CRI/T/8/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

NARO LEFASO

Held at Butha-Buthe

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 26th day of May, 1989.

Accused pleaded not guilty to two counts; first of arson and next of murder.

It is alleged in the indictment that he set fire to 'Mampooa Paepae's house with intent to injure her in her property at Benteke in the district of Butha-Buthe. It is also alleged that on the same day i.e. 28th June 1988 accused killed 'Mampooa Paepae unlawfully and intentionally.

The facts of this case fall within a very narrow compass. It was only in addresses that the crown approximated persuading the court that accused is the one who burnt the deceased's house on the basis of circumstantial evidence that he was found there immediately after the alarm was raised and was beating the deceased. So it was submitted the two charges are part of a continuous process.

The evidence led arouses a very strong suspicion

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that in order to facilitate deceased's expulsion from her house accused set it on fire. There is no direct evidence showing that he indeed did so. Whatever circumstantial evidence may link accused with arson does not exclude the possibility that deceased herself might have accidentally caused the fire that made her flee from the house. Nor is the possibility excluded that someone other than the accused set fire to this house.

There is however a strong suspicion, founded on the presence of burnt match sticks found outside that the fire was set from outside; thus excluding the possibility that deceased caused the burning of the house from inside. But P.W.1's evidence that he charged the accused with having caused the fire was not gainsaid. However the crown did not pursue this with any purposeful enthusiasm that was to be expected in the circumstances. It was not put to the accused that he burnt the house nor was it drawn to his attention that he did not assert his innocence in the face of evidence implicating him in the burning of that house.

Needless to say no evidence was led to show what the structure that got burnt was made of.

I therefore find that the requirements of circumstantial evidence have not been satisfied. Accordingly accused is given benefit of doubt and acquitted on count 1.

The defence admitted the evidence of P.W.3 Home Mpooa at preparatory examination in the court below. The thrust of his evidence is that he is a headman. Accused and deceased are his subjects.

In response to an alarm raised he went to deceased's house which was on fire. He found the deceased already dead. Accused was not at the scene when P.W.3 got there. P.W.3 looked for him but failed

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to find him. He reported the matter to the police and proceeded with them to accused's home where the police obtained a knob-kerrie which is now before Court.

He admitted evidence of 'Matsele Matlatla merely shows that she helped put out the flames from the burning house.

P.W.5 'Mamako Motsoanyane's evidence was also admitted. Her evidence shows that she felt deceased's forehead and concluded that she was dead. She also testified that she knew "Ex.1" the knob-kerrie to belong to the accused.

P.W.7 'Makhojane Paepae's admitted evidence is that she is deceased's granddaughter who helped put the fire out.

P.W.8 'Malikeleko Phello's admitted evidence is that in the early morning of 28-6-88 some people came looking for accused at night "but he came very early in the morning. He went away. During the day police came". Accused disappeared until when this witness saw him on the day when the P.E. proceedings were conducted. P.W.8 is the one who handed the knob-kerrie to the police.

P.W.9 Mosiuoa Motholatseleng's admitted evidence is that he identified deceased's body before the post-mortem was conducted.

P.W.10 Trooper Khaboliso's admitted evidence is that he is a member of the Royal Lesotho Mounted Police stationed at Qholaqhoe. On 1st July 1988 he was on public transport coming to town when he saw accused go on board the vehicle in question when it arrived at Ha Marakabei. P.W.9 arrested the accused when they reached Butha-Buthe town. Accused told him he had come to surrender himself. P.W.9 then charged accused with murder. P.W.11 No. 5618 Detective Trooper Saba's admitted evidence shows that he went on inspection of

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the house which had burnt.

The house had been burnt partly at the back. In front of the house he saw blood on the ground about a meter away from the door. He observed that deceased had bled from mouth and nose. She had a depression on the head. He conveyed the body for further examination by a doctor.

P.W.12 Doctor Krick's admitted evidence is that he was on duty on 1-7-88 at his station in Butha-Buthe. He performed a post-mortem on the deceased. Deceased had died from the extensive fracture of her left head. The bones had been pressed down on the brain which itself was smashed. There had been bleeding into the brain. He formed the opinion that the injury could have been caused by a heavy instrument. His report was handed in marked "A".

P.W.1 'Mota Paepae testified that deceased was his mother. He said he knew the accused and that they live in the same village of Benteke.

P.W.1 said on 28-6-88 he was at home. In the evening of that day while he was in bed he and his wife heard his mother the deceased screaming,

"My son Caswell the house is burning".

The deceased was outside her own house which is in the same yard as P.W.1's. The houses are facing each other and are about fifty paces apart.

Thereupon P.W.1 woke up together with his wife and headed for deceased's house.

There was moonlight. P.W.2 'Mantsoaki Paepae who is P.W.1's wife corroborated this evidence and said she was able to see that it was accused who was seen molesting the deceased three times with a knob-kerrie "Ex.1" because of the light from the burning fire and the fact that there was moonlight also.

/P.W.2

P.W.2 testified that accused was wearing a dun blanket when she saw him belabouring the deceased even when she was already on the ground.

The deceased was bleeding from the nose and mouth when P.W.1 saw her.

P.W.1 identified and pointed out a knob-kerrie which he said he saw accused belabour the deceased with.

It is a bamboo-coloured stick with a crude and heavy club.

Under cross-examination P.W.1 was referred to a passage recorded in his evidence at Preparatory Examination showing that in reference to whoever he said was belabouring his mother when first was seen by him, he did not say that it was the accused Naro that he saw. Whatever the merit this question may carry it seems to me not to advance accused's case in any manner because P.W.1 further testified that when he appeared accused stopped belabouring the deceased when P.W.1 took a reed and threatened to stab accused with it. Even as he uttered the threat to stab accused with the reed P.W.1 told him that he was aware it was accused who had burnt deceased's house.

P.W.1 said it was at this stage that accused turned tail and ran away; and disappeared from the scene till when later seen by this witness at P.E. in the Court below.

However it was put to P.W.1 that at P.E. he is recorded as having said

> "the man ran away when I came near but he came back and I said I would stab him. It was then that I identified him as Naro."

P.W.1 conceded that those were his words.

This witness clarified the position by saying that accused ran away first when seen by P.W.1, then turned

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back towards him but ran away for good when P.W.1 pulled a reed and threatened accused with it. This explanation does not seem to me to disturb the substance of P.W.1's evidence.

At this time P.W.1 was with his wife P.W.2 and nobody else had come to the scene yet.

It was put to P.W.1 that he made an assumption when he did not see accused among people who had responded to the alarm raised that it was on account of accused's guilty conscience and P.W.1 agreed that this was the case. He was emphatic that the man he had seen was the accused whom he knows very well and with whom he has had normal relationships.

P.W.2 'Mantsoaki Paepae corroborated P.W.1's evidence in all material respects and testified that she saw accused hit deceased three times with a knobkerrie.

She further testified that 'Mamoliehi who was jointly charged with the accused before the matter came before this Court was accused's girl-friend.

Under cross-examination P.W.2 said when she and her husband heard the alarm raised by deceased that her house was burning they simulteneously proceeded to deceased's house. She testified that accused on seeing them approach ran away but came back still holding "exhibit 1" the knobkerrie which he was brandishing but did not hit anybody with it at that stage. However when P.W.1 took a reed and challeged accused to a fight accused ran away.

Asked why she never said at P.E. that deceased was hit three times she said the question was not put to her in that manner hence she confined herself to saying accused assaulted the deceased within her view.

She testified that she did not see 'Mamoliehi. She also said accused was wearing a dun blanket and

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went further to say he also had black trousers and a tattered cap on.

She was adamant that Ex."1" was the weapon she saw accused hitting the deceased with. She also testified that deceased was bleeding from the mouth and nose. She was not able to see if the knob-kerrie had blood on it for it remained in the possession of the owner.

She admitted that some people whom she knows live across the Caledon at a farm in South Africa and that sometimes they just cross the river to come to Lesotho. However she did not know one Phamola.

P.W.6 'Mathabang Khoana said she is accused's sister. Accused came to her on 30-6- 88 at 7 p.m. before he left for Butha-Buthe camp the following day. Accused told her that people were saying that he had killed the old 'Mampooa. Consequently accused said he was going to report himself to the police. She also testified that she knew that 'Mamoliehi was in love with the accused. She however denied any knowledge of the knobkerrie before court.

Under cross-examination she said she knew Phamola though she did not know where he lived. She did not know the name of the farm where Phamola used to live. Phamola was not a relative of the accused. Their relationships were however normal.

On that day, that is, 30-6-88 accused did not say where he came from nor did he say it when he left. However she said accused denied having killed the deceased. P.W.6 knew of no conflict that existed between accused and deceased prior to the incident and felt she would have known if there were any clashes involving accused because he usually though not always confides in her.

Accused in a sworn statement before this Court said he lives at Benteke. He was coming home from the Orange Free State when he learnt that deceased had died. He

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had gone to the Free State to fetch his money from Phamola. He said he had gone to the Free State late on Tuesday. He said he had gone late there because he was running away from the Republic of South African police. He spent the night on the farm in the Free State at Phamola's place but did not get the money.

In the morning he was told to go away and come later for all the occupants of Phamola's house would be going to work and that his bosses would not like it if accused remained there in their absence.

Then accused went home early in the morning.

Accused denied the admitted evidence of P.W.8 'Malikeleko Pheello that he came early in the morning to her place. P.W.8 had indicated that some people had come to her place looking for accused on the night of 28-6-88. Accused's denial of this witness's testimony is centred on his own explanation that he only came to P.W.8's place after sunrise. He conceded though that he came there in the morning hours.

He went further to state that he went back to the Free State during the day. Asked how he could brave going into the Free State during the day in the light of the fact that he had earlier said he only moved in the Free State at night because of his fear that the R.S.A. police would arrest him he said the mountain ridges where he moved about at day time ensured his safety from the police and gave him an advantage of seeing them before they could come and surprise him.

He spent this further night in the Free State i.e. 29-6-88.

Accused denied that he killed the deceased; and branded as lies evidence saying he did so or assaulted her at all.

For all it is worth P.W.1's evidence that he drew

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to accused's attention the fact that he had burnt deceased's house was not denied during cross-examination of that witness nor in accused's evidence in-chief.

Accused stated that he used to be in love with 'Mamoliehi but their love affair terminated long before the events giving rise to this case.

When it was pointed out to him that his own sister testified to the events immediately surrounding the incident, and in her evidence she showed that he and 'Mamoliehi were lovers even then, accused said he was not aware that his sister was referring to the time immediately surrounding and particularly pertaining to the incident.

He acknowledged the knobkerrie as his. He had left it at home when he went to the Free State and only learnt later that police had taken it.

He said he came back from the Free State on a Thursday and met his sister to whom she reported that it was being alleged he killed the deceased; hence his decision to go to Butha-Buthe police station the same day.

Along the way at Ha Marakabei he met with a policeman in a vehicle bound for Butha -Buthe. He told the policeman that he was going to Butha-Buthe. Accused denied the admitted evidence of P.W.10 that this policeman arrested him. He denied that he told the policeman that he was going to surrender himself. He said he told the policeman that he was going to report himself.

Accused does not remember the day he left for the Free State but can only remember that it was towards the end of the fifth month.

He stated that he did not know the dates of the months. Accused said though he had a passport he did not use it to cross to the farm in question for that place was very near.

/Accused

Accused said he had not quarrelled with P.W.1 and did not know why he could implicate him falsely. He did not know why P.W.2 corroborated P.W.1 in implicating him falsely either.

He conceded that he has some dun or donkey blankets. He said he didn't have a tattered cap.

Mr. Molapo in argument submitted that indeed accused had told him about the fact that he had gone to the Republic of South Africa during the events which constitute the subject matter of this case. He submitted further that accused might not have understood the question why the version was not put to the Crown witnesses. He further submitted that it would seem putting such a question would not be necessary in view of the fact that P.W.2 conceded that she concluded it was accused who had committed the offence because he was not among villagers who came to help extinguish the fire.

But accused's attitude will become clearer as we go further down in this judgment.

Accused conceded that it was only when he was giving evidence on his behalf that the court for the first time learnt that he had gone to the Free State. In other words he never disclosed his case during the time when the version for the crown was being heard. See Phaloane vs Rex 1981(2) LL.R 246 where Maisels P. said

> "It is generally accepted that the function of counsel is to put the defence case to the Crown witnesses, not only to avoid the suspicion that, the defence is fabricating, but to provide the witnesses with the opportunity of denying or confirming the case for the accused ...."

Accused was questioned

> "If you are aware of this particular and important aspect of your defence, why is it that witnesses who say that they saw you on that day were not challenged that you were not there on that day,

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but rather were in the Free State - ?

There was no one who knew where I was.

You mean your lawyer didn't even know that story that you were going to give when you are in the box - ?

Not so - ?

He didn't know".

In R vs. Hlongwane 1959(3) SA. 367 at 370-1 it is stated :

> "The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted ..... But it is important to point out that in applying this test, the alibi does not have to be considered in isolation.
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> .....The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses."

There is no escaping the view that accused when confronted with cast-iron evidence of eye-witnesses who know him and could not be mistaken as to his identity and who testified that they saw him effect the assault decided to embark on fabricating that he was at the time in the Free State. There is authority for the view that an accused who gives false evidence does thereby provide a basis which has the effect of strengthening an inference of guilt. See Broadhurst vs Rex 1964 A.C. 441 at 457. The tenor of this authority does not of course relieve the Crown of the onus resting on it to prove its case beyond a reasonable doubt. At 409 of 3rd Edition of South African Law of Evidence by Hoffmann and Zeffertt we are told

> ".....no onus rests on the accused to convince the Court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his

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explanation being true, then he is entitled to his acquittal."

But in R vs Mlambo 1957(4) SA. at 738 et seq Malan J.A. said

> "..... there is no obligation upon the crown to close every avenue of escape which may be said to be open to the accused. It is sufficient for the Crown to produce evidence by which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration comes to the conclusion that"

the case has been proved against the accused. Mr. Molapo urged the court to find that there are doubts in this case which should redound to accused's benefit. He pointed out that it is improbable that if accused was the one who committed the offence he would run away when he had not been identified only to come back into the glare of the raging flames so as to be identified. But the evidence that was elicited in this connection did not show that in running away he fell out of the view of these witnesses who said they saw him.

He further submitted that it would be doubtful that a man who is said to have used the weapon "Ex.1" could leave it at his house and make no attempt to dispose of it, and further that there was no drop of blood on it yet it is shown in evidence that deceased was bleeding.

First it is not unusual for people who commit crimes to do strange things. Next absence of blood from a blunt instrument cannot serve as proof that it was not used. Moreover blood seen was issuing from mouth and nose. Blows were effected on the head and not on those organs.

At 738 of Mlambo above Malan J.A. said

> "An accused's claim to the benefit of a doubt ..... must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence

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> or gathered from reasonable inferences which are not in conflict with, or outweighed by the proved facts of the case."

See also Miller vs Minister of Pensions (1947) 2 ALL E.R. at 373 where Lord Denning in regard to the same issue expressed himself as follows :- i.e. (Criminal standard)

> "It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so great against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence (of course it's possible but not in the least probable), the case is proved beyond a reasonable doubt, but nothing short of that will suffice."

The instant case has not shown what the motive for killing was. But reference to Mlambo above at 737 shows that

> "Proof of motive for committing a crime is always highly desirable, more especially where the question of intention is in issue. Failure to furnish absolutely convincing proof thereof, however, does not present an insurmountable obstacle because even if motive is held not to be established there remains the fact that an assault of so grievous a nature was inflicted upon the deceased that death resulted either immediately or in the course of the same night. If an assault ..... committed upon a person causes death either instanteneously or within a very short time thereafter and no explanation is given of the nature of the assault by the person within whose knowledge it solely lies, a court will be fully justified in drawing the inference that it was of such aggravated nature that the assailant knew or ought to have known that death might result."

Mr. Mokhobo for the crown asked the court in acknowledging the existence of the intention to commit the crime charged to rely on the

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(1) nature of the weapon used namely the crude knobkerrie,

(2) the part of the body where it was applied, namely the head, a vital organ.

(3) The resultant dent which was observed after the use of the weapon.

(4) The apparent brutal force that must have been used to accompany the application of the weapon; and

(5) The fact that accused immediately disappeared for a long time before he could surrender himself to the police who arrested him.

I may add to the above list the fact that deceased was a defenceless old lady who to all appearances was taken unawares by the brutal assault on her.

Account being taken of the fact that the distance between P.W.1's house and deceased's house is short and that in response to the alarm raised by deceased P.W.1 and P.W.2 rushed to the scene it is apparent that the wielding of the weapon was brisk, deliberate and effective.

I find nothing in the Crown evidence especially that given by oral witnesses to serve as a basis for doubting their veracity.

Much in the same manner as Rooney J. said in CR. T. No. 112/88 The King vs. James Masilela (unreported) at 12 lines 7 to 8.

> "The tenuous alibi raised by the accused comes to nothing. It is for the crown to show that the alibi is not well founded"

those observations are dittoed in the instant case.

This - i.e. duty to disprove the alibi - I think the crown has managed to do as evidence has amply borne it out in this case.

I have been informed from the bar that a witness who would testify in support of accused's alibi is serving term in South Africa. The defence proposed to abandon attempts at summoning him before this Court.

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Even assuming he would testify to accused's presence in the Republic at the time of the events it is scarcely possible that his evidence would prevail against that of the Crown witnesses who said the accused was seen belabouring deceased at the relevant times. One person cannot be at two different places at once.

Moreover in his own defence accused never put his version of an alibi to crown witnesses who say they saw him in order to enable them admit or deny his version or even to cast a doubt as to their untramelled perception of accused and his identity.

I therefore find that the alibi cannot be true and that accused's attempt at raising it albeit so late in the day is nothing else but something akin to clutching at the straw of a drowning man. The accused's defence is rejected as false beyond all doubt.

On the basis of evidence led and tested before this Court I accordingly find accused guilty of the murder of the deceased as charged.

My assessors agree.

J U D G E.

26th May, 1989.

ON EXTENUATING CIRCUMSTANCES

The purpose of an inquiry into the existence or otherwise of extenuating circumstance is to afford a person convicted of a capital offence an opportunity of escaping the ultimate penalty where such circumstances are shown to exist. Attention is focussed on the moral blameworthiness of the convicted person and the test is subjective. In other words the question asked is whether even though the accused has been convicted of the murder the court should find circumstances which subjectively speaking reduce accused's moral blameworthiness with regard to the offence committed. Conversely acceptance of diminished moral blameworthiness reduces the full rigour of the sentence to some extent.

In the address intended for persuading the court that such circumstances do in fact exist the court was told that accused comes from a background and social milieu of ordinary people who live in the villages where they are apt to project the type of mentality prevailing there.

A woman 'Mamoliehi whose name appeared time and again in this case is said to have been in love with the accused.

She is also said to be the deceased's close relative. The court was asked to take into account that in the absence of this woman's husband the deceased had a high degree of care over her.

Accused through his counsel maintains that 'Mamoliehi has caused the break down of accused's own marriage in the sense that he and she lived virtually as man and wife.

'Mamoliehi played on accused's feelings to the extent that she urged him to get rid of the deceased who seemed to be interfering in their illicit love affair.

It was projected as accused's weakness or human

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frailty that he failed to appreciate that deceased was entitled to live also; and thus fell to the temptation of putting her away at the instigation of his lover 'Mamoliehi.

Mr. Mokhobo indicated that accused is not entitled to the claim that he committed the act in order to live happily with 'Mamoliehi after clearing the deceased out of the way because accused testified that the love affair had long stopped before the commission of this crime.

But even if the affair still prevailed around that time, does it reduce his moral blame worthiness? That is the question.

Regard being had to the short distance between deceased's house and that of P.W.1 and P.W.2, and to the fact that P.W.1 and P.W.2 immediately set out for the deceased's house on hearing deceased's alarm it would appear that the assault was effected quickly and brutally with the aim of causing death, and death occurred within minutes if not seconds.

The particularly brutal, cowardly and wicked manner of the killing is in my view a factor to be taken into account in considering the matter regarding the existence or otherwise of extenuating circumstances.

At 738 Mlambo is authority for the view expressed as follows :-

> "Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so.
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> The logical result of the contrary view

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> would be to place a premium upon false testimony and to afford protection to the cunning and ingenious criminal who could with impunity commit murders and, by destroying the body, defy detection of the cause of death and thus escape condign punishment. The danger of serious miscarriages of justice would be very real and if this line of reasoning had succeeded in the past many notorious murderers would have escaped the gallows."

The summary of the proposition advanced before me is that deceased had to die so that she could not interfere in the love affair. I do not accept this proposition on the grounds that the law cannot put a premium on the fact that failing deceased's death the illicit love affair would not thrive freely. In this regard it cannot sincerely be said accused properly and fairly reflects the attitudes of the village or of the social milieu of which he is a product. Even in the villagers' view free propagation of an illicit love affair cannot mitigate the death of, or cost the life of the deceased. Rather than that such an attitude should serve as reducing the moral blameworthiness it would aggravate it.

Accused took advantage of the blackguardly trick - no matter who initiated it - played on the unsuspecting wretched old woman who had to flee from her burning house. Instead of obtaining help for which she was shouting she was mercilessly assaulted by the accused.

I taxed my mind to find, with the assistance of my assessors whether, even if the existence of the love affair between accused and 'Mamoliehi could be said to have reduced his moral blameworthiness there could be other factors which would lead to the same end, but in vain. Hence I have come to the conclusion that the existence of that love affair fails to ground any extenuating circumstances whatsoever. A defenceless old lady who posed no danger to the accused lost her life while exercising her legitimate function as a parent. In such circumstances the law allows only one

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sentence which is mandatory.

Will the accused say why death sentence should not be imposed - ?

Accused : "I wish to be given prison term to serve."

Sentence: The sentence of the Court is that you be removed from the place where you are standing and taken to the place of custody where on an appointed day, you will be hanged by the neck until you are dead. May God have mercy on your soul.

J U D G E.
26th May, 1989.

For Crown : Mr. Mokhobo
For Defence : Mr. Molapo.