

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

MAKOAKOA LEBAKA
MATALA NYAPISI
LIEMO RAMPAI
MAHLOMOLA MASUPHA

1st Accused
2nd Accused
3rd Accused
4th Accused

J U D G M E N T

Delivered by the Honourable Mr. Justice J. L. Kheola
on the 29th day of October, 1990.

The accused are charged with the murder of Abraham
Tali Khosi on the 5th March, 1988 at Matukeng in the district
of Leribe. They have pleaded not guilty to the charge.

P. W. 1 'Mamahlope Khosi is the wife of the deceased.
She testified that on the 5th March, 1988 she and her late
husband attended a funeral service at Matukeng. After the
funeral service they returned to Hlotse where they lived as
her husband was a policeman in the Royal Lesotho Mounted
Police. On their way back to Hlotse they called at Motsoeneng
Restaurant at Matukeng because the deceased wanted to buy
some tobacco. Having bought the tobacco the deceased asked

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for some money so that he could buy some beer. She gave him the money and he bought beer which he drank with one Pesa Letuka. While they were drinking the beer one Pinki Monoane came to them and accused the deceased of being a killer because he had instructed the police to kill him. He persisted in this accusation until Pesa Letuka intervened and ordered him to stop it. Pinki complied.

After this disturbing incident she and the deceased left the restaurant. When she came to the door one lady called her and said that she was pleased to know her as the wife of the deceased. As the lady was talking to her she (P.W.1) saw that the deceased was outside opposite the window. She got out and found the deceased standing with A4 and the latter was insulting the former. She caught the deceased and they went to the bus stop. A4 followed them and when they came to the bus stop he caught the deceased by his jacket at the neck and invited him to fight or shoot. The deceased said A4 should leave him alone and moved backwards for a distance of about twenty-five paces while A4 was still holding him. He let him free but continued to follow him for another distance of about seventy-five paces. She heard a gun report and A4 pulled up his skipper and showed the deceased a wound saying he had shot him. At this time A2 and A3 arrived and passed her at the bus stop and went to the deceased who was already at the top of the bank of the road. A1 also came up from the restaurant and passed P.W.1 at the bus stop and went to the deceased.

P.W.1 deposed that when A1 came near the deceased he shook himself and the deceased fell down. She did not see what A1 did to the deceased before the latter fell down. After he had fallen down A2 and A3 hit him repeatedly with their sticks. A1 left them and went down towards the restaurant. He was walking normally and not running. After A2 and A3 had belaboured the deceased with their sticks A4 searched him.

In cross-examination P.W.1 said that it was raining heavily that afternoon. She has known A1 for a very long time and denies the allegation by the accused that he does not know her. The deceased was still retreating when he ended up shooting A4. After that he went up to the top of the bank of the road and was opposite the gate of Spar Supermarket. P.W.1 says that although she was confused and crying she saw well what was happening. She denied that A1 was hit with a stone at the solar-plexus region while he was trying to stop people who were throwing stones at the deceased, she also denies that after the deceased had fallen down A1 chased a person who had taken the gun of the deceased. While she was in the restaurant and having a good view of the deceased she did not see him separating people who were fighting. However, when she came out the deceased was at the corner of the restaurant and A4 was insulting him.

P.W.1 testified that although she has not told this Court that A2 and A3 were throwing stones at the deceased, they were actually doing so. She knew A2, A3 and A4 before this

incident because she lived in the same village with them. She denied that the deceased threatened to shoot A2 and A3 when they were enquiring from A4 what had happened. She denied that the deceased then fired at A2 and A3 and that they ran away and turned and faced him when he fired the second shot. At the time the deceased shot A4 the latter was throwing stones at the former.

P.W.2 'Mabaruti Mochesane testified that on the 5th March, 1988 she was in the restaurant when A1 had a quarrel with another person. One man asked the deceased, as a police, to separate them. The deceased intervened and took or led the man who had a quarrel with the accused to the bus stop. Deceased's wife followed them towards the bus stop. P.W.2 also went with them to the bus stop. She noticed that some young men were throwing stones at the deceased and one of them was A4. She did not know why they were doing so. A1 and others came up from the restaurant and one of them took out something from his sock and gave it to A1 who went to the deceased. He was already at the top of the bank on the road and opposite the Spar supermarket. A1 went in front of the deceased and the latter immediately fell down. She did not see exactly what A1 did to the deceased but it was as if he held him at the neck before they both fell down. He took the gun of the deceased and then he called A2 and A3. On their arrival there A2 and A3 hit the deceased with their sticks. A1 was kicking him with his shoes after he had taken the gun. While stones were being thrown at the deceased she heard gun reports and saw that the

deceased was shooting but aiming at the ground because mud was going up everytime he fired.

Under cross-examination P.W.2 said that although she was in the bar she did not see the quarrel between the deceased and another person. She was sure that it was A1 who was causing trouble in the bar and not Pinki. 'Machabane' (P.W.4) knows about the quarrel. She originally intended to go to Spar Supermarket but failed to reach her destination because when she came to the bus stop there were many people who were throwing stones at the deceased. She did not see what that person gave to A1 because she did not pay any particular attention to what that person was doing. He denied that A1 was hit with a stone on the solar-plexus area. She also denies that A1 is not the person who took the gun of the deceased; the truth is that it was A1 who took it from the deceased after he had caused him to fall. She denies that the deceased was held by his jacket while he was retreating.

P.W.2 said that when she came to the bus stop stones were already being thrown at the deceased by more than two people. When the throwing of stones at the deceased started A2 and A3 were still near the restaurant. But when A1 beckoned them they went to the deceased and hit him with sticks. She admits that A4 had been shot and had taken a lot of liquor but she is adamant that he was throwing stones at the deceased..

P.W.4 'Machetane Tsuba testified that she was in the restaurant sitting at a table with her husband when A1 came to them and asked her if she lived with one Hlomphang. Her husband answered A1 and told him that she was his wife. A1 was too quick to take offence and asked P.W.4's husband what he thought he could do with his wife. He said she was too old and not his type. He threatened to stab and kill them. P.W.4 says that she saw one Thebe Letuka (he was P.W.7 at the preparatory examination and his deposition has been admitted by the defence) and called him and asked him to talk to the accused because he was threatening her and her husband with death. Thebe Letuka went out with A1 but he (A1) returned and continued to threaten to stab them with a knife. She saw when one man gave a knife to A1 after taking it from his sock. She also saw A2 and A3 come into the restaurant. They asked one Matšelisio to give them beer. She offered them wine but they said they wanted beer and left. A1 went out with them. She later saw that A1, A2 and A3 were involved in a fight with the deceased. A1 threw a stone at the deceased while A2 and A3 were hitting him with sticks. She went into the restaurant and made a report to Thebe Letuka. She went with Thebe to the spot where the deceased had fallen; on the way they met A1, A2 and A3 running on the tarmac going towards Leqhutsungu.

P.W.5 Tsietsi Setheki was employed as a nightwatchman at Spar Supermarket. He deposed that on the 5th March 1988 he arrived at work at about 5.00 p.m. while he was

attending the dogs at the back of the supermarket he heard a gun report. He immediately came to the front of the supermarket and saw the four accused persons. A1 was coming up the road; when he came to the deceased the latter fell down. He did not see what A1 did to the deceased. A2 and A3 belaboured the deceased with their sticks after he had fallen down. They ran away when they noticed that he was dead. They were hitting him on the head. After that A4 came to him at the gate and showed him a wound. He asked him if he was happy that he had been wounded. A4 went to the deceased and held him and bumped his head against the ground. He searched him but found nothing. A1 had taken the gun of the deceased before he ran away.

P.W.5 testified that he knew A1 by sight. He often visited the home of the parents of A1 because it is used as a shebeen for Sesotho beer. He saw A1 there on several occasions. He denied that he mistook A1 for another person. He recognized him very well as a person he knew. A1 did not kick the deceased, he took the gun and ran away. He heard one gun report and denied that there were several gun reports.

P.W.6 'Matumahole Hlaeli corroborates P.W.4 that A1 had a quarrel with P.W.4 and her husband. She saw when one man gave a knife to A1. A2 and A3 came into the restaurant but did not do anything. P.W.6 says that she went to the lavatory outside the restaurant. When she came back she met the deceased. A1 pointed at him and said that he had

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caused his arrest for unlawful possession of dagga. The deceased did not answer him but went straight to the bus stop. When she later went to the other side of the road where the deceased had been assaulted she met A1, A2 and A3. A3 was saying that the policeman could not beat or defeat him because he had defeated many policemen from the Orange Free State. A1 was saying that he had eaten or taken that thing.

Dr. Knight testified that on the 5th March, 1983 he was on duty at Hlotse Government Hospital. The deceased was seen by him after a history of assault. He was unconscious and bleeding profusely from the mouth. He had multiple lacerations all over the body, especially on the head, clinically he had multiple fractures of the skull and fracture of the mandible. He was taken to the theatre immediately and tracheotomy was done and blood transfusion given with all that resuscitation the patient died within half an hour.

The difficulty I have with the evidence of Dr. Knight is that the original report he compiled on the 5th March, 1988 when his memory was still very fresh and was then relying on the notes or the medical chart, is lost. On the 18th August, 1988 he was approached by the police and asked to make another report. In compiling the present report (Exhibit "A") he relied entirely on his memory. Dr. Knight appeared before me many times when I was the Senior Resident Magistrate of Leribe. He is a very reliable witness whose reports were usually very comprehensive and

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thorough that they were usually admitted without much cross-examination. However, in the instant case he was asked to make a report from memory of the events which occurred over five months ago. A doctor at Hlotse Government Hospital attends to many patients in just one month. In five months Dr. Knight must have treated hundreds of patients. Although Dr. Knight was not prepared that he might have made some mistakes, I think his report is unreliable, especially the details of the injuries.

Dr. E. O. Olusola performed a post-mortem examination on the deceased's corpse. He found severe head and facial injuries with multiple depressed skull/mandibular fractures and intracranial haemorrhage. There was a stabwound on the centre of the throat and another stab wound on the left chest wall. He said that the stabwound of the left chest wall did not go into the lungs and had nothing to do with the death of the deceased. The head was like a cracked egg shell. He was of the view that several blows must have been inflicted to cause all those fractures and that tremendous force must have been used to cause those fractures. His report is Exhibit "C" in these proceedings.

I think the report of Dr. Olusola is more reliable than that of Dr. Knight. When he performed the post-mortem examination there was no emergency and had enough time to do a proper observation. Although he did not complete pages 1 and 3 of the post-mortem examination form, I am satisfied that all the injuries were observed and recorded on the first page of the form. There is no doubt that the assault

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were so severe that the head was completely disfigured.

A1 testified that on the day in question he went to Motsoeneng restaurant at about 5.00 p.m. He remained at the restaurant for about twenty minutes and downed four long-toms tins of beer during his stay there. When he left for the bus stop it was raining. On his arrival at the bus stop A2, A3 and A4 were fighting with the deceased. They were throwing stones at him while he (deceased) was retreating and was near the corner of the yard of Spar Supermarket. He rushed to the accused and shouted at them but they seemed not to hear him because of the noise made by the vehicles passing on the road. He finally came to the accused and passed them and stood between them and the deceased. He raised up his hands in order to stop throwing stones at the deceased. He took a few steps towards the accused but was hit on the chest with a stone. He fell down. When he rose one Thabo Tsukutla told him that someone had taken the gun of the deceased and was running away with it. He chased that person and caught him a very long distance from the scene of the crime and took the gun from him. He returned to the scene of the crime and found that all the people had left. He went to his home and gave the gun to one Senatla Lebaka (His deposition at the preparatory examination was admitted by the defence. He was P.W.3).

He denies that he was given an open knife in the restaurant. He denies that he caused the deceased to fall nor that he ever kicked him. He did not touch the deceased.

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at all. He knew all his co-accused as well as the deceased and wanted to talk to them to stop the fight. He admits that while he was in the restaurant he had a quarrel with one Khorro. He did not see the deceased and he did not intervene in his altercation with Khorro.

The stories of A2 and A3 are the same and shall be treated together. On the morning of the 5th March, 1968 they went to Tsikoane Restaurant and bought eight (8) quart bottles of beer and drank with two of their friends. From there they went to Motsoeneng Restaurant and one 'Malikosa' bought one quart bottle of beer for them. They drank it and then went into the village of Matukeng where they bought one babaton scale of Sesotho beer and drank it. When they were about to leave that place they heard sound of a gun coming from the direction of the bus stop. They rushed to that place and on the way someone reported to them that A4 had been shot. They eventually came to A4 and asked him who had shot him. He pointed at the man who had shot him. As they were still talking to A4 that man came to them and threatened to shoot them on the buttocks. He immediately took out a gun and fired at them. They did not see where the bullet landed because they were already running away and not facing that man.

They ran for a short distance of about twenty paces and that man fired the second shot. They turned and advanced towards the man. He retreated as they threw stones at him. After crossing the road that man fired again and went up the bank of the road. They followed him and found him sitting

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down on the top of the bank of the road. They went to him and hit him several times with their sticks. A2 says that he hit the deceased on the belly and not on the head as alleged by some Crown witnesses. A3 hit him on the head about three times. Thereafter they left for their homes leaving the deceased lying prostrate on the ground. They say that they did not foresee that the deceased might die as a result of their hitting him with sticks. They had no intention to kill him. The deceased did not have any visible injuries when they found him sitting on the top of the bank of the road. He was still holding his gun but no longer firing at them. As they belaboured him he was still trying to stand up and that gave them the impression that he was still fighting and trying to shoot them.

A3 says that he was hitting the deceased very hard and knew that when a person is hit in the manner he did he might die.

It is quite correct that there were many people at the bus stop when the fight started and that the fight is correctly described as a rough and tumble. Nevertheless the main actors in the fight were clearly seen by all the Crown witnesses. Moreover the main actors themselves do not deny taking some active part in the fight. The main actors in the fight are the four accused before Court.

The evidence against A1 is that he first had a quarrel with the husband of P.W.4. It was during that quarrel

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that a certain person was seen taking out a knife from his sock and giving it to A1. At that time the knife was apparently given to him to stab the husband of P.W. with it. P.W.2 says that the deceased was asked to intervene because he was a policeman. On the other hand P.W.4 whose husband was involved in the quarrel says that it was not the deceased who was asked to intervene in the quarrel but one Thebe Letuka. I think the evidence of P.W.4 is more reliable on this point because she asked Thebe Letuka to intervene and the latter confirms this in his deposition which was admitted by the defence. There is evidence by P.W.1, P.W.2 and P.W.5 that after the fight against the deceased had started A1 was seen going to the deceased and as soon as he (A1) came near the deceased the latter fell down. The witnesses did not see what A1 did to the deceased but P.W.2 says that she saw as if A1 held the deceased on the throat. She says that while A2 and A3 were hitting the deceased with sticks A1 was kicking him with his shoes.

There is evidence that after doing what he did to the deceased A1 took the gun of the deceased and went away with it. P.W.4 says that at one stage A1 was throwing a stone at the deceased and that after the deceased had fallen down A1 beckoned A2 and A3. When they came they hit the deceased with sticks.

A1 said he went to the deceased because he wanted to stop A2 and A3 from throwing stones at the deceased but was struck with a stone and fell down.

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Mr. Mphutlane, attorney for A1, submitted that the Crown has failed to prove that A1 assaulted the deceased in any way. I have attempted to give a complete summary of the evidence of the Crown witnesses regarding the participation of A1 in the killing of the deceased. At one stage he was seen throwing a stone at the deceased; at another stage he was seen coming near the deceased and the latter fell down; at the last stage he was seen kicking the deceased. The most important thing is to establish exactly what A1 did to the deceased before he fell down. No one saw exactly what he did but circumstances indicate that he must have done something to him. When the body of the deceased was examined by Dr. Olusola it was discovered that there was a stabwound on the left chest wall. The evidence before this Court is that just before this fight started A1 was given a knife by someone and there is no evidence that any of the accused stabbed the deceased with a knife except A1, who approached him and caused him to fall down. It seems to me that the only reasonable inference to be drawn from the facts proved is that A1 did something to the deceased and felled him. That something is that he stabbed him with a knife on the left chest wall. It is also unlikely that the deceased fell because he was struck with a stone. The witnesses did not see anybody throw stones at the deceased at that stage. He was standing alone above the bank of the road when A1 came to him. He beckoned the A2 and A3 after he had felled his victim.

Mr. Mphutlane submitted that the Crown had not

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established any ~~motive~~ why A1 would wish to kill the deceased. I think this is not quite correct because P.W.5 testified that when he returned from the lavatory A1 was standing at the door of the restaurant while the deceased was coming out. A1 pointed at the deceased and said, "This one caused my arrest for dagga." Deceased did not answer him but went to the bus stop. It seems to me that A1 had a motive and when he discovered that the deceased was being attacked by his friends he found an opportunity to revenge. In fact if it had not been for A1's attack upon the deceased it is quite clear that he would have reached Spar Supermarket because his assailants were still below the bank of the road when A1 came to him and felled him.

A1 was very aggressive that day and was prepared to attack other people for no apparent reason. He first of all became very aggressive to the husband of P.W.4 and threatened to kill him. That was the time he was given the knife.

I shall deal with common purpose amongst the accused at a later stage of this judgment. The story of A1 that he was hit on the chest or on the solar plexus is not true. All the people who were there did not see that happen. One of the Crown witnesses admits that A1 fell with the deceased. But that does not mean that he was struck with a stone; he fell when he stabbed the deceased with a knife. It cannot reasonably possibly be true that when A1 rose he straightaway received a report from one Thabo Tsukulu that a certain man had taken the gun and that he (A1) chased that man.

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His alleged intention was to protect the deceased from the attack by A2, A3 and A4 who were throwing stones at the deceased. How could he leave the deceased lying there and being belaboured with sticks and then concentrate on the recovery of a gun? And having found the man who was running away with the gun let him go scot-free without even asking him his name? A1 was seen by many witnesses taking the gun of the deceased and going away with it.

A2 and A3 have no defence to the present charge. Their story that the deceased fired at them when they asked A4 what had happened to him is false beyond any reasonable doubt. At the time they joined the fight the deceased was already retreating from the onslaught by A4. It is not even true that they threw stones at the deceased after A4 had told them that he had been shot. They just joined in the throwing of stones when they saw that A4 was doing so. There is no question of self-defence as far as A2, A3 and A4 are concerned. The deceased was obviously trying to stop them from coming to him by firing at the ground in front of him to try to scare them away but they just kept on advancing towards him. One of the witnesses said she could see mud going up as the deceased's bullets hit the ground. It is common cause that one of such bullets hit A4 and grazed him on the side of the trunk. They followed the deceased for a long distance of about one hundred paces according to P.W.1 and went to him above the bank of the road and belaboured him with sticks after A1 had beckoned them. A2 and A3 say that when they came to the deceased he was sitting down and doing nothing but still holding a gun.

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A2 and A3 cannot claim that when they left the road and found the deceased above the bank and sitting there without posing any danger to their lives, they were entitled to belabour him with their sticks in self-defence.

In Rex v. Attwood, 1946(1) A.D. 331 at p.340

Watermeyer, C.J. said:

" The accused would not have been entitled to an acquittal on the ground that he was acting in self-defence unless it appeared as a reasonable possibility on the evidence that accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury, that the means of self-defence which he used were not excessive in relation to the danger and that the means he used were the only or least dangerous means whereby he could have avoided the danger."

It is trite law that where an accused exceeds the bounds of reasonable self-defence and kills his assailant he may be found guilty of culpable homicide despite the fact that the killing was intentional (R. v Molife, 1940 A.D. 202 at 204,205). However, if the excess was immoderate a verdict of murder will be returned (R. v Mhlongo, 1960(4) S.A. 574 (A.D.) at 581).

In the instant case the question of self-defence does not arise. A2 and A3 were aggressors right from the beginning. They joined in a fight that did not concern them in any way.

Mr. Teele, counsel for A2, A3 and A4 referred to Rex v Molibeli Rantsoti 1967-70 L.L.R 289 in which it was held that on a charge of murder, although self-defence, intoxication and provocation were raised and each one was not made out, the combination of circumstances arising from all three defences sufficed to repel an inference of intention to kill which was not discharged by the Crown. That was a case in which the Court found as a fact that the accused had been provoked and that he had drunk a considerable amount of liquor. In the instant case there is no evidence of provocation or of self defence or any intoxication to the extent that the accused did not know what they were doing. It can safely be ~~accepted~~ they had been drinking for a greater part of that day but there is nothing to show that they were so drunk that they did not know what they were doing. They seem to remember what they did that day and this is an indication that they were not too drunk.

The evidence against A4 has not been controverted in any way because he did not give evidence. The story of which was put to the Crown witnesses was that the deceased found him outside the restaurant where he was having a quarrel with another person. The deceased hit him on the chest with the butt of a gun and ordered him to stop the nonsense. Later A4 went to the bus stop and found the deceased there with his wife. He said: "Ntate, you scared me with that gun." It is alleged that the deceased went into the road and said: "I can shoot you." He pointed his gun at A4 and shot him. This story was denied by the wife of the deceased (P.W.1) whose version of how A4 started the fight is summed up above. Her version was challenged in

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cross-examination but her denial convinced the Court. I think it was unwise of A4 not to go into the witness box in order to enable the other side to test his story in cross-examination. I do not mean that A4 had to prove his innocence but where there is a strong prima facie evidence against an accused person at the close of the Crown case, he may be expected to give an explanation.

In R. v. Dube, 1915 A.D. 557 at pp. 563, 564 Innes, C.J. said:-

"The onus rested upon the Crown to establish her guilt. At the same time the fact that she did not endeavour to explain the circumstances of suspicion which the prosecution had set up was an element which the trial Court was entitled to take into consideration."

The case against A4 is that he threw stones and that when he found the deceased already lying prostrate on the ground after he had been fatally assaulted by the other accused, he held him and bumped his head against the ground. By so doing A4 was actually extending the injury already done to the head of the deceased.

The last point I wish to deal with is whether the accused had a common purpose. In R.v. Zwakala and another, 1976 L.L.R. 221 at pp. 222-223 Mofokeng, J. summarized the law regarding common purpose as follows:

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" In law it is clear that persons may be held liable for the acts of each other if they act in pursuance of the same purpose and have agreed to share that purpose. Although persons may pursue the same purpose, it is not common purpose until there has been an agreement, (R. v. Bayat and Others, 1947(4) S.A. 128(N)). Moreover, to have sufficient common purpose to murder, the persons involved need not plan together to bring about the death of the deceased any more than the single accused must be shown to have aimed at the death of the deceased before he can be found guilty of murder. (R. v. Geere and Others, 1952(2) S.A. 319 (A)). I therefore come to the conclusion that the two accused acted with a common purpose when they inflicted the fatal injuries on the deceased. But it must be remembered that in law the basis of the guilt of a socius criminis is his own mens rea (R. v. Nsele, 1955(2) S.A. 145 (A) at 151; R. v. Mqeba and Others, 1959 H.C.T.L.R. 71), because on a charge of murder where common purpose has been established it does not necessarily follow that the same intent or absence of it must be imputed to all who took part in its execution. (R. v. Hercules, 1954(3) S.A. 826 (A))."

A1 aimed and stabbed the deceased on the left chest wall which he must have known to be a vulnerable part of the body. The force used must have been light because the doctor said the wound did not contribute to the death of the deceased. However, it was severe enough to cause him to fall to the ground. After that A1 called A2 and A3 to come and finish up the deceased. They did that by belabouring the deceased with sticks on the head. The evidence of A1 that he struck the deceased on the belly only cannot be reasonably possibly true. He was seen by P.W.5 Tsietsi Setheki that he was hitting the deceased on the head. The doctor who performed a post-mortem examination of the body of the deceased found no wales or contusions on the belly

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of the deceased. Surely if the deceased had been struck on the belly in the manner described by the A2 some welts or contusions ought to have been found on the belly.

There is no doubt that A1, A2 and A3 acted in concert and their intention was to bring about the death of the deceased. A4's participation was minimal but was sufficient to make him a party to the common purpose. There is evidence that deceased was still alive when A4 came to him, bumped his head against the ground. The head had already severely injured and the deceased was in ^{any} case already found injured but still alive.

In R. v. Mgxwiti, 1954(1) S.A. 370 Schreiner, J.A. held that where an accused person has joined in an assault which he knows to be aimed at the death of someone else, his responsibility for the ensuing death will depend on whether the victim was alive at the time when the accused joined in the assault and not on whether the victim had or had not at that stage received mortal injuries. In the instant case the deceased was still alive when A4 joined.

I come to the conclusion that the Crown has proved beyond a reasonable doubt that there was common purpose amongst all the accused and that they all had the required intention for murder in the form of dolus eventualis. I therefore find all the accused guilty of murder.

My assessors agree.

J. L. KHEOLA
JUDGE

EXTENUATING CIRCUMSTANCES

1. Intoxication - There is ample evidence that all the accused had been drinking beer for almost the whole day on that fateful day. In their evidence before this Court they gave the exact quantities of beer they consumed at various place in the Tsikoane and Matukeng areas. I am satisfied that the liquor in some way affected their mental faculties and their judgment and thereby influenced them in regard to the murder (S. v. Saaiman, 1967 (4) S.A. 440 (A.D.)), S. v. Msila, 1966 (1) P.H., H159 (A.D.).
2. Absence of factor justifying a finding of dolus directus. The Appellate Division held in S.v. Sigwahla, 1967 (4) S.A. 566 (A.D.) at p. 571 that

"(a) Trial courts in their conspectus of possible extenuating circumstances, should not overlook the fact (if it be such) that it is a case of dolus eventualis. (b) While it cannot be said that this factor must necessarily be an extenuating circumstance, in many cases it may well be so, either alone or together with other factors, depending on the particular facts of the case."

I found that there are extenuating circumstances.

SENTENCE:

A1, A2 and A3:- Sixteen (16) years' imprisonment each.

A4:- Thirteen (13) years' imprisonment.

DISPOSAL OF EXHIBITS:-

1. The revolver shall be given back to the police.
2. The blankets shall be given back to the accused from whom they were taken.
3. Sticks are forfeited to the Crown and shall be destroyed by the police.

J.L. KHEOLA
JUDGE

29th October, 1990.

For Crown - Mr. Mokhobo

For Accused one - Mr. Mphutlane

For three others - Mr. Teele.