more favourable. Immediately after leaving the bus stop a police vehicle came and they asked for a lift. Instead of giving them a lift the police interrogated them saying that they suspected them of involvement in a Quthing robbery.

/Thereafter.....

Thereafter they handcuffed them and tied them to a spare wheel. They were taken to a dam and drowned and hit with stones. Finally they were led to a car at Ramokoatsi's by Sergeant Thamae and his colleagues. A few days later they were led to a place at Ramokoatsi's where Warrant Officer Mara pointed out a certain spot in a donga and ordered them to dig. Several bags of money were unearthed. He knew nothing about those bags..

The story of A3, Tumahole Tanyele, is the same in substance with that of A2 from the time they were arrested at Mathebe. He met A2 at Mathebe by chance. He had spent the night with his girlfriend at Matlapaneng in Mafeteng. He got a lift from Matlapaneng to Mathebe where he found A2.

A4, Johannes Mothiba, testified that on Friday the 29th January, 1988 he went to Seetsa's in Leribe accompanied by one Ntene (D.W.5). The purpose of their journey was to go and discuss the possibility of jointly running a cafe owned by Ntene. On the 30th January, 1988 they went to Butha-Buthe and bought stock at Metro Cash and Carry. On the 31st January, 1988 he spent the whole day at the cafe and slept at Ntene's place on the night of the 31st January. He returned to Maseru on Monday, the 1st February, 1988.

He admits that on the morning of 4th February police raided the masonite shack in which he was sleeping. They found him in bed and threw away his blanket and took him outside where they searched him. They found M300 and a piece of paper referred to above. He denied that he used the shack as a hide-out. The reason why he

/slept there.....

slept there was because he had asked the owner of the shack, P.W.10 to go and take care of his ill child. She had been sleeping at his place for a few days and he was afraid that thieves would break into her house.

The first issue in this case is whether the identification of A1, A2 and A3 as the culprits has been proved beyond a reasonable doubt.

In the first identification parade held at Quthing police station A1 was identified by William Holder, Julia Thakalekoala and Maaustin Thakalekoala. It is not in dispute that at the home of Holder the electric lights were on when the thieves raided the house. A1 had not covered his face and was in the house for a long time. Mr. Holder had a very good chance of observing his features even before they went to the shop. It is also not in dispute that at the shop the electric lights were on and that A1 was in the shop/office for about half an hour. During all that time A1 was very close to Mr. Holder, Mrs. J. Thakalekoala and Mrs. M. Thakalekoala. Although the witnesses were frightened I am of the opinion that they had a very good chance of observing A1. They saw that he had pimple holes or marks on his cheeks, that he was not tall and that he was well built. A1 made it very easy for the witnesses to see him well because he did not disguise himself in any way.

In the second identification parade Mrs. Holder identified A2 and A3. She said that A2 was covering his head and face with a pantyhose. It is doubtful whether she could identify A2 under such

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circumstances. A3 was identified by Mrs Holder and Mr. Holder. However their evidence differs as to whether his face was covered or not. Mr. Holder says that A3's face was covered with a scarf. We now know that a person whose face was covered is the accomplice (.P.W.4). The identification of A2 and A3 by Mr. Holder and his wife leaves much to be desired and must be rejected.

The next question to consider is whether the identification parades were conducted in a fair manner or not.

In Teboho Mohajane and another v. Rex, C. of A (CRI) No. 7 of 1984 (unreported) at pages 3-5 Mahomed, J.A., set out in great detail a number of salutary rules concerning the holding of identification parades as follows:-

1. The prospective witness should be asked to give his description of the alleged offender at the earliest opportunity to avoid the risk of faulty recall and the risk of discussing recollections with other potential witnesses R v. Y 1959 (2) S.A. 116 (W).
2. The identification parade itself should for this reason be held as soon as is reasonably possible.
3. There must be a sufficient number of persons present on the parade to make any consequent identification significant. 8 or more persons are generally necessary. (Hoffman South African Law of Evidence 2nd Edition p. 438).
4. The persons present on the parade must be substantially similar in appearance and dress. If by appearance, dress or otherwise, the accused stands out conspicuously, the identification of the accused might not only be unfair to him, but of little evidential value. More particularly, where the culprit is alleged to have worn attire of a distinctive colour or design at the time of the offence, there would be little significance in an identification taking place at a parade where the accused alone is attired in such colours or design.

R. v. Masevang 1950 (2) SA 488 (AD)

S. v. Mhlati 1984 (4) SA 629 (AD)

5. The accused person, on an identification parade should be given a fair opportunity if he chooses, to change his or her position on the parade.
6. An identifying witness should not be required to make his identification on the assumption that the culprit concerned is in fact on the parade. The witness should be asked to point out the person concerned "if such person is present" on the parade. (R. v. Nara Sammy 1956 (4) SA 629 (T) 1926 S.A.L.J. 287).
7. Care should be taken to ensure that the identifying witness does not see the accused before the identification parade is assembled, particularly in circumstances where he can get the impression that he is indeed the person suspected by the police. (Kola v. R. 1949 (1) P.H.H. 100 (AD)).
8. Where there is more than one potential identifying witness, steps should be taken to ensure that such witnesses do not have the opportunity of discussing the identification. (R. v. W. 1947 SA 708 (AD at 712)).
9. It would often be salutary to hold more than one identification parade, and to include a "blank parade" on which the accused is not present at all. (Hoffman (supra) p. 440).
10. Contemporaneous notes of any relevant circumstances accompanying any identification at such a parade, should be kept where it is possible e.g. if the witness shows hesitation or passes the accused a few times before finally identifying him or if he uses words indicating some uncertainty such as "I think it is him".
11. It is undesirable that the officer who is investigating the case should also be in charge of the parade (S.v. Nara Sammy (supra)).

12. A photograph of the persons assembled on the parade, preferably in colour, should be made available to the Court whenever possible so as to enable the Court to appreciate the significance of the identification or any objection thereto.

It seems to me that in the present case the police officer who conducted the identification parade (Sgt. Nathane, P.W.13) observed the above rules in a satisfactory way. His instructions to the identifying witnesses were that they should "select suspect if any there". In other words he did not give the witnesses the impression that the suspect or suspects were in the parade. At the charge office the witnesses were kept in separate rooms and went in different directions after they had been to the parade. It was suggested that A1 wore an unironed uniform and unpolished boots while the other people in the parade wore well ironed uniforms and polished boots. This was denied by William Holder.

It was submitted on behalf of A1 that he was the only one in the parade who was 39 years old. The others were much younger than him. I do not agree with this submission that the ages of the people in the parade were so different from that of A1 that he was outstanding. There was one person who was 37 years old and several were 25 years old or over. There was only one person who was 17 years old. I do not think that A1 was prejudiced in any way because all the people in the parade except one were adults. A1 is not an old man who can easily be distinguished from a man of 27 years of age.

The next question to be decided is that of pointing out. Section 229 (2) of the Criminal Procedure and Evidence Act 1981 reads:

/"Evidence.....

"Evidence may be admitted that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against him on such trial."

It was submitted on behalf of all the accused that the evidence of pointing out should be rejected on the ground that the policemen concerned led the accused to the car and the money dug out of the donga. It was also submitted that the accused were badly assaulted before they were led to Ramokoatsi's. I cannot rule out the possibility that the accused were assaulted but not to the extent they want this Court to believe. When A4 was examined by Dr. Choi on 8th March, 1988 eighteen (18) whip marks were found on the back, both wrists and on the right big toe. There were healed fractures of the bones of the right hand. A1 had handcuff marks on both wrists, both arms and buttocks. He had a deformed rib which was protruding. It was not a recent injury. Even if the accused were assaulted it is impossible that they would know where the car used by the robbers as a get-away car was abandoned and where the loot was buried. There is evidence that the car was not just on the side of the main road between Mafeteng and Maseru. They had to turn away from the main road. They drove along the road to Koranta's before they came to the car.

In S. v. Ismail and others (1), 1965 (1) S.A.446 it was held that the intention of Legislature in enacting section 42 of Act 29 of 1955 and then section 245 (2) of Act 56 of 1955 (similar to our section 229 (2) was to make admissible evidence of a pointing out forming part of a confession as such, notwithstanding that the pointing out followed upon considerable physical violence done to the accused. It follows that even if the accused were assaulted the

/the evidence.....

the evidence of pointing out is admissible. I reject the evidence of the accused that they were led there by the police. A2 and A3 were arrested near Mathebe and lied that they came from Mathebe. After a short interrogation they led the police to the car used by the robbers. After further interrogation A1 joined A2 and A3 and led police to the spot where the money was buried.

It is also trite law that when the State wishes the court to draw an inference of guilt solely from a pointing out by an accused, then the evidence of pointing out must be satisfactory in every respect and beyond suspicion. It must be such that it is beyond reasonable doubt that the only inference which can be drawn is that the accused had knowledge of the exact position of an implicative spot because he took part in the commission of the offence (S. v. Gwevu and another, 1961 (4) S.A. 536 (E)). In the instant case the Crown does not wish the Court to draw an inference of guilt solely from the fact that accused pointed out the car and the stolen money. There are other pieces of evidence which implicate the accused.

In addition to the pointing out A1 was identified by three witnesses as one of the robbers. He was found in possession of a brief case containing money, cheques and letters of Lilian Thakalekoala. All these articles were taken from the shop on the day of the robbery. His evidence that when the police arrived at the masonite shack he had just arrived is rejected by the Court. It is also not true that the brief case was brought by one of the policemen who was wearing a blanket. Sergeant Mokeretla deposed that A1 insisted that the brief case belonged to Weary (A4); the latter denied and said it belonged to A1. I have no reason to

/disbelieve.....

disbelieve Sgt. Mokeretla. The impression I had of him was that he was a truthful witness and was not shaken by cross-examination.

I shall now deal with the evidence of the accomplice. The law regarding the approach to be adopted by a Court when dealing with the evidence of an accomplice was propounded in S. v. Hlapezula and others, 1965 (4) S.A. 439 at p. 440 where Holmes, J.A. said:

"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit. Accordingly, even where sec. 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular R. v. Ncanana, 1948 (4) S.A. 399 (A.D) at pp. 405-6; R. v. Gumede, 1949 (3) S.A. 749 (A.D) at p. 758; R. v. Nqamtweni and Another, 1959 (1) S.A. 894 (A.D.) at pp. 897G - 898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned."

It is true that Baba Sello did not want to commit himself as far as dates were concerned. He also contradicted himself as to whom he handed himself over after he had been on the run for a long time. However on the whole I found him to be a reliable witness. His evidence is corroborated by that of William Holder, Julia Thakalekoala and Maaustin Thakalekoala who identified A1 in an

/identification.....

identification parade. Another piece of evidence which corroborates the accomplice is the fact that A1, A2 and A3 pointed out the stolen money buried in a donga and the car used by the robbers.

The accomplice said that when they came to Mathebe they found out that A3 had a wound at the back. He gave him his top of a track suit because the shirt was torn. On this point he is corroborated by Sgt. Thamae that A3 had a fresh wound on the back but strange enough there was no hole on the dustcoat he was wearing.

The corroborative evidence directly implicates the accused in the robbery committed at Quthing on the night of the 31st January, 1988.

Sgt. Thamae says that when he searched A2 he found a .38 special revolver. Although A2 now denies that a revolver was found when he was searched at Mathebe, he seems to have forgotten that in his affidavit when he applied for bail in CRI/APN/74/88 he stated in no uncertain terms that he was found in possession of the same revolver when he was arrested at Mathebe. I am convinced that A2 is a liar. He was found in possession of the revolver before Court (Exhibit 2). His alibi that he was at Matlapaneng at the relevant time is rejected. He is implicated by the accomplice whose evidence is corroborated by the pointing out of the car and the loot done by A2.

In the same way I reject the alibi of A3. He was seen by several credible witnesses during the robbery. They later identified him in an identification parade. He is also implicated by the accomplice. He pointed out the loot and the car.

/A4's alibi.....

A4's alibi that he was at Seetsa's in Leribe cannot be true. He is not only implicated by the accomplice but was also found in possession of the black brief case containing cheques drawn in the name of Maluti Retailers and letters of Mrs. Thakalekoala. All these articles were taken by the robbers on the 31st January, 1988. His witness, Mr. Ntene was a very poor and unreliable witness. He took a very long time to answer straightforward questions put to him. I had the impression that he was not telling the truth and merely wanted to help his friend who was in trouble.

I have stated above that the evidence of the accomplice has been corroborated in material respects which directly implicate all the accused. It was argued on behalf of A4 that the accomplice's motivation to testify was unacceptable. The explanation that he wanted this matter to come to an end and that he should live freely again. It must be pointed out that he testified that he had been on the run for too long and he decided to give himself up to the police. He told them what part he played in the robbery. He was taken to two magistrates to confess. Because of the injuries - handcuff marks on the wrists - they refused to take down his confession in writing. It was the decision of the Crown to call him as a witness. I find no substance that his motivation to testify as an accomplice is unacceptable.

The evidence of the accomplice was reliable and corroborated not only in material respects but even in very minute detail. For example, he testified that when they came to Holder's house A4 dropped them there and drove to the shop. On this point he is

/corroborated.....

corroborated by Mr. Holder that when they went to 'Maaustin's place they passed a car parked some distance from his home i.e. between his home and the shop. He says that the scarf with which he covered his face kept on falling but he tried his best to cover his face. On this point his evidence is confirmed by Mrs. Holder that one of the robbers ^{had} ~~and~~ his face covered with a scarf. It is true that she is mistaken as to who that person was.

A4's movements following the Quthing robbery show that he became aware that police were looking for him and kept away from his home despite the fact that he had a sick child. He finally stole the key of Limakatso's (P.W.10's) house and slept there without the owner's knowledge and consent. A1 and possibly the accomplice met him there for the purpose of sharing the loot. The accomplice testified that A4 told him that the tip came from his (A4's) father-in-law who resides in Quthing. I am of the opinion that it was not by coincidence that immediately after the robbery his father-in-law came to A4's house. On the night he stole Limakatso's key he was seen going into the bedroom in which his father-in-law was sleeping. He did not even go into the bedroom in which his wife was sleeping. One would have expected him to find out how the sick child was doing. He stealthily went in the bedroom in which his father-in-law was sleeping, "stole" the key and left. His movements were definitely not those of an innocent man.

Much was made of the fact that although Sergeant Mokeretla received the information at 7.30p.m. on the previous day but he decided to raid the masonite shack on the following morning. I -

/find nothing.....

find nothing strange about that because it all depends on the nature of information he received. It could have been that A4 and A1 were going to meet there in the morning. During the cross-examination none of the defence counsel asked Sergeant Mokeretla to disclose the nature of the information he had received. However, he testified that nothing would go wrong until the following morning.

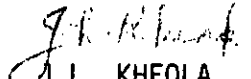
It was also submitted that Sergeant Mokeretla lied when he said there was no curtain dividing the masonite shack. It was proved by Limakatso that there was such a curtain. I am of the opinion that Sergeant Mokeretla did not intend to mislead the Court but was mistaken or had forgotten.

I again repeat that it is a good thing that when police intend to search any premises in a village or intend to arrest anybody in the village, they usually seek the assistance of a local chief or headman. However, it must be made quite clear that where the seeking of such assistance may cause a delay during which the suspects may be alerted, the police are justified in raiding the premises without seeking assistance from the local chief or headman. In the present case Sergeant Mokeretla deposed that the chief of the area is a friend of A4. He was afraid that he would alert A4 if they sought his assistance. In any case the presence of the chief during a search of premises or the arrest of a suspect in his village is not a statutory requirement. Its purpose is to confirm and to corroborate police evidence. If the Court finds the police witness to be a credible witness and believes him, then the absence of the chief during the search and arrest makes no difference.

/In my judgment.....

In my judgment the Crown has proved its case beyond reasonable doubt against all the accused. I find them all guilty of robbery.

My assessors agree.


J.L. KHEOLA
JUDGE

18th April, 1989.

For Crown - Mr. Thetsane, assisted by Mr. Sakoane.
For Defence - Messrs. Peete, Molapo, Mohau and Kambule.

SENTENCE:

In passing sentence I took into account that Order No. 10 dated the 14th July, 1988 shall not apply to the present case because the events in this case took place on the 31st January, 1988. Order No.10 is not retrospective.

I took into account that A2 and A3 are much younger than A1 and A4. There is evidence that A1 and A4 played a dominant role in the planning of the crime and that A4 provided the guns, the knife and the uniform.

I also considered the fact that all the accused are first offenders; and that they spent some time in gaol before they were released on bail.

On the other side I took into account the seriousness of the offence with which the accused are charged; and the fact that robbery has become very prevalent in this country.

Having taken all these factors into account the accused are sentenced as follows:

A1 and A4 - Nine (9) years' imprisonment each.

A2 and A3 - Seven (7) years' imprisonment each.

My assessors agree.

/Disposal of

DISPOSAL OF EXHIBITS:

Revolver, holster and bullets (Exhibits 2,3 and 4 respectively) are forfeited to the Crown; Drivers' Licences (Exhibit 5) must be returned to their respective owners.

Brief case (Exhibit 7) to be returned to the owner, Money from the brief case (Exhibit 8), cheques (Exhibit 9), all monies found on the persons of the accused when they were searched and all the money in bags (Exhibit-13) shall be returned to the owner, Maluti Retail Shop;

Mazda car (Exhibit 10) is forfeited to the Crown, Skyline car (Exhibit 11) to be returned to Mr. Holder. P.W.4 Baba Sello is discharged from all liability to prosecution for the offence concerned in the present proceedings.

J. L. KHEOLA
JUDGE

18th April, 1989.

For Crown - Mr. Thetsane, assisted by Mr. Sakoane
For Defence - Messrs Peete, Mólapo, Mohau and Kambule.