C of A (CRI) No.5 of 1986

IN THE LESOTHO COURT OF APPEAL

In the Appeal of:-

MALEFETSANE PHALA MABOPE	1ST APPELLANT
PITSO MAKHETHA	2ND APPELLANT
MOJALEFA MPOTA	3RD APPELLANT
SEMPE TAU	4TH APPELLANT
AND	
REX	RESPONDENT

Held at Maseru

Coram

Mahomed P.
Ackermann J.A.
Browde J.A.

JUDGMENT

Ackermann J.A.

The four appellants (to whom I shall refer respectively as "the accused") were charged in the High Court with robbery. All four were convicted of robbery and all four sentenced to 12 years' imprisonment.

/...

The charge against the four accused was that they, together with two other persons, namely, Isaac Shemane Hatla and Lira Marai (who were not accused in the trial and whose whereabouts were according to the indictment unknown) committed a robbery on the 29th June, 1984 at the Hlotse Standard Bank in the district of Leribe and stole a revolver and M39,676 from the bank.

It was common cause on appeal that a robbery had been committed as detailed in the indictment and the only issue was whether the Crown had proved the participation of the accused in such robbery. At approximately 12.30 p.m. on the day in question P.W.1 Paul Phafane, an employee of the bank, was at the bank counter serving customers. He noticed four men entering the bank, all dressed in clothes resembling police or military uniforms with the leader carrying a rifle. He did not know any of the four men. The leader first moved to the counter next to the witness but then turned to him, pointed his rifle at the witness and ordered him to raise his hands. Phafane's colleague ran away, whereupon the intruder in question placed a bag on the counter and ordered the witness to put all available money into the bag. The witness carried out this order and the gunman also placed money from the counter into the bag. During this process the gunman shook the witness and knocked him against a wall. It is undisputed that

M39,696 of the bank's money was removed in this bag. The witness Phafane described this bag as a "cloth" bag but could not remember the colour thereof. The gunman also took possession of a revolver which was in the possession of this witness. At a stage Phafane noticed that certain of the other men who had entered the bank with the leader gunman were also in possession of firearms which they were pointing at the witness. Phafane heard the report of a gun outside the bank whereupon the leader of the robbers immediately ran out of the bank and the witness hid himself under the counter, emerging some 2 to 3 minutes later to notify the bank's office in Maseru of the incident. P.W.2 Musa Mangoaela, a colleague of the previous witness, confirmed the essential features of his evidence up to the point where the witnesses were asked to raise their hands. Immediately thereafter Mangoaela escaped to a bank toilet and only emerged when the previous witness indicated that it was safe to do so. Mangoaela says that there were 3 or 4 persons who took part in the robbery and that they were dressed in police or military uniforms. Neither of the bank tellers was able to identify the robbers.

P.W.3 Warrant Officer Ntlama was on duty at the Leribe police charge office on the day in question when he received a report that the bank was being robbed. The charge office is approximately 100 yards from the bank. Ntlama and sergeant Mothepu armed themselves

and proceeded to the bank. When they reached the main road Ntlama heard a gun report whereupon they took cover. The witness noticed two men outside the bank. They were both carrying rifles and firing them in the direction of the charge office but pointing upwards. Although the witness did not expressly so state the clear inference from this evidence is that the witness saw these two gunmen from the front, face on. The one gunman was standing at the right corner of the bank, the other at the left corner. The gunman on the right was wearing a brown overall and his weapon was similar to an AK47. The gunman on the left was wearing fawn trousers and an old black jacket and his weapon appeared to be a M65 or a M16. The witness identified the gunman on the right as a policeman called Hatla. As Ntlama watched the two gunmen firing he noticed a third person appearing from behind the bank. The entrance to the bank faces in the direction of the charge office and thus in the direction of the place where Ntlama was observing events. Ntlama identified this third person as accused 2. Accused 2 ran to a yellow-coloured vehicle parked outside the bank and climbed into it. The witness thought the vehicle was a Ford Granada. At this stage, apparently, the witness returned to the charge office in order to fetch more ammunition and immediately thereafter went back to the bank. When he was approximately 30 paces from the bank he saw Hatla and accused 1 coming out of the bank in the company of two other persons. Hatla was carrying a bank bag and a gun. When

later questioned by the Court the witness stated that accused 1 was wearing an overall. Hatla and one of the other persons proceeded to jump over the wall at the rear of the bank while accused 1 and the other persons ran in the direction of the Spar shop and the Linare Football ground. He gave chase. In the process one of the two men fleeing looked around and the witness was once again able to identify him as accused 1. As he pursued them in the direction of the Linare Football ground he noticed the yellow car which accused 2 had previously boarded. Although the witness did not say so, it is implicit in his evidence that while he was returning to the charge office to get ammunition accused 2 must have driven off in the yellow car because when he saw the Car again he says "it had stopped." In re-examination he said that it had stopped outside the Football ground. Accused 1 and his unidentified companion boarded the yellow car which drove off in the direction of Butha Buthe. The witness boarded a police vehicle which had arrived at the scene and headed in the direction of Butha Buthe. At a plantation next to the Tale Local Court he found the yellow vehicle abandoned. Some of the police remained with the abandoned car while the witness and other officers looked without success for the occupants of the car. There was no eye witness evidence of any participation by accused 3 or 4 in the robbery.

The above summary of the Crown's case of the actual robbe suffices as a background against which to indicate the gener basis on which the trial Court convicted the four accused. Befo doing so I would point out that accused 1, 2 and 3 gave eviden and denied that they had participated in any way in the robbery

P.W.3 Warrant Officer Ntlama was the only witness t positively identify accused 1 and 2 as participants in the robbe at the bank on the day in question. The witness said that he ha already known accused 1 for about three years prior to the robbe and accused 2 for six or seven years. He had seen both of the only four days prior to the robbery at the charge office. If thi were true it would significantly reduce the dangers of an erroneou (as opposed to a false) identification. In its judgment the Court *a quo* recorded certain adverse credibility findings in regard t this witness namely the following:

> "It may be mentioned that P.W.3's evidence was teeming with words like 'I think, I believe, about, etc.' which give the impression of uncertainty."

A trier of fact does not record such a finding because a witness is cautious. The finding indicates rather a witness who

/...

is not seen as being very reliable.

> "Indeed, he was at one time asked under cross-examination whether he had signed for his deposition at the preparatory examination when he said he did and pointed out the signature which was clearly that of the presiding magistrate. He, himself eventually conceded that he was wrong for like all other crown witnesses at the preparatory examination he was never called upon to sign for his deposition."

This criticism is justified. It is suggestive of a witness who jumps to conclusions and about whose powers of observation there must be some doubt.

> "I watched the demeanor of P.W.3 as he testified from the witness box. Without saying he was a liar, he was such a witness whose evidence required to be approached with care."

This not the description of a witness who inspires confidence.

In addition to the aforegoing the witness gave a strange answer in cross-examination when describing how accused 1 looked

back at the witness while running away from the bank towards the yellow motor vehicle.

> "As they ran away one of those people looked back and identified his face, I mean I identified him. I do not remember if I mentioned his name to the magistrate."

If the witness had indeed identified accused 1 at an earlier stage (as he stated in his evidence-in-chief) then it seems inept and inappropriate to say that he "identified him" at this later stage. It also seems surprising that, if he indeed had known accused 1 for three years prior to the robbery, he would have had any doubt as to whether he mentioned the name of accused 1 to the magistrate, bearing in mind hat it is not the witness's contention that he did not know his name.

There are three issues concerning the reliability of Ntlama's identification which are important. The first is whether it has been proven that accused 1 and 2 were well-known to the witness. Secondly whether his identification is honest. Thirdly, whether the circumstances were such that he could and did make a reliable identification. No specific demeanour findings adverse to accused 1 and 2 were made and except for the fact that ultimately, on a conspectus of all the facts and probabilities, the versions of

these two accused were rejected in favour of the prosecution witnesses, the two accused were not demonstrated to be lying witnesses on any specific issues in the case. Ntlama did, it seems to me, shift or adjust his evidence somewhat as to whether these two accused were well-known to him. When challenged on his asserted belief that accused 2 stayed in Maseru at his parent's shop he shifted his position to a concession that

> "I would not dispute it if accused 2 says he never stayed at Makhetheng shop because I only believed that his relatives were staying there as there were living quarters". (Emphasis added)

In his evidence accused 2 stated that his family had a shop in Maseru but he denied ever having lived at the shop. He also denied Ntlama's assertion that he had known accused 2 for many years. Accused 1 also denied knowing the witness prior to the date of the robbery. The Court *a quo* suggested that, as a matter of probability, Ntlama would not falsely have implicated accused 1 and 2, as inhabitants of Maseru, in a robbery at Leribe, several miles away. If he were a liar, so the judgment ran, Ntlama would rather have implicated someone nearer home in the district of Leribe. I cannot agree with this approach, which is purely speculative. There are other purely speculative possibilities which are no less

probable, such as the possibility that the police had inadmissible information concerning accused 1 and 2 which this witness's evidence was designed to bolster. On the issue as to whether the witness previously knew the accused concerned there are no inherent probabilities either way and on a matter of pure credibility there seems to be little to choose between the witness and the two accused, bearing in mind the strictures on the witness in the Court *a quo's* judgment to which I have already alluded. That the Court *a quo* itself entertained doubt in this regard emerges clearly from the following final sentence of the judgment on this issue:

> "It seems to me there is some element of truth in P.W.3's evidence that he did identify accused 1 and accused 2 as people he already knew prior to the events of 29th June, 1984 and in denying it the accused were not being candid with this court." (Emphasis added)

In my view this approach in rejecting the evidence of the two accused on this limited issue is unacceptable. In the first place it evinces an attitude that because the evidence of a crown witness appears to be acceptable therefore, as a matter of logic, the accused's evidence must be rejected. This is the type of approach which was rejected in S v. Guess 1976(4) S.A. 715 (A). Before being able to accept the crown witness's testimony on a point there

must be valid grounds for rejecting that of the accused (ibid at 718E - 719A).

In the present case there is even less warrant for rejecting the evidence of the two accused merely because there was "some element of truth in P.W.3's evidence" that the two accused were previously known to him. The Court had to be satisfied that Ntlama was speaking the truth on this issue and that the accused were lying. In view of the adverse credibility findings against the witness Ntlama the evidence of the two accused could not in my view have been properly rejected in the absence of some other corroboration of or circumstantial guarantee of the trustworthiness of Ntlama's evidence on this score. There was in my view no such corroboration or guarantee and the Court *a quo* accordingly erred in finding as a fact that the two accused in question were previously known to Ntlama. The Court accordingly erred in approaching the identification of the two accused by the witness on the day of the robbery on the basis that they were already known to the witness.

That being the case the various factors relevant to a reliable identification such as, for example, the period of observation, the proximity of the observer to the observed, the angle of observation, the visibility or state of light, the presence of

noticeable physical or facial features, marks or peculiarities, or the clothing or other accessories or possessions of the person observed, become important. (See S. v. Mahlape 1963(2) S.A. 29 (A) at 32A - 33B).

The observation took place at approximately midday, the light was therefore excellent and as the two accused emerged from and around the bank respectively they would, at least initially, have been looking almost directly in the direction of the identifying witness. These circumstances are favourable for a reliable identification, but the other enumerated factors have to be considered.

It must be remembered that Ntlama only identified accused 2 on the first occasion (i.e. before he returned to the charge office to collect more ammunition) and did not thereafter see him again. There is no precise indication of how far from the bank the witness was when, on the first occasion, he took cover and conducted his observations. The charge office, he said, was about 100 yards from the bank, but he does not say how far from the bank or the charge office he took cover; all that can be said is that it was something less than a 100 yards. When accused 2 emerged from behind the bank he was running and he continued running until he got into the car parked outside the bank. There is no evidence that the bank

building was set back any distance at all from the street. (In passing I would point out that having regard to the importance of identification in this case, a proper plan of the scene of the crime, indicating the positions of relevant points and distances, would have been of great assistance in clearing up uncertainties and obscurities in the evidence). Under these circumstances the witness could only have had the person running from behind the bank under observation for a few seconds. The person under observation was not stationary, but moving. The witness was also giving attention to the two persons standing at the corners of the bank firing in his direction. In fact he was sufficiently concerned for his own safety to have taken cover. It is therefore not surprising that in cross-examination he conceded that the scene was one of "commotion" and that he only had "glimpses" of the intruders. Notwithstanding the fact that it was broad daylight the aforesaid factors must raise serious doubts as to the reliability of the witness's identification of accused 2.

The witness only saw the person whom he identified as accused 1 after returning to the scene with additional ammunition. On this occasion he proceeded to within 30 paces of the bank. If anything there was greater "commotion" on this occasion than previously because four persons came running out of the bank. Ntlama's attention was divided between the two intruders who jumped over the

wall behind the bank and the two intruders (one of whom he said was accused 1) who ran away in an opposite direction and away from the witness. Once again the witness could only have seen the latter pair for a second or two from the front before they ran away from him in the direction of the Spar shop and the Linare Football ground. It is true that he said that one of this pair turned around as he was chasing them from behind and he then identified the person as accused 1, but on this occasion he could only have had the most fleeting sight of accused 1's face. Nowhere in his evidence does Ntlama give any description of noticeable physical or facial features, or build or gait, or marks or peculiarities of the persons he identified either as accused 1 and 2. He does say that accused 1 was wearing an overall, but there is nothing significant about this fact and there is certainly no other evidence that accused 1 was wearing an overall on the day in question. When cumulative regard is had to the fact that the attention of the witness was, for the most time, divided, that the scene was fast changing, that he was certainly in some fear for his own safety and had to take some cover for his own protection, that his observation of the faces of the two intruders in question must have been for a brief period only, that he gives no description of their features or other physical characteristics and that he was a witness who did not inspire the Court *a quo* with confidence, one is driven to the conclusion that it would be most dangerous to

accept his identification as correct beyond reasonable doubt in the absence of other reliable evidence corroborating such identification, or providing a circumstantial guarantee of its trustworthiness or otherwise implicating accused 1 and 2 in the commission of the crime.

I turn next to deal with such other implicating evidence relied upon by the Court *a quo* or pressed upon us by the Crown as justifying the conviction of accused 1 and 2 as well as the evidence relied upon for the convictions of accused 3 and 4.

In the judgment it is stated that -

> "... the evidence of PW4 (Thabang Lengoasa) who said accused 1 and two other men were at his house at Maputsoe in the district of Leribe one night towards the end of June, 1984, seems to me to lend strong support to PW3's story that accused 1 and a group of other people were in Leribe on that day (i.e. 29th June, 1984)".

As far as the precise date of this alleged episode is concerned the witness Thabang Lengoasa was extremely vague, even in his evidence-in-chief. he said that he could

"no longer remember the exact date but it was in June. It could have been during the middle or towards the end of June".

For the mere presence of accused 1 in Leribe to have any corroborative significance, such presence must be established immediately prior to or immediately after the date of the robbery. The fact that accused 1 might have been in Leribe on, say, the 15th June 1984 would contribute absolutely nothing, by way of probability or otherwise, to the issue as to whether he was there and at the bank on the 29th June. Even on the acceptance of Thabang Lengoasa's evidence, it is just as probable that accused 1 was there on the 15th, as that he was there on the 28th or 29th or 30th June. On the basis relied upon by the Court *a quo* this evidence did not take the case against accused 1 any further at all.

The Crown, however, sought to place further reliance on this evidence in a somewhat different way. Mr. Mdhluli submitted that the evidence established that on the occasion testified to by Thabang Lengoasa (whenever it was) accused 1 was lent a brown bag belonging to Thabang Lengoasa's mother, DW 5, 'Mathabo Lengoasa. This, it was submitted, was the same bag which, according to PW6 Private Malefetsane Thaane, was handed to him by Marai (one of the

/...

uncharged alleged robbers referred to in the indictment) some time after the commission of the robbery. When the bag was handed to this witness by Marai it contained the witness's personal service rifle which he had on a prior occasion handed to Marai, at the latter's request, to enable Marai to carry out a robbery at Mathebe. I shall in due course deal with Private Thaane's evidence concerning firearms supplied to him by accused 4. Suffice it to say at this stage that the rifle in the bag handed to Private Thaane by Marai was Thaane's private issue and not one emanating from accused 4. There are considerable problems concerning the identity of this bag and whether in fact it is the bag handed by Thabang Lengoasa to one of the persons who visited him during June 1984. In the Court's judgment this bag is consistently referred to as Exhibit 26. When Thabang Lengoasa testified and purported to identify a bag before Court the exhibit number of the exhibit to which he was testifying was not recorded. This was unfortunate. The presiding officer in a Court should ensure that this is recorded. (I shall deal later with Thabang Lengoasa's description of the bag). When Private Thaane testified about the bag handed to him by Marai the exhibit in question is recorded as "(1 for id.)". There is no explicit evidence that "1 for id.)" is the same as Exhibit 26. Private Thaane says that he returned the rifle that was in "(1 for id.)" to the armoury and kept the bag at his home. He did not return or, on his testimony, identify the bag

to the police. According to the investigating officer P.W. 14 Detective Lieutenant Koza, he collected a bag Exhibit 26, from the home of Private Thaane. Exhibit 26 was handed to him by Private Thaane's wife. It must be inferred however that "(1 for id.)" is Exhibit 26, because Private Thaane later learnt that the brown bag at his home (clearly the bag he referred to as "(1 for id.)" had been removed.

There were at least six bags before Court, namely Exhibits 5, 12, 19, 21, 22 and 26. It was unfortunate and unnecessary for there to have been any confusion or uncertainty on the record as to the exhibit to which Thabang Lengoasa and Private Thaane were referring. I think it can be safely assumed, however, that these witnesses were indeed referring to Exhibit 26. The question still remains, however, whether Exhibit 26 was the bag which Thabang Lengoasa handed to one of his visitors in June 1984.

Apart from the fact that D.W.5 'Mathabo Lengoasa did not identify accused 1 as ever having slept at her home, she contradicted her son P.W.4 Thabang Lengoasa as to the identity of Exhibit 26. She denied that it was her property. She admits that a bag of her's went missing and that when she confronted her son about it he said that he had lent it to friends. She says that the bag that went missing was older and that its handles were loose.

Furthermore she said that her full names "'Mathabo Lengoasa" were written inside her bag whereas in the case of Exhibit 26 only the name "Lengoasa" is written on the outside of the bag. She explained that she made a mistake when she identified Exhibit 26 as her bag at the preparatory examination because she did not have a close look at it. The Court *a quo* found Mrs. Lengoasa not to be an impressive witness and that her explanation about mistakenly claiming Exhibit 26 as her bag in the preparatory examination was not convincing. The Court *a quo* implicitly rejected Mrs. Lengoasa's evidence in favour of her son's, notwithstanding the fact that accused 1 also denied ever having spent a night at the Lengoasa house. The Court *a quo* did not subject Thabang Lengoasa's evidence to any analysis and merely found that there was "no convincing reason why PW 4 an acquaintance of accused 1 should false incriminate him on this point". This finding overlooks evidence given by Thabang Lengoasa in cross-examination that the police brought pressure to bear on him to identify accused 1, 2 and a stranger as the people who had come to his house and that "because I was innocent" he agreed with them. He even says that he was treated violently. In the circumstances he is clearly implying that he was treated violently by the police and that he was prepared to go along with what the police suggested to him to save his own skin. Thabang Lengoasa is not the only person connected with this case to be physically and mentally violated by

the police involved in the investigation. Both Private Thaane and accused 1 gave graphic accounts of being repeatedly tortured by the police who wanted them to give evidence or statements favourable to the police. This evidence was not seriously challenged in cross-examination nor contradicted. The Court a quo did not reject it, and by implication appears to have accepted it. The pressure which Thabang Lengoasa says was brought to bear on him by the police was not an isolated occurrence in this case. Under these circumstances there is good reason why he should falsely involve accused 1. It would in my view be dangerous to accept his evidence in preference to that of his mother and accused 1. It is also significant that in cross-examination this witness conceded that he had previously said that his mother's full names were written on the inside of the bag, and that in the process of identifying Exhibit 26 he had in fact looked inside the bag to see if her names were inscribed there. In my view there is on the evidence no basis for finding that accused 1 was at Mrs. Lengoasa's home as testified to by Thabang Lengoasa or that the bag which Marai handed to Private Thaane belonged to Mrs. Lengoasa or was the one that went missing in June 1984. Accordingly there is no corroboration from this source for accused 1's presence in Leribe on the day of the robbery.

/...

The Court *a quo* in its judgment referred to certain things which accused 1 had pointed out to the investigating officer P.W.14, Detective Lieutenant Koza:

> "Following interrogation, accused 1 took him to his house in Maseru where he in vain searched the house for the missing Standard Bank revolver. They then returned to Leribe. He and accused 1 subsequently went to Tale tree plantation. Accused 1 showed him the place where the yellow Ford Granada car was abandoned next to the plantation. He also showed him a spot in a donga in the tree plantation where he said they went and sat after abandoning the car. According to P.W.14 the grass was somewhat disturbed at that spot as though something had been lying thereon. The donga itself was about 150 yards (indicated) from the place where the car had allegedly been abandoned and the spot in the donga was quite secluded. P.W.14 then returned with accused 1 to the police station."

The Court *a quo* did not expressly rely on such pointing out to convict accused 1 but this appears to be the implication of the following finding of the trial Court:

> "I must say P.W.14 impressed me as a reliable witness who, despite lengthy cross-examination lasting many days, gave his evidence in an unshaken and straightforward manner. I am inclined to believe his story that it was accused 2 (and accused 1) who said he would go to Tale tree plantation and point out at the various places he had pointed out to him".

It is not clear what the phrase "I am inclined to believe his story" is intended to convey. It falls short of an acceptance of P.W.14's version and a rejection of that of the accused concerned. The Crown submitted that the pointing out strengthened the cases against accused 1 and 2.

In regard to the pointing out relied upon by the Crown the provisions of s.229 (2) of the Criminal Procedure and Evidence Act, No.7 of 1981 ("the Act") are relevant and read as follows:

> "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 of information forms part of a confession or

> statement which by law is not admissible in evidence against him on such trial."

The corresponding provisions in the South African Criminal Procedure Act No.51 of 1977, namely s.218 (2) provide as follows:

> "Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings."

Despite the slight difference in wording the substance of the provisions are identical.

In S. v. Sheehama 1991 (2) S.A. 860 (A) the Appellate Division of the South African Supreme Court had occasion to reconsider the provisions of s.218 (2) in the case of an involuntary or forced pointing out. The English headnote of the case at p.861 (which is

/...

a correct reflection of the judgment of FH Grosskopf, J.A. delivered in Afrikaans and concurred in by the other four members of the Court) reads as follows:

> "A pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which *prima facie* operates to his disadvantage and it can thus in an appropriate case constitute an extra-judicial admission. As such, the common law, as confirmed by the provisions of s.219A of the Criminal Procedure Act 51 of 1977, requires that it be made freely and voluntarily. It is also a basic principle of our law that an accused cannot be forced to make self-incriminating statements against his will, and it is therefore inherently improbable that the Legislature, with a view to sound legal policy, could ever have had the intention in s.218 (2) of Act 51 of 1977 to authorise evidence of

forced pointing out.

The decisions in the cases of S. v. Tsotsobe and Others 1983 (1) S.A. 856 (A) and S. v. Shezi 1985 (3) S.A. 900 (A) to the effect that a relevant pointing out does not amount to an extra-judicial admission are clearly wrong.

The decision in the case of S. v. Ismail and Others (1) 1965 (1) S.A. 446 (N), which was followed in the cases of S. v. Bvuure (1) 1974 (1) S.A. 206 (R); S. v. Nyembe 1982 (1) S.A. 835 (A) and in the Tsotsobe and Shezi decisions *supra*, that evidence of a forced pointing out is admissible in law is clearly wrong. The precedents set by these cases should also for another reason not be maintained, viz. the objection in principle which exists against the admissibility of evidence of forced pointings out. It was never the intention of the Legislature in S.218 (2) of Act 51 of 1977 to admit evidence of a pointing out which was otherwise inadmissible as soon as such pointing out formed part of an inadmissible confession

/...

or statement. The section, on a correct interpretation thereof, provides that evidence of a pointing out which is otherwise admissible shall not be inadmissible merely by virtue of the fact that it forms part of an inadmissible confession or statement. Put differently: when evidence of a pointing out is inadmissible it will not be admissible simply because it forms part of an inadmissible confession or statement.

Applying the above principles to the facts of the instant case, the Court held that evidence of pointings out, which the appellant had made to a police officer and which related to five charges of murder on which, *inter alia*, the appellant had been convicted in the Court *a quo*, was inadmissible as they had not been made freely and voluntarily. The Court found that the pointings out had been preceded by assaults and threats directed at the appellant and by a routine warning issued by the police officer which had however been so inaccurately relayed by the interpreter that the appellant was

> brought under the impression that he was compelled to make such pointings out as should be required of him. The Court accordingly upheld the appeal against the five charges of murder."

I am in full agreement with this approach.

Furthermore s.229 (2) of the Act, insofar as it relates to pointing out, only validates the pointing out and not the proof of an otherwise inadmissible confession or admission (See S. v. Mbele 1981 (2) S.A. 738 (A) at 743 C - D and S. v. Mphahlele and Another 1982 (4) 505 (A) at 518F - 519D). The following observations of Botha AJA in S. v. Nkosi 1980 (3) S.A. 829 (A) at 843 F - H are apposite:

> "In the present case the appellant's alleged acts of pointing out, standing by themselves, are of no significance: neither the pointing out of accused No.3's kraal nor the pointing out of accused No.3 in person could serve to reveal any link between the appellant and the crimes with which he was charged. What the State sought to rely on was what the appellant

allegedly said to accused No.3 after he had pointed him out and, more importantly, what the appellant allegedly said after the revolver had been pointed out by Amon Kheswa and it had been handed to him, as quoted earlier. However, these statements of the appellant followed upon his earlier report to the police, which, on the totality of the police evidence, probably amounted to an inadmissible confession, and which resulted in the appellant being taken at once to the places where he made the statements. In these circumstances, applying the approach reflected in the passages from the judgment in Duetsimi's case, quoted above, the conclusion is inescapable that the evidence of the appellant's statements should have been excluded from consideration of the case against the appellant, for *prima facie* those statements were made in elaboration of an inadmissible confession and formed a constituent part thereof."

I have already alluded to the fact that accused 1 was repeatedly tortured by the police in order to induce him to give

evidence or make statements favourable to the police. Shortly after such treatment accused 1 was taken by Detective Lieutenant Koza to point out various things. The witness says that during interrogation accused 1 gave certain explanations. On 7 July he volunteered to take the witness to his home in Maseru where the witness conducted a search, looking for "the Standard Bank revolver, which went missing at the time this robbery was committed" but could not find the revolver. The witness says that on a later occasion accused 1 took him to the place where the yellow motor vehicle had previously been found (it was of course no longer there on this occasion). Accused 1, after giving some explanation and taking the witness to a donga in the tree plantation, explained "that after they came out of the car next to the plantation they went and sat at that spot. The car he was referring to was the ..... yellow Ford Granada Car. Accused 1 ..... and some of the police showed me the spot where the car had been parked. The spot was about 150 yards (indicated) from the donga where accused 1 said they had been sitting. From the donga one could not see the spot where the car was allegedly parked."

In the light of the judgment in S. v. Sheehama, *supra*, any such pointing out would be inadmissible unless freely and voluntarily made. The *onus* was on the Crown to prove that, notwithstanding the fact that accused 1 had shortly before been

tortured in order to make statements favourable to the prosecution, the effect of such improper inducement had ceased to operate by the time he pointed out the various matters referred to. The Crown failed to establish this, no real attempt in fact being made to do so. On this ground alone the evidence of the pointing out was inadmissible. In any event the pointing out, taken on its own, is quite colourless and warrants no inference that accused 1 was involved in the robbery. Of course Detective Lieutenant Koza did his best to implicate accused 1 by referring directly or obliquely to statements accused 1 had made prior to or contemporaneously with the pointing out. The way he related the episode of going to accused 1's home was a thinly veiled attempt to let the Court know that the accused had made an incriminating admission concerning a revolver connected with the robbery. More blatant was his evidence concerning the inculpatory statements made. Either this evidence is blatantly false or else it is a clear indication that the accused had during interrogation made incriminating admissions or confessions to the witness which the witness well knew were inadmissible because of duress or because they had not been confirmed before a magistrate. Yet he quite improperly tried to slip them in under the guise of the pointing out. This is obviously inadmissible for the very reasons mention in S. v. Mbele, *supra*, S. v. Mphahlele, *supra*, and S. v. Nkosi *supra*. Exactly the same criticism applies to the witness's evidence concerning the

fact that, as a result of explanations by accused 1 and 2, he went to Marai in detention who in turn gave an explanation in consequence whereof he found an AK47 rifle at the home of Marai's mother-in-law. The criticism likewise applies to the passage in the witness's evidence where he states:

> "Accused 1 pointed at his brother at a football ground. That was after he had told us that he suspected that his brother had removed the gun."

The Crown further relied on certain evidence, adverse to the accused and amounting either to admissions or confessions, which were elicited, so the Crown contended, in the cross-examination of Detective Lieutenant Koza by accused 1's legal representative. There are two possible bases in law on which such admissions or confessions, otherwise inadmissible, could be received in evidence. The first is in terms of s.228 (4) of the Criminal Procedure and Evidence Act 1981 which provides as follows:

> "In any proceedings any confession, which is by virtue of this section inadmissible in evidence against the person who made it, shall be admissible against him if he or his representative adduces in those proceedings any

> evidence, either directly or in cross-examining a witness, of any statement, verbal or in writing, made by the person who made the confession, either as part thereof or in connection therewith, if such evidence is, in the opinion of the officer presiding at such proceedings favourable to the person who made the confession."

(The confessions here referred to are ones which are inadmissible, *inter alia*, because they have not been freely or voluntarily made or if made to a policeman have not been confirmed and reduced to writing before a magistrate).

The other possible basis is at common law, if the admission or confession (otherwise inadmissible) has been "elicited" in cross-examination by or on behalf of the accused. The matter is not yet settled in the South African courts. There is no unanimity as to precisely when such an "elicited" admission or confession will be admissible (Compare R. v. Bosch 1949 (1) S.A. 548 (A), S. v. Magagula 1981 (1) S.A. 771, S. v. Olifant 1982 (4) S.A. 52 (NC) and S. v. Minnie 1986 (4) S.A. 30 (E). At best for the Crown, however, and in terms of the decision in S. v. Minnie *supra* at 314:

> ""(an otherwise inadmissible) confession will be admissible against the accused provided that the reply which disclosed the contents of the confession constituted a direct and fair answer to the question of the cross-examiner and that, in the case of (an unrepresented) accused ..... the Court was satisfied that the accused was fully aware of the risk attaching to the question."

The difficulty of applying this latter principle in the present case is compounded by the fact that in the record of the evidence before us, which is a reconstructed record, questions and answers in cross-examination are not separately recorded and it is often difficult to infer precisely what the question to a recorded answer was.

In the cross-examination of Detective Lieutenant Koza the following passage appears:

> "It is not true that accused 1 said he was not involved in the robbery."

It is difficult to know what this means. It could possibly mean that accused 1 did not positively deny anything. One cannot necessarily infer from this that accused 1 admitted involvement in the robbery. I also do not think that a statement put to a witness in the form "My client says he told you that he was not involved in the robbery" can in all circumstances be said fairly to elicit an answer which amounts to a confession. A simple denial by the witness could have sufficed. The witness also stated that

> "I deny that the idea was to force accused 1 to say he had taken part in the robbery ..... Accused 1 readily explained to me what he knew about this robbery not because he was tortured and wanted to save his life. Accused 1 volunteered to go and show me where the gun was."

I am not satisfied that any of these answers are fair and direct answers to questions which were put. The first sentence suggests that the cross-examiner was enquiring about the ill-treatment of accused 1, not about what accused 1 had said.

In the result it would seem that the only admissible incriminating evidence against accused 1 is his purported identification by Warrant Officer Ntlama. The latter was a single

witness whose demerits as a witness I have already referred to, as well as the fact that he was some distance from the person he was identifying and had very little time to identify accused 1. Moreover, accused 1 gave evidence denying that he was ever at or in the vicinity of the bank at the time of the robbery. Under these circumstances I think it would be inherently too dangerous to convict accused 1 on the uncorroborated evidence of Ntlama. Taking into account the demerits of Ntlama as a witness and all the circumstances of the purported identification, the Crown has not succeeded in proving, beyond reasonable doubt, that the person outside the bank was accused 1 and has not otherwise proved his complicity in the crime.

I deal next with the case against accused 2.

I have earlier analysed Ntlama's evidence regarding his identification of accused 2 at the scene of the crime and adverted to the fact that accused denies being previously acquainted with this witness. As pointed out the witness had even less time to correctly identify accused 2 than he had to identify accused 1. The precise distance at which he observed accused 2 is also not clear; it has only been established to be less than 100 yards. My remarks earlier in this judgment concerning the dangers of accepting this witness's identification of accused 1 in the absence

of corroboration or some other guarantee of trustworthiness or implication in the commission of the offence apply *a fortiori* to the identification of accused 2.

It will be remembered that P.W.6, Private Thaane, stated in his evidence that accused 2 was present when Marai handed to the witness the bag containing the witness's rifle. It has not been proven, as I have indicated, that this bag belonged to Mrs. Lengoasa nor that it, or any other bag was handed to accused 1 at any time relevant to the commission of the robbery. In the absence of evidence that accused 2 knew what was in the bag or claimed any knowledge concerning the witness's rifle, this evidence is quite colourless and does not implicate accused 2 in any way.

Reliance was also placed by the Crown on Detective Lieutenant Koza's evidence concerning what accused 2 pointed out at the spot where the yellow car was abandoned. What accused 2 pointed out and said as he did so was substantially the same as in the case of accused 1, albeit that his observations were slightly less inculpatory. In addition, according to the witness "He also pointed out where he threw the keys to. We looked for the keys but could not find them". According to the witness the pointing out occurred on the 7th July, 1984. Accused 2 said in evidence that he was taken into custody on the 4th July, 1984 and that

thereafter, but before the pointing out, he was threatened in various ways by Detective Lieutenant Koza who told him "man we kill people here in Leribe" and after causing his handcuffs to be tightened "do you know that we are going to kill you." A statement allegedly made by Hatla was then read to him and he was asked to confirm it. He refused to do so but upon being told that it was up to him to choose between life and death and in order to avoid the pain being caused by the handcuffs he admitted the correctness of the statement. At the scene of the pointing out he was told to go into the plantation and to point out where they had hidden. He was reminded that he could be shot dead. Accused 2 says that he was so frightened that he pointed out a nearby place. Leaving aside the issue as to whether the pointing out by accused 2 was freely and voluntarily done, in regard to which the ill-treatment of accused 2 is not as severe as in the case of accused 1, it seems to me that the statements made by accused 2 at the pointing out are inadmissible for the same reason as in the case of accused 1 and that the pointing out was as colourless as in accused 1's case. In my view the events of the pointing out do not advance the Crown case against accused 2.

The Crown also relied upon certain evidence by Detective Lieutenant Koza in cross-examination to the effect that accused 2 had admitted to him at the pointing out that he had participated

in the robbery in question. The Crown contended that this evidence was admissible because it had been elicited in cross-examination from the witness by the legal representative of accused 2 under circumstances covered by the judgment in S. v. Minnie 1986 (4) S.A. 30 (E) referred to above. It is necessary to consider carefully how the answer came to be given in cross-examination. In his evidence-in-chief the witness says that accused 2 "pointed out where he threw the keys to" and further explained in relation to the donga "that they were sitting there after abandoning the yellow car". This evidence was highly prejudicial to the accused and on the Crown case must have been part of a fuller, inadmissible confession made to the witness. No attempt was made to prove any fuller, previous confession for the obvious reason that it was inadmissible. For the reasons previously stated these statements made by accused 2 at the pointing out were clearly inadmissible and ought not to have been admitted in evidence. The fact that Crown was allowed to prove these statements must have put accused 2's legal representative into a quandary as to what line of cross-examination to follow. He could clearly not allow this evidence to go unchallenged. It is against this background that the following evidence in cross-examination at p.103 of the record, relied upon by the Crown, must be evaluated:

"I never forced accused 2 to admit having committed the robbery. He was merely telling me what he knew and parts played in the robbery.

Accused would not be telling the truth if he says he never admitted taking part in that robbery. After all I would not have known of the donga that he pointed out to me."

The last sentence is disingenuous to say the least, because the witness on his own evidence knew of the donga from accused 1. Because the cross-examination was not recorded in question and answer form it is difficult, if not impossible, to determine what precise questions were put to the witness. The first two sentences in the above quotation might well have been an answer to something put to the witness in regard to what he had said accused 2 stated at the pointing out, namely an assertion by the cross-examiner that accused 2 had been forced to say whatever he had said at the pointing out. A mere repetition of an inadmissible observation in a witness's evidence-in-chief, does not become admissible in cross-examination merely because it is repeated in response to a denial of voluntariness on the accused's behalf. The same is true of the second last sentence in the quotation. None of the admissible evidence concerning the pointing out advances the Crown case at

all.

The last piece of evidence relied upon by the Court *a quo* in convicting accused 2 emanated from P.W.6, Private Thaane who, in the words of the Court *a quo* (at p.203 of the record):

> "..... testified that when he asked him, at Marai's house in Maseru West, about the Leribe robbery money accused 2 told him that Hatla would be coming with it. We know that according to P.W.11's evidence, which I have no reason to doubt, when he was found at Matukeng bus stop, Hatla was in possession of a large amount of money. It seems accused 2 was, therefore, right in telling P.W.6 that Hatla would be coming with the money. The question that immediately arises is how accused 2 came to know about it. An irresistible inference is that he knew about it because he was in the group that was with Hatla when the money was taken at the Leribe agency of the Standard bank on 29th June, 1984. This in my view fortifies P.W.3's evidence that accused 2 was one of the robbers he saw in Leribe on

29th June, 1984."

It is common cause that prior to the robbery Private Thaane and accused 2 knew one another well and were apparently on good terms. The witness's account of what happened at Marai's house reads as follows:

> "I asked them to tell me how they faired at the robbery at Hlotse especially because I had only known about the Mathebe robbery and not the one at Hlotse. Marai then explained what happened at the Hlotse robbery. I did speak to accused 2 as well. I asked him in whose possession the robbery money was. He said the money was with one Hatla who would be coming with it. I then told them that if they said the money was with Hatla they should know that Hatla had been arrested and he could have well been arrested still in the possession of that money. They both appeared dejected."

Accused 2's version of the events is to the following effect:

> "I once left Maseru West with Marai and P.W.6. P.W.6 found me in company of Marai. We played some music. P.W.6 then asked Marai where his property was. Marai

said it was at Bus stop area. We then left and boarded a taxi next to Tlelai's at Hoohlo's village. We went to the bus rank area. Marai told me and P.W.6 to wait whilst he went else-where. I then asked P.W.6 why he appeared worried. He said he was wondering if Marai was telling the truth when he said Hatla was coming with the money. I asked him who Hatla was and he said he was a police officer. I told him not to worry because Marai would not deceive him. Then Marai appeared carrying a bag which he handed to P.W.6 then went to where Kokoptjoe bus was waiting. I went to the taxis going to Tsosane's. Marai took the taxis going to the station."

In another part of his evidence accused 2 stated that he had known Marai for some years and that Private Thaane and Marai were his friends. They used to meet on weekends.

It is necessary to consider carefully the evidence of Private Thaane. He was warned as an accomplice and on his own evidence was directly instrumental in obtaining arms for the planned robbery which he supplied to his elder brother and Marai. His evidence is also relevant to the convictions of accused 3 and 4. The cautious approach which a trier of fact is enjoined to adopt in dealing with the evidence of an accomplice is well-known and the so-called

cautionary rule was formulated as follows by Holmes, J.A. in S. v. Hlapezula and Others 1965 (4) S.A. 439 (A) at 440 D - H:

> "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 had 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."

In the judgment of the Court *a quo* the learned trial Judge warned himself (at p.190 of the present record) as follows of the dangers of accomplice evidence:

"it is trite law that accomplice witnesses are not merely witnesses with possible motives to tell lies about innocent accused but are as such witnesses peculiarly equipped, by reason of their inside knowledge of the crime, to convince the unwary that their lies are the truth. In dealing with the evidence of these two accomplice witnesses, I accordingly warn myself against

/...

the dangers that are always inherent in the evidence of such witnesses."

These remarks notwithstanding, the learned trial Judge does not appear to have applied these cautionary remarks to the facts of the present case and does not appear to have looked for any safeguards such as indicated in S. v. Hlapezula, *supra*.

A few pages later in the judgment (at p.194-195 of the record) the learned trial Judge, before alluding to, considering or analysing the evidence of accused 2, states the following:

" As has been pointed out earlier, P.W.6 and P.W.12 are accomplice witnesses whose evidence must be approached with caution in order to lessen the risk of a wrong conviction. Their evidence that the accused 4 supplied firearms for the purpose of carrying out robbery and thus associated himself in the commission of the offence has, however not been challenged by accused 4. I have observed P.W.6 and P.W.12 as they testified before me especially P.W.6 who was subjected to a rigorous and lengthy cross-examination that lasted almost full two days. They acquitted themselves well, in my view. No convincing reason has been advanced why P.W.6 who was admittedly a friend of accused 2 and a colleague of accused 3 at the L.P.F. would falsely implicate them in this case. Mindful that they were accomplices I am satisfied that P.W.6 and P.W.12 were witnesses of the truth in this case."

As stated earlier in this judgment, when referring to S. v Guess 1976(4) S.A. 715 (A) at 718E - 719A, this is not the correct approach to a conflict of fact between a crown witness and an accused.

There is a further unsatisfactory feature of this case. S. 236(3) of the Criminal Procedure and Evidence Act 1981 provides that an accomplice who has been produced as a witness on behalf of the prosecution shall (subject to sub-section (3) which is not relevant in this context) be discharged from all liability as to prosecution for the offence concerned "and the court shall cause the discharge to be entered on the record of the proceedings" provided that the accomplice "fully answers to the satisfaction of the court all such lawful question as my be put to him."

/ ..

The invariable practice in the South African courts, in terms of the substantially similar provision in the South African Criminal Procedure Act No.51 of 1977, is to give such discharge only in the final judgment on the merits and to enter it on the record thereafter. There are at least two very good reasons for not doing it earlier. Without considering the full import of the phrase "fully answers to the satisfaction of the court all such lawful questions as may be put to him" it means at least that the court must be satisfied that the accomplice has answered frankly, fully and honestly and has not deliberately withheld information from the court. The first reason for not giving the discharge earlier, for example at the conclusion of the accomplice's evidence, is that the court is at that stage not able to satisfy itself, in the respects mentioned, regarding the accomplice's answers. It may be conclusively proved at a later stage in the trial, either through prosecution or defence witnesses, that he has deliberately lied or withheld information. The second reason for not doing so, is that it might create the impression that the Court has prejudged a vital issue without having heard the defence case. Furthermore it may subconsciously influence the court when considering the evidence of the accused.

In the present case the court a quo granted such discharge to Private Thaane immediately after the conclusion of his evidence and to his brother Lieutenant Thaane immediately after the conclusion of his evidence. In doing so the court a quo erred.

/ ...

In the last passage from the judgment quoted above it is stated, inter alia, that "no convincing reason has been advanced why PW6 who was admittedly a friend of accused 2 and a colleague of accused 3 at the L.P.F. would falsely implicate them in this case." This is not a correct approach. There is no onus on the accused to prove that a prosecution witness has given false evidence. In making this observation the court a quo has apparently overlooked very real reasons why PW6 might falsely have implicated accused 2 and 3, namely, that the witness wanted to protect himself from prosecution and, more importantly on the facts of this case, that the witness had been tortured into giving false evidence.

The witness's evidence in this latter regard was not challenged in the trial. He together with various other suspects, were arrested and detained after the robbery. On the sixth day of his detention his interrogation started. Much of it was conducted while he was hooded. At one stage an electric heater was brought close to his shoes and held there until he felt he was burning. At the same time he was beaten with an instrument like a stick on the stomach and chest. He was burnt on the legs and back of his thighs and still bore the scars of those burns at the trial. All the time he was asked by the police to make admissions which he was not prepared to do. He was terribly burnt at the Maseru charge office. He was (in early July) refused a warm covering or access to the fire. He was unable to walk because of his burns. He made statements after his interrogation started and the interrogators wanted him to confirm what they were interrogating him about.

In my view these circumstances indicate that as an accomplice the testimony of this witness must be considered with more than usual care and the cautionary rule applied with great care. Accused 2 denied that he participated in the robbery in any form and said that he was in South Africa on the 29th June 1984, having left on the 15th June and only returning on the 30th. He produced his passport which bore stamp imprints of the 15th and 30th June. According to accused 2 these imprints were made at the South African border post at Maseru when he entered South Africa on the 15th and left on the 3oth June to return to Lesotho. I shall deal presently with his evidence regarding his alibi. Suffice it to say that the trial court, although ultimately rejecting his evidence, did not make any adverse demeanour findings concerning accused 2 as a witness. It cannot therefore be said that there was any substantial difference between Private Thaane and accused 2 insofar as their intrinsic merit as witnesses is concerned. It is true that they were on good terms prior to the robbery and that this would tend to militate against Thaane falsely implicating the accused. This is offset, to my mind, by the fact that Thaane was badly tortured in order to extract information from him. To my mind, on the facts of this case, the only satisfactory way in which the cautionary rule could be satisfied is by independent corroboration of the witness's evidence in a way which implicated the accused. In this regard it is important to bear in mind that Private Thaane's evidence does not implicate accused directly in any way with the events of the robbery which took place on the 29th June, 1984. It was Marai, and not accused 2, who responded to the question as to how "they faired (sic)

at the robbery at Hlotse". The only contribution to the discussion by accused 2 was when he was asked in whose possession the robbery money was to which he replied that it was "with one Hatla who would be coming with it". Such knowledge does not justify as a sole, or even as the more probable, inference that accused 2 took part in the robbery. He could, as a result of information imparted to him by his friend Marai, have known of the robbery as well as the whereabouts of the stolen money, without having taken part in the robbery. He might have known of its planning, execution and benefits, without necessarily having been a party to it. It does not seem to me that Private Thaane's evidence to what accused 2 said or how he behaved on this occasion really affords any corroboration for the evidence of PW3, Warrant Officer Ntlama, in the sense of making it more probable that the latter's identification was more correct. Conversely I also cannot see how the latter's evidence renders it more probable that a discussion took place along the lines testified to by Private Thaane.

DW6, Stephanus Smith, testified that he placed the stamp in accused 2's passport which indicated that the holder had passed into South Africa on the 15th June 1984. He did not affix the stamp indicating that the holder had left South Africa on the 30th June.

A passport is not, in my view, a public document which, on mere production, proves the truth of the contents of the information therein contained. In Northern Mounted Rifles v O'Callaghan 1909 TS 174 at 177 Innes C.J. summed up the common-law requirements of a public document by saying:

" It must have been made by a public officer in the execution of a public duty, it must have been intended for public use and the public must have had a right of access to it".

While a passport is indeed issued and the entries therein made by a public official in the execution of a public duty, it is not intended for public use nor do the public at large have any right of access to it.

I do however agree with the trial Court that the passport in question provides prima facie proof that on the 30th June 1984 accused 2 passed from South Africa through the South Africa border post to the Lesotho side. The passport bears such a stamp, which the witness Smith identified as a valid stamp. There is no suggestion that it is a forgery or that it could have been placed there by any border post official other then one at the border post in question. On the basis of omnia praesumuntur rite esse acta the presence of this stamp in accused 2's passport raises a strong likelihood that he passed through the border post from South Africa into Lesotho on the 30th June 1984.

The critical date is, however, the 29th June. Does the above inference afford any assistance as to the probabilities of where accused 2 was on the 29th June 1984? It is true true that, on the basis of the above findings, it must follow that for accused 2 to have been in Lesotho on the 29th June 1984 he must have left and re-entered South Africa at a place other than at a border post.

This Court is entitled to take notice of the fact that South Africa surrounds the borders of Lesotho and that, on the western border, the areas are rural and sparsely populated. It seems that the illegal exercise postulated could have been executed, particularly at night time, with little fear of detection. Had accused been a party to the planning of the robbery, this is an exercise which could have been planned in advance. In these circumstances the passport stamp of 30th June 1984 in accused 2's diary provides, at best, the very slightest corroboration for his version.

I have, in the course of this judgment, dealt with the evidence of Warrant Officer Ntlama, his deficiencies as a witness, his very limited time for identifying accused 2 and the fact that his identification has to be evaluated on the basis that he had not known the accused previously. I have also pointed to the particular dangers of relying on Private Thaane as an accomplice witness.

In the end result, insofar as the guilt of accused 2 is concerned, the cumulative effect of these two witnesses has to be weighed up against accused 2's denial of involvement, bearing in mind that, as indicated, Thaane's evidence offers no real corroboration for Ntlama's identification. It is obvious that there is a high degree of suspicion concerning accused 2. Nevertheless I am of the view, having given the matter anxious thought, that the prosecution evidence when weighed up against accused 2's denial, falls short of proving beyond reasonable doubt the involvement of accused 2 in the robbery.

I turn next to accused 3's conviction. He was not identified at the scene of the robbery and the case against him depends on circumstantial evidence taken in conjunction with certain admissions he is alleged to have made.

Detective Lieutenant Majalle, who retired from the police force in 1984 and who was clearly not one of the investigating team in the present case, testified that on the 4th July 1984 (the day after accused 3's arrest) accused 3 took the witness to his (accused 3's) father's house at the Central Prison, Maseru where Mr. Mpota Snr. was a prison officer. The witness and accused 3 met the latter's father outside the house. In the company of Mr Mpota Snr. they went inside the house. It is common cause that at this time accused 3 was living with his parents. Accused 3 took the witness to his bedroom in the company of his father. In his bedroom accused 3 "took down" a closed brifcase. He opened it and produced a 9mm pistol No. 245 PM 63241. It is common cause that the briefcase belonged to accused 3. The witness identified the pistol as "the one before Court now" (the only 9 mm pistol before Court was Exhibit 2). Thereafter the witness and accused 3 returned to the charge office. The witness handed the pistol in question to Detective Lieutenant Koza. The latter confirmed this, as well as the fact that this pistol was Exhibit 2 before Court.

During 1984 Captain Mosoatsi was stationed at the armoury section of the Lesotho Police Force (LPF). He testified that during 1984 accused 4 was working at the armoury. Although accused 3 was at that time attached to

the transport section of the LPF it is common cause that during that year he also from time to time worked in the armoury. It is commoncause that Exhibit 2 before Court was a 9 mm pistol No. 245 PM 63241. He was shown this pistol by Major Ramakhula in Leribe during 1984. The witness noticed that it was similar to the pistols in the armoury. The prosecution endeavoured to prove this fact extraneously by production of the armoury firearms record book, which reflects a pistol with the same number as Exhibit 2. This record is however not a public document in terms of the last two criteria stated in the Northern Mounted Rifles case, supra, because the prosecution has not proved that the armoury record in question was intended for public use nor that the public had a right of access to it. Although the entries in this record can consequently not be used to prove the truth of the contents of the information there recorded (i.e. that Exhibit 2 was kept in the armoury and the dates of its issue and return) it can of course be used for other purposes, i.e. simply to show that the number of a particular firearm is reflected in the armoury record and that there is for example, no record of a firearm with the number of Exhibit 2 having been issued to accused 3.

It is common cause that Private Thaane and accused 3 have known one another for several years and although not particular friends have always had an amicable relationship.

Private Thaane explained the procedure of drawing arms from the armoury. This evidence was never challenged, is supported by the probabilities and can, in my view, safely be accepted. He said that when a firearm is drawn from the

armoury, the person to whom it is issued must sign for it. He says that during the period in question he received firearms from accused 4 without signing for them.

Private Thaane testified that during April or May 1984 he met Lira Marai in the company of the witness's elder brother second Lieutenant Thaane. Marai and his brother asked the witness to approach accused 4 and ask the latter to give them a 9 mm pistol from the armoury. The witness complied with the request but says that accused 4 first wanted to know for what purpose the pistol was required. Lt. Thaane informed the witness that the pistol was wanted for a robbery. The witness told accused 4 this who then complied with the request and gave him a 9 mm pistol. The witness handed it to his brother. The witness in his evidence gave the number of Exhibit 2. In giving evidence he apparently read out the number from something in his possession for the record contains the following passage

> " ....witness allowed to check the number on the pistol and finds the number as he read it out to the Court".

He says that when given to him the pistol had its magazine with about 13 rounds of ammunition. Thereafter Marai requested the witness to approach accused 4 for a bigger rifle, because the 9 mm pistol had insufficient power for purposes of a robbery. The witness conveyed the request as well as the purpose for which the rifle was needed to accused 4 who acceded to the request and handed an AK47 rifle (not one of the Court Exhibits) to the witness who in turn handed it to Marai. Thereafter Marai requested the witness to obtain more firearms for the planned robbery from accused 4.

The witness obliged and procured a further AK 47 rifle from accused 4 which he also handed to Marai. He identified this rifle as the AK 47 rifle before Court.

Once again the witness does not indicate the exhibit number of the rifle he is referring to, the record merely reading "witness points it" but inasmuch as there was only one AK47 rifle amongst the exhibits (i.e. Exhibit 23) the witness must have been referring to this exhibit. This rifle (Exhibit 23) was according to Detective Lieutenant Koza, found by him during or about the period 12th - 14th July 1984 under a bed at the home of one Maphoka Lesoli at Phaphama village in the reserve. Susequent to handing this third firearm to Marai, the witness says he again met Marai who told the witness that these firearms were going to be used for a robbery at Mathebe. From the witness's evidence it is not clear precisely when the rifles were handed over or when these discussions with Marai took place, save for the fact that he states that when Marai approached him for the second firearm it was "during April/May 1984". In answer to a question put to him by one of the assessors, Mr. Sekoai, the witness said that Marai had promised to give him some money if the robbery succeeded. The next time he spoke to Marai was (according to the information imparted to him by Marai) after the robbery had taken place at Leribe. Marai, according to the witness, told him about the robbery at his (Marai's) house. This was the occasion when, according to the witness, accused 2 was also present. In his evidence the witness does not state what Marai told him about the robbery. As will appear

later in this judgment the statements of an accomplice, who has not been called as a witness, are in certain circumstances admissible against an accused. One of the conditions for such admissibility is that the statement must be an "executive" statement, i.e. one made in the furtherance of the common purpose to which the accused was a party and not when it is merely "narrative", i.e. merely an account or admission of past events.

After his own arrest the witness met accused 3 at the Central Prison. He asked accused 3 why "they" went to Hlotse since "we" had agreed about the Mathebe robbery. According to the witness accused 3 responded as follows:

> " He told me that when they realised that Mathebe robbery was failing, Marai suggested that they should go to Hlotse. I asked him what happened at Hlotse since I learned that there was shooting. He said the police opened fire and they had to shoot in order to protect themselves as they were running away".

The state also relied upon the evidence of Detective-Lieutenant Koza that accused 3, after his arrest, admitted knowledge of the bag, Exhibit 26.

The state further relied upon an answer given by the last-mentioned witness in cross-examination to the effect that, in respect of the yellow motor vehicle in which, it is common cause, the robbers made their gateway, accused 3 made a confession to him. The confession was made after

accused 3's arrest and on the 26th July 1984 when the witness showed accused the motor vehicle in question. He testified that accused 3 said the following:

> " he (i.e. accused 3) and these other accused and those who are not berore court left Maseru in that car when they went to Leribe to carry out the robbery."

The Crown submitted that accused 3's complicity was proved by:

(a) the fact that he was found in possession of a 9 mm pistol that was traceable to one of the robbers;

(b) his confessions to private Thaane and Detective-Lieutenant Koza, which were confirmed by the proof of fact (a).

I deal first with the proof of the alleged confessions. Insofar as the confession to Private Thaane is concerned I have dealt fully with his position as an accomplice in this case and why, in my view, his evidence should be treated with special circumspection and caution in this case when used against accused 2. Exactly the same approach should be applied to his evidence against accused 3.

The basis upon which the Crown argued that accused 3's confession to Detective Lieutenant Koza was admissible was on the grounds that it was "elicited" in the cross-examination of that witness. I have already alluded to the relevant legal principles. It is therefore necessary to consider the circumstances under which the answer by Detective

Lieutenant Koza was given in order to determine whether the answer constituted a "direct and fair answer to the cross-examiner".

In his evidence in chief the witness had stated that he had shown the motor vehicle to accused 3 and Marai. They did not point out the vehicle to him. This evidence of the witness therefore never purported to be evidence of a pointing out. After stating that he had shown accused 3 and Marai the motor vehicle his evidence continues:

" They gave explanation in respect of Exhibit 4"

Now if the explanation had been an innocent one all this evidence would have been quite irrelevant and there would have been no point in tendering it. But the witness stated in cross-examination that at the time he was well aware that the explanation amounted to a confession. The inescapable inference that one is left with is that the evidence was led with the purpose of creating the impression, quite improperly in the light of the judgments already referred to (i.e. S v Mbele, S. v Mphahlele and Another and S v Nkosi), that the accused had made a damaging admission. The line in the record preceding the answer given in cross-examination by the witness that I have quoted above reads:

> " It would not be correct to say when he showed me Exhibit 4 accused said he new nothing about the car".

It is a fair and reasonable inference from this that all that the cross-examiner had put to the witness was a denial that his client had given an explanation which was incriminating.

In my view the answer given was not a direct answer to the question and certainly not a fair one. I am firmly of the view tht the witness's answer was inadmissible.

I consider lastly, on this part of the case, whether the prosecution has proved beyond reasonable doubt, as it claims to have done, that the 9 mm pistol which accused produced from his briefcase "was definitely traceable to one of the robbers" (I quote from the Crown's heads of argument).

The prosecution has clearly proved in my view that accused 3 had in his possession, in his briefcase, in the room occupied by him in his father's house, a 9 mm pistol and that this pistol was Exhibit 2 before Court. Accused 3 does not deny that a 9 mm pistol was found under the circumstances detailed by Detective Lieutenant Majalle. Lieutenant Majalle is quite certain that the pistol he found is Exhibit 2 before Court. He was not part of the investigating team in the robbery and had retired from the police force in December 1984, 10 months before the trial commenced. Whatever one may think of the other police witnesses in this case and the interrogation and torturing techniques used, one gains a very strong impression that Lieutenant Majalle was not a party thereto. Detective-Lieutenant Koza confirms that Exhibit 2 was the pistol handed to him by Majalle. Accused 3's evidence on this point was demonstrably unsatisfactory. Majalle's evidence that accused 3 himself took down the briefcase in his room in which the pistol was found was not challenged in

cross-examination, yet in evidence accused 3 stated that it was the police who conducted a search and found the pistol. In his evidence in chief accused 3 said that the pistol was "my service firearm". Yet in cross-examination he denied this unequivocal statement and said that he had obtained it from a friend of his in the LPF.

The next issue is whether the 9 mm pistol, Exhibit 2, was the pistol unlawfully extracted from the armoury. Private Thaane says he received Exhibit 2 from accused 3. His elder brother confirms that he received a 9 mm pistol from him and identified it as the pistol before Court. (Exhibit 2 was the only 9 mm pistol before Court). For purposes of the cautionary rule one accomplice can corroborate another accomplice (S. v Avon Bottle Store (Pty) Ltd 1963(2) SA 389(A)). In addition the objective fact that a 9mm pistol with this number is registered in the armoury's arms register provides real, circumstantial confirmation. In addition Captain Mosoatsi said that Exhibit 2 looked "similar to the pistols we had at our armoury". When regard is had to the cumulative effect of all this evidence and it is weighed up against accused 3's unsatisfactory denial, then in my view it is safe to find it established beyond reasonable doubt that the 9 mm pistol found in his possession emanated from the armoury and was handed by accused 4 (who did not testify to deny this evidence against him) to Private Thaane who in turn handed it to his brother who handed it to Marai.

The question still remains, however, whether it has been proved that this pistol can be traced to one of the

robbers. It has not been proved that either accused 1 or 2 participated in the robbery. There is direct and uncontroverted evidence from Warrant Officer Ntlama that the man called Hatla took part in the robbery but according to this witness Hatla was carrying a rifle not a pistol and there is no other evidence at all indicating that Hatla ever was in possession of a pistol.

It was suggested in argument that the statements made by Marai which were testified to by various prosection witnesses, were statements made by a co-conspirator, and therefore admissible as proof of the contents thereof against his co-conspirators, i.e. accused 3 and 4.

Statements (like acts) by one co-conspirator in the execution of a common purpose are admissible against other co-conspirators. They are not admissible when they are merely narrative and made as an account or admission of past events (See Hoffmann and Zeffertt, The SouthAfrican Law of Evidene, 4th ed., 190 and R v Mayet 1957 (1) SA 492 (A) at 494).

Furthermore the existence of the conspiracy cannot be proved solely by the statement of the co-conspirator. There must be some evidence aliunde to lay the foundation of a common purpose before the executive statement can, at the end of the case, be taken into account. In S v ~~ff~~rench - Beytagh 1972 (3) SA 430 (A) at 455 E-H, Ogilvie - Thompson, C .J., enunciated the position as follows:

/ ...

" ..... While, as previously mentioned, the averment of the conspiracy materially widens the ambit of initially admissible evidence, certain prerequisites have to be satisfied before such evidence can, at the final stage, rightly be taken into account. This Court has adopted the principle stated in Phipson, 9th ed., p. 98, that

"It is immaterial whether the existence of the conspiracy, or the participation of the defendants, be proved first, although either element is nugatory without the other".

Vide R. v Mayet, supra at p 494, and earlier decisions there cited. In accordance with that decision, the executive statements of co-conspirators are rendered admissible. There must, however, also be some evidence aliunde to lay the foundation of a common purpose before such executive statements can, at the end of the case, be taken into account (R v Leibbrandt and others, 1944 A.D. 252 at p. 276; R v Mayet, supra at p. 494H). As Phipson concisely states: 'either element is nugatory without the other'. See also R. v Victor, 1965 (1) SA 249 (S.R., A.D.) at pp 254 et seq."

What is the position in the present case? Any statements made by Marai after his arrest are clearly narrative statements and are not admissible. The evidence of Private Thaane about what Marai told him subsequently to the robbery is also merely narrative and inadmissible.

The only statements by Marai which could notionally be part of an executive statement in execution of a

/ ...

common purpose are those to which Private Thaane testified on p. 45 l.2 to 45 l.19 of the record. Initially Marai merely told him that the weapons were required for a robbery and subsequently that they were required for a robbery which was to be carried out at Mathebe. These discussions occurred in April/May 1984. From these statements it does not emerge whether, at that stage, there was as yet any conspiracy with other conspirators, let alone with accused 3. There is no aliunde evidence whatsoever of such a conspiracy existing between Marai and any other persons at this stage. In my view, therefore, the statements made by Marai were inadmissible to implicate accused 3.

The only evidence, therefore, against accused 3 is the alleged confession he made to Private Thaane. As previously stated a proper application of the cautionary rule in the present case, and the only safeguard to satisfactorily reduce the risk of a wrong conviction on the evidence of the accomplice Thaane, would be evidence aliunde implicating accused 3 in the robbery in question. There is no such aliunde evidence because there is no admissible evidence before us to prove that the pistol, exh.2, was used in the robbery. In the result I am of the view that accused's 3 implication in the robbery was not proved beyond reasonable doubt, bearing in mind that accused 3 denied in his evidence any such participation. His lying about the identity of exh.2 is reasonably explicable on the basis that he did not want to be implicated in its theft from the armoury.

/ ...

I turn finally to consider the correctness or otherwise of accused 4's conviction. The court a quo did not find that it had been proved that accused 4 had participated in the robbery as a principal. He was convicted as a socius criminis on the basis that he had "supplied firearms that were to be used to carry out bank robbery" and had therefore aided and abetted the robbery.

In my view it would be insufficient to prove that accused 4 had supplied firearms for a robbery unless it is also proved that the firearms he supplied were in fact used for the robbery detailed in the indictment. The only question therefore is whether it has been proved that accused 4 did supply any arms and, if so, whether any of these arms were used in any way to assist the robbers to execute the robbery. It is not necessary that there be proof that the arms were fired or even that they were used to threaten people in the bank. It would be sufficient if any of the robbers carried the arms with them during the execution of the robbery if this were done by the robbers in order to give them confidence or if they were carried with the intention (either by way of direct intent or dolus eventualis) to use them if the need arose.

Private Thaane could only identify two of the exhibits before Court as having been supplied to him by accused 4, namely the 9 mm pistol, exh.2 and an AK47 rifle which he identified in court without indicating the exhibit number. Inasmuch as there was only one exhibit

before court that was an AK47 rifle, namely exh.23, the witness could only be referring to exh.23.

I have already come to the conclusion that it has not been proven that the 9mm pistol, exh.2, was used in any way in the robbery. Exh.23 was, according to Detective Lieutenant Koza, found at the home of one Maphaka Lesoli under his bed. There is no evidence at all that this man took part in the robbery or that any other person taking part in the robbery was in possession of exh.23 during the robbery. When Hatla was arrested no AK47 was found on him or in the taxi he had been travelling in. There is nothing on the record to show that he had ever been in possession of exh.23. Accordingly there is no proof that any of the weapons which accused might have supplied to Private Thaane were used (even in the broadest sense I have mentioned) in the execution or furtherance of the robbery. There was accordingly no factual basis for convicting accused 4.

In the result the appeals of all four appellants succeed and the convictions and sentences of all four appellants are set aside.

Delivered at Maseru this 26th day of July 1991.

.....
L. W. H. ACKERMANN
JUDGE OF APPEAL

I agree .....
I. MAHOMED
PRESIDENT OF THE COURT OF APPEAL

I agree .....
J. BROWDE - JUDGE OF APPEAL