

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

THABANG SOSOLO MAQEBA

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 20th day of September, 1991

The Crown charged the accused with having committed three criminal offences enumerated in Counts 1, 2 and 3. The first two are of Murder while the last is of theft.

The deceased, husband and wife i.e. Lehlohonolo Moloche and Mannena Moloche respectively are allegedly to have succumbed to injuries inflicted unlawfully and intentionally on them on or about 18th March 1989 at a place known as Maqoala in the Mophale's Hoek district. The accused pleaded not guilty to both these charges.

The content of the 3rd charge is that the accused intentionally and unlawfully stole a wallet, a watch and a sum of M1-50 all belonging to Lehlohonolo Moloche. This offence is alleged to have occurred around the same time and place as the two other offences referred to above. The

/accused

accused pleaded not guilty to this offence as well.

The first witness for the Crown was PW9 number 1570 Detective Trooper Jonase who testified that he is a member of the Royal Lesotho Mounted Police stationed at Mohale's Hoek and is attached to the C.I.D. section.

In March 1989 this witness was still at his Mohale's Hoek station. He testified that on 20th March 1989 while at his duty station he received a report about two dead bodies which seemed to have suffered death from unnatural causes.

PW9 took a vehicle and made for the scene in the company of detective troopers Seeiso PW10 and Moseli. On arrival at the scene PW9 saw the dead body of a woman lying below a hill. The body was covered with blood all over. PW9 saw three wounds on it. He saw a wound on the left corner of the head, another one below the left eye and the third was in the form of a tear on the upper lip. PW9 formed the opinion that the two wounds on head and below the left eye respectively were caused by a blunt instrument. They were nonetheless open wounds. The one on the upper lip seemed to have resulted from a sharp instrument.

Because PW9 and his colleagues were surprised that there was no evidence of blood having collected underneath the body when they lifted or shifted it to expose the ground below it they started looking for clues from which to determine how this body could have come to the place where it was found resting. Thus 20 paces away from this body PW9 and his colleagues saw a footpath next to which were

two stones with blood on them. The ground where the stones were had some blood that appeared to have been covered with soil. Other stones and bushes nearby appeared to have borne some blood.

Some hundred yards away from this body PW9 was taken to the second body. This was a man's body. It lay some 15 paces away from the footpath mentioned above. It appeared to have been pushed into and among some high shrubs. This witness whose height is 5 feet 10 inches testified that the shrubs where the body lay over-topped him in height by about one foot.

On examining the scene PW9 discovered that the shrubs and grass were broken. Around that area the grass was about an ankle high. This grass was broken from that point to some other point at the path.

On examining the body two wounds were visible on the deceased's head. One was in the middle of the head while the other was on the left corner of the head. Both appeared to have been caused by a blunt instrument and were open. There was no blood on the ground from where the body was lifted by PW9 and his colleagues. Thus it was PW9's conclusion that the body had been transported to the scene in the bushes after the blood had congealed. Following the lead of the disturbance on the grass to the path PW9 found that there was blood on the ground and shrubs near and at the path.

PW9 testified that it appeared that soil had been used to cover the blood. This view he came to for it seemed the soil had scattered on the path and on grass.

/PW9

PW9 examined the vicinity around this second spot and found a bamboo coloured crook made of cane with a black plastic tip (apparently for purposes of protecting the tip from wear as it comes into contact with the ground). Around the area where this crook was found there were neither foot prints nor signs of disturbance on the grass.

At both places along the path opposite the respective corpses PW9 collected stones which were stained with blood. These respective spots were about five hundred paces apart. The dimensions of one of these stones was given as about 1 ft by 6 inches by 3 inches.

PW9 collected these stones along with the cane stick and handed them before the court below at the preparatory examination of this matter. However at one of the sittings of the High Court at Quthing PW9 discovered that the stones were all missing except the cane stick handed in and marked Exhibit "1".

PW9 took the dead bodies to the mortuary. These bodies did not sustain any further injuries from where they were collected to the mortuary where they were taken for purposes of post mortem examination.

A few days thereafter following some information PW9 dispatched police to arrest the accused and one Lebohang.

Under cross-examination PW9 testified that the ground at the scene was wet and that he noticed human foot prints. PW9 couldn't discern if these foot prints were of one pair of feet or of more because they seemed to have been imprinted on broken grass which formed a trail. He further testified that there was a stream near where Lehlohonolo's body was

/found

found in the tall shrubs. The woman's body too lay next to a stream. But this is a different stream from the one next to which the man's body was found. These streams converge further down.

PW9 in response to the question whether the grass from the path to the respective bodies seemed as if something had been dragged on it or rolled said it did not seem as if anything had been dragged along that grass. He said the soil used to cover the blood in both spots near the path appeared to have been liberally sprinkled.

PW9 explained that the stones he had collected were three in all - two from the spot at the path near where the male deceased was found, the other from where the female deceased was found. All of these appeared to have been freshly chipped and also to have been knocked together. There was no soil on any of these stones. In fact they seemed to have been placed by some other agency than natural where they were found.

It was elicited through cross-examination that PW9 had appealed to people gathered at the scene that anyone who knew of whoever was responsible for the deaths should report the matter to the police. PW9 was however not informed there and then by anyone who knew of who had committed the offence even though Lebohang and 'Mampe had allegedly been informed by the accused about this.

PW9 said he knew that Lebohang had also been arrested as a suspect. He didn't know if Lebohang was arrested before or after the accused. In any case Lebohang was not arrested by PW9. He said he didn't remember if Lebohang's wife 'Mampe was also arrested.

/It

It was put to PW9 that the accused was kept ten days in detention in a matter investigated by PW9 but the latter replied that even so he didn't remember. PW9 was informed that the accused would say (presumably when testifying in his defence) that he was kept in detention and viciously tortured under PW9's command and by his physical act too. PW9 denied this.

PW9 stated that he didn't believe the suggestion that the Court ordered on 4th April 1989 that the accused be medically examined following the assaults he received in detention. PW9 further stated he didn't remember where he was when the accused was taken to Court on 4th April 1989.

It was put to PW9 that at Preparatory Examination he had said 20 paces away from where he found the body of the male deceased there were traces of blood. PW9's answer was a virtual affirmation of this though he seemed to make it appear that he had said differently at preparatory examination. His answer was:

".....? I said from the body and not towards the corpse.

What is the difference.....? Yes there is the difference for there was no blood at the place where the body was and along the way to it".

With regard to the woman deceased PW9 testified under cross-examination that there was no trail of blood from the rock on the blood stained spot to where the body was.

PW9 said there were signs of some struggle near where he found the stones twenty paces away from the male deceased but none where the body was found. The same was the case around the blood soaked spot several paces away from the female deceased.

/He

He said he was shown items of property near each of the deceased. Near the woman deceased he found a jersey and a shoe. This deceased was still wearing the companion of this shoe on one of her feet. He also stated that he saw near the stone at the path uprooted sehalahala or senokonoko sheaf. In relation to the male deceased he found uprooted sehalahala near the blood soaked spot. He also found a cane stick in the gulch some distance away from the male deceased.

The witness was referred to the preparatory examination record where he referred to two instead of the three stones he talked about in this Court. He however insisted the stones were three and stated that he couldn't remember if he referred to only two at the preparatory examination.

To put his story in perspective at preparatory examination this witness said at page 26 -

"..... stones had moved and brushesbroken. The stones had been freshly broken. Other stones had scratches. These are the stones. I took two of them".

It seems possible that the two of them referred to above are in reference to the spot relating to the deceased 20 paces away from the path. Thus it seems to me the witness was not referring to the total number of stones he collected from the respective spots of both deceased. He spoke in relation to the male deceased and was not led in relation to the stone he picked in relation to the female deceased according to my reading of the relevant portion of the P.E. record. In this context the witness's honesty was brought to the surface when he said he didn't remember if at P.E. he said he collected only two instead of the three stones he referred to in this Court.

/PW9

PW9 was told that he only mentioned footprints leading from the path to the male deceased when he heard Counsel for the accused mention it. PW9 replied that he had indicated that grass was broken along the "path" leading to the body of the deceased showing that it was trampled on. It was suggested to PW9 that grass or bush can be broken by anything but he insisted that it appeared to have been walked on.

PW9 admitted that he had heard about a watch removed or stolen from the deceased's body. He further admitted hearing as well about a purse ^{about} as/the M1-50 stolen or removed from the deceased's body. He also admitted hearing of the fact that the watch was said to have ended up in 'Mampe 'Mapane's possession.

PW9 denied ever being untruthful to this Court. He denied that he was evasive on important aspects of the case. He told the Court that it wasn't true that the accused was tortured by him or in his presence. He denied that the accused was at all sent to a doctor following the alleged tortures.

The next witness for the Crown was PW10 No. 5544 Trooper Seeiso who testified that he set out for Maqoala where he received information relating to people who had died. He and PW9 made for the scene where they found many people already seated. Among them already were the Chief and Sgt. Mphahama. The Chief took them to the body of a woman who was lying face down. The number and positions of the wounds observed by this witness lend support to PW9's evidence on the relevant points. There was a jersey near the body. It had blood on it. The only blood seen was near the footpath but none near or under the body. This witness saw three broken stones near the blood. They were stained in blood and were about half the size of a foot-ball.

The investigating team then headed for the body of a man some 400 paces away from that of the woman. This body was among "kolitšana" brushes. There were two open wounds on the head which was flattened from front right to base. Teeth were protruding. At a point on the foot path some distance away from the body PW10 observed blood which seemed to have been spilled and later been covered with soil. Near the blood was a green bag made of wool described as the type of bag used by old men. This was a sling bag the size of this witness's palm. There was a brown wallet also. These purses were both empty.

On 25th March 1989 PW10 set out for the accused's residence in the company of Troopers Moletsane and Pheko. They found the accused there, introduced themselves to him and PW10 showed him his I.D. Card and gave him caution. Thereafter he charged the accused with the two murders; arrested him and took him to the Charge Office at Mohale's Hoek.

PW10 stated that either on 26th or 27th he and others were led by the accused to a place where a handle of a knife was recovered near where the two bodies had been found previously. This handle was of a knife regarding which the accused is said to have made a report to PW10. The blade was broken and the accused's explanation of how it got broken was that it got broken when he was stabbing the woman deceased. This handle was handed to the Clerk of Court Mohale's Hoek but it went missing.

It was put to PW10 that the accused would say he never showed PW10 any knife anywhere any time. PW10 denied this.

/PW10

PW10 denied making the accused dig with his fingers for a knife at a spot to which the accused was taken at the area where bodies were found. PW10 readily inclined to the inquiry whether the knife was picked up on the surface of the ground covered with grass.

PW10 said on the day the bodies were collected from the scene he had looked for clues and suspicious objects that might have been used to commit the murders. He didn't find the knife handle that day. When discovered this knife was lying some 45 to 50 paces away from the woman's body. He said he didn't know what happened to the blade. He said that the question put to him that PW1 'Makamohelo Moloche took the blade was new to him. He said he never interrogated PW1 about the alleged blade.

PW10 was told that the accused would say he knew nothing about the knife, further that PW10 took the accused to where the bodies were found and ordered ^{him} to look for the knife he knew nothing about till he found it. PW10 denied this. It was put to PW10 that the accused dug with his fingers into the ground. This too was denied by PW10. He also denied that the knife handle was not above the grass but dug under the surface of the soil. He denied leading the accused to where the bodies had been. Asked to explain

"What happened. Did you just say to him take us where the bodies were? We were not going to the bodies but where he said he had thrown a knife.
Meaning it was by coincidence that the knife handle was found where the bodies had been found? Yes.

PW10 further stated that it was through investigations that he realised five days after the bodies had been discovered that the accused was the culprit. He said he

/didn't

didn't know about the arrest of Lebohang but did see him at the police station. PW10 despite having said that he had seen Lebohang at the charge office and thus giving an impression that he did not know what he had come to do there stated that he had seen him at Maqoala at the time when this witness was going to take a statement from him. This time the accused was already under arrest.

PW10 conceded to the suggestion that the accused would say when he got to the charge office after his arrest he found PW2 Lebohang and PW1 'Makamohelo Moloche.

He denied that PW1 handed a knife blade to him. He denied ever seeing the knife blade described as rusty. He denied that the accused last saw that knife blade in PW10's possession at the police station. He further denied that the knife blade was purposefully made to disappear in order to mislead the Court.

PW10 admitted that the accused was arrested on 26th March 1989. He however did not know who took him before the Magistrate. He stated that he would not be in a position to deny that the accused was brought before a Magistrate on 4th April 1989. Nor would he know if the magistrate ordered that the accused should go to see the doctor as he had been assaulted.

PW10 reiterated his statement that the female deceased had one wound below the right eye and another on the right side of the head. Further that there was a cut wound on the lip but explained that because of the clotting of blood it was not clearly discernible if the cut was incised or rugged. He held fast to his story that the male deceased had two open

/wounds

wounds on the head. Consequently Counsel for the accused withdrew a question which initially was intended to show inconsistency between this witness's testimony and the doctor's on the point.

PW10 admitted that at P.E. he had said he followed a trail to the man's dead body. This he described as a narrow trail not in constant use. It was covered with grass here and there and was wet at certain points hence his ability to see footprints along it. It appeared more than one person had used it. He explained that some footprints went even beyond the man's body but stated that one couldn't determine if the footprints were in any way connected with the conveyance of the body.

To my mind this should not be surprising because other evidence disclosed that some boys who came to report to some villagers including the accused's aunt about their discovery of a dead body were advised not to make any mention of that even though it had been realised in the village that the two deceased's absence for days before was unaccounted for. Not to mention that the accused's aunt including PW2 and PW3 and one more woman had allegedly heard the accused say he had killed those deceased. PW2 and PW3 had not only heard this but had seen the two dead bodies allegedly shown to them by the accused himself and had been allegedly forced to dispose of these bodies.

PW10 stated that he received a report about the watch, purse and M1-50 allegedly stolen by the accused from the dead man. His investigations led him to the recovery of a purse though and not any of the other items of property. This purse he said he found near the man's dead body. He said he questioned 'Mampe about the watch he had learnt had

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found its way to her possession but did not find it.

On re-examination PW10 illustrated that the bodies appeared to have been dumped where he found them for there was absence of signs of their movements to the respective spots and of blood below where they had rested.

He further testified that of the three stones he alleged he found some distance from where the woman's corpse was he took only two because only these were blood stained and therefore vital to his case. He said he was positive he was led by the accused to the spot where the accused retrieved the knife handle. He stated there couldn't have been any reason why he would hide the knife blade from Court. He reiterated that all the exhibits which disappeared had been handed to the Clerk of Court for safe keeping during P.E. It was then that they disappeared.

He stated that the knife wound was the one on the dead woman's mouth. He said this was a knife wound because it was straight and not rugged.

The next witness for the Crown was PW2 Lebohang Mafoso who was introduced to the Court as an accomplice. After his rights had been explained to him and he had expressed willingness to give evidence he was sworn and he testified that he could neither read nor write. His home is at Mpharane some distance from Maqoala. He said he knew the accused as the latter used to come and stay at 'Mamotelele's in the Ha 'Mapane village.

PW2 knew the two deceased. Asked if he could recall the events of 18th March 1989 he told the Court that this was a Saturday when he and others were at Ha Rampeli with the two

/deceased

deceased. They had gone there for the ritual ceremony of the removal of a mourning cloth. The two deceased had a daughter married at Ha Rampeli.

PW2 and others spent their time at this place until after sun set when the two deceased left him at late dusk. PW2 remained there till very late. He only left when the moon was up and around that period the moon would set just before sun rise. When PW2 left the two deceased had long left. PW2 was in the company of PW3 'Mampe.

He testified that when he and PW3 were at Hlabaneng-sa-Ha Rannoi heading for their home they heard some (natural) whistle being blown from behind them

PW2 stopped when he heard this whistle. So did PW3. When PW2 looked back he saw the accused appearing from the direction of the whistle. PW2 waited for the accused because he knew him and was a fellow-villager. The accused reached and joined PW2 and PW3.

Some ten paces later the accused said "Ngōanabo I have done something bad". PW2 asked what. The accused replied that he had killed Paballo and 'Mannena.

The trio proceeded along their way.

PW2 further testified that although he had seen the accused at Ha Rampeli at day time the accused was not at the house where the two deceased and he were. The accused was at the old Mamalefane's house next door. PW2 did not see when the accused left for their common village.

PW2 said when reporting his alleged act the accused was talking normally. He was speaking not in whispers but in

/clear

clear voice. PW2 would not say if the accused sounded fulfilled in what he reported he had done because he said he didn't know the accused so well as to make any such determination about him. He told the Court that the accused has a big voice and that he was speaking in his usual big tone that he had heard him speak in to others.

As they moved along with the accused leading the way followed immediately by PW2 they came upon the body of the deceased 'Mannena. The accused stood aside and pointed at the deceased and said "this is where I killed 'Mannena".

This deceased had lain across the middle of the path which measured about a foot in breadth. The witness was positive that two people cannot walk abreast in that path.

The accused ordered that PW2 should pick up 'Mannena's body and carry it along with the accused to dump it off the edge of a ledge in the ridge. The ridge was described as not far from the spot where the body was picked up. The distance between these two points was estimated at between 40 and 50 paces. From the sound of the accused's tone PW2 felt that he was not being requested to help but was being commanded to carry the body. When PW2 protested that he had never carried a dead body before the accused ordered him to quit his talk and do as told.

PW2 said he saw that this deceased was full of blood in the upper part of her body. The accused ordered him to take the deceased by the legs. The two men lifted the body (the accused holding the head) and tossed the body over the edge of the ridge.

/PW2

PW2 said he complied with the accused's order to carry the deceased by her feet because he feared him and has all along been afraid of him. He testified that he never exchange any words with the accused because the accused never talks to him. Although their homes are only 50 to 60 paces apart with the accused's aunt where the accused stays PW2 would rather communicate with the accused's aunt's children if he wishes to make a report about that household's stray stock or drive the stock himself than alert the accused to any such event.

He told the Court that the accused was threatening him with death if he did not do as ordered. The words attributed by PW2 to the accused are

"Hey, you fellow as you refuse carrying this person I kill you here and now. I will kill you both with 'Mampe like this person".

PW2 said he was besides himself with fear at this stage and feared that the accused was going to kill him.

PW2 described the ledge where 'Mannena's body lay hidden from view as shallow - only the height of the chair from the seat down. Because of the weight of this deceased's body PW2 said he was compelled to take short unsteady strides.

It was clear to the Court that although the ledge was shallow it effectively obscured the body thrown into it from the view of anybody moving along the path from where it was picked up.

PW2 said the accused picked up the deceased's jersey from the scene wiped blood from the ground with it and rubbed off dirt from underfoot by stepping on it with his shoes. The accused then took this jersey and threw it where 'Mannena

/had

had been dumped. This time the accused went there alone. Then he came back and placed stones on the blood which had collected in the path where the body had been.

PW2 said when he responded to the accused's whistle they were twenty paces apart from each other.

PW2 said the particular area where he saw the stones which were later dunked into the blood was not rocky. He felt that these stones had evidently been brought there by someone. He said 'Mampe didn't help carry the deceased or even accompany the two men to the edge of the ridge where the body was dumped, but remained behind.

After all this then the trio picked their way along the path leading to their village. They moved silently without talking. Then they reached a spot where Lehlohonolo's body was lying some 400 or 500 metres from where that of 'Mannena's was found. Lehlohonolo is also known as Paballo. The accused is said to have said "here is this other one of the man I killed". Only the legs of this body were in the path. The rest of the body was outside the path. The head was resting near a "lengana" bush.

The accused pointed at this body and immediately searched the pockets of its cloths. He thrust his hand up the deceased's inner clothing. Apparently the deceased had strapped a sling purse to his body. The accused, I am told extracted a palm sized brown purse from inside this woollen one. The accused further opened this brown purse from inside which he took R1-50. PW2 said he saw that this was R1-50 because he was next to the accused and because even though he cannot read or write he can count and identify money through his constant use of it. He told the Court

/that

that this purse has a flap that goes over the mouth and gets secured to the side of the purse by studs.

PW2 stated that the accused extracted white papers from the woollen purse and took them into a field nearby and set them alight. He further testified that the accused went to the male deceased, removed that deceased's watch and handed it to PW3. When PW3 asked what she was to do with this watch the accused said to her "Hey you I say you should throw away this watch". PW3 then did as ordered. PW3 herself said she made as if to obey the order. As a concession to be deduced from PW2's testimony on this point the Court was to hear PW2 testify as follows "I only saw the hand move in a throwing motion but did not see the watch land".

PW2 further informed the Court that the accused thrust his hand along the male deceased's waist and extracted from a hand made sheath a thin knife. The accused pocketed this knife.

PW2 went on to say the accused then ordered him to hold the male deceased by the feet while the accused held him by the face-end. They placed the deceased among the bushes in the dingle near a brook. The accused then uprooted the Senokonoko bushes. The deceased had been carried and placed about 4 paces away from where PW2 first saw him lying across his path.

PW2 testified that the brook goes on the other side and the shrubs have created a thick cluster of impenetrable curtain to sight. Stressing this point he stated -

"No way can one passing along the path see a body dumped on the other side of the shrubs. The view is obstructed by a canopy of shrubs".

/With

With the "Senokonoko" which the accused had uprooted the latter using it as a broom swept the blood with it. This blood was where the deceased's head had rested four paces away from where the body was dumped.

PW2 stated that he complied with the order to carry this other deceased also because he feared he would come to some harm if he refused.

In this regard PW2 testified as follows :

"The accused asked me if I was still fooling when told to carry the corpse. The same threat was used that I would be killed. I was so afraid that I felt I wouldn't have been able to run away. I said I was scared. Then the accused said : Don't tell me that S..... Then I complied".

PW2 said that when the accused realised that the "Senokonoko" was not effective in sweeping the blood he kicked a chunk of soil and covered the blood with it.

Thereafter the trio headed home.

It was PW2's testimony that in answer to PW3's question accused replied he had killed both deceased because they were making life difficult for his aunt. By accused's aunt PW2 understood that this was a reference to 'Mantsie Moloche who lived some 20 paces away from the deceased's home.

PW2 said he also is the accused's neighbour and swore that it was not true that the two deceased made life unbearable for 'Mantsie.

On reaching their home village a kilometre or less from Sehlabane-sa-Rannoi the trio came to 'Mathoriso's house.

/The accused

The accused knocked at the door. PW4 'Mathoriso opened. She appeared to know who was knocking. PW2 saw her at this stage holding the hat which he had seen the accused wearing during the day.

PW2 explained that PW4 and the accused are not related. However the two are often seen together with 'Mantsie. Even that day they were. He testified that the accused is not married. PW4 is married and her husband works in the mines.

The accused, we were told, reported to PW4 that he had killed Paballo and 'Mannena. PW2 said he heard this for he and the accused were together when the accused said this. Asked to say the actual words PW2 said the accused said "'Mathoriso I have killed Paballo and 'Mannena just now". Then PW4 said "I would rather you had not killed 'Mannena". PW2 said he saw PW4 shedding tears at this stage and observed that she was crying.

PW2 went further to say that the accused asked PW4 to join him, PW3 and PW2 to PW5's place where the accused said they should go. The accused did not say why they should make for PW5's though.

Like a rolling volcanic mud the initial party of three collected PW4 on their way to PW5's.

The accused knocked at the door of the hut there. PW5 'Mantsie asked if the accused wanted the key. The key in reference according to PW5 was that of a nearby flat of hers normally used by the accused for sleeping in.

PW2 said the accused replied that indeed he wanted the key. However the accused, it is said, invited PW5 to

/come out

come out for as he suggested PW5 had visitors. PW2 said he had never intimated to the accused that he wanted to go to the accused's aunt's. However by visitors PW2 understood the accused to include him among these others who did not stay at PW5's place.

PW5 opened the door to the flat roofed hut and asked these people to go inside. They sat down in there. Then the accused said to PW5 "I have killed Paballo and 'Mannena just now". PW5 said "if only you hadn't killed 'Mannena". Saying this PW5, the Court was told, started crying; and that she appeared frightened to PW2's observation when this report was made to her by the accused.

Asked by PW5 why the accused had killed 'Mannena also, it is said he said "I killed her because she shouted my name". Asked to explain what harm there could have been in 'Mannena shouting the accused's name the Court was told that the accused replied as follows :

"Aunt I killed her for she had said Sosolo I know you. You are the one killing my husband".

The accused is known as Sosolo.

PW5 in the presence of PW2 advised the accused to go and report himself at the police station at sunrise. To this suggestion it is said the accused asked why he should go to the police and who in any event would have revealed this whole matter. When PW5 suggested that PW3 and PW2 would the accused is said to have said "if they dare reveal it I'll kill them". It is said that when PW5 insisted that she knew that these children don't keep secrets and that they would reveal this the accused said if he did not kill PW2 and PW3 then on reaching the charge office he would report that PW3 and PW2 had already killed the two deceased.

/Then

Then PW2 and PW3 left for their own home. The accused did not stop them. PW2 said Ha Rampeli is closer to Sehlaba-sa-Ha Rannoi than the latter is to Ha 'Mapane the home village of PW2.

In the morning according to his version PW2 went to the home of PW7 one Chiriki in an attempt to report about these two deceased. This aspect of the matter is corroborated by PW7 as follows :-

"On Sunday PW2 came to me. He told me about the fact that the two deceased had died and how he came to know about it from the accused".

Significantly PW7 following this report took some steps to inquire from the deceased's children about the deceased's whereabouts as well as to PW5's place where the accused stayed. PW5 gave him a report. The following day being a Monday PW7 said he went to his chieftainess's place but on the way he saw people from chieftainess 'Mabatho's place moving in the opposite direction in search of the deceased.

He said the bodies were found on that Monday. Apparently when he saw this search party he didn't proceed to the chieftainess's place and only went there on Tuesday the day following the discovery of the bodies. He said he reported to the chieftainess what he had been told by PW2.

PW3 did corroborate PW2's story as to the utterances made by the accused during the night at both the scene and at the homes of PW4 and PW5. There was however some element of discrepancies about the fate of the watch that the deceased Paballo was stripped of by the accused.

/The

The thrust of the Crown evidence is that on the Saturday when there was a ritual feast held in observance of the removal of the mourning cloth the two deceased were seen leaving the place of the feast at Ha Rampeli for their home. PW2 and PW3 had been in that village and at the home where this feast was held.

The two deceased asked PW2 and PW3 to accompany them back home but PW2 and PW3 declined to do so saying they were still busy drinking.

PW4 told the Court that PW5 whom she had wanted to go back home with had disappeared in the village. So because she wanted to go home to Ha 'Mapane she asked the accused to accompany her. When the two had approached Ha 'Mapane within such distance that PW4 felt safe the accused went back to Ha Rampeli.

PW2 and PW3 testified that they left Ha Rampeli at around 11.00 p.m.

It was while they were at Khalong-la-Rannoi a place nearer to Ha Rampeli than to Ha 'Mapane that they heard a whistle which they soon realised came from the accused. I may just attach some significance following on the relative distances between Ha Rampeli, Sehlabaneng-sa-Rannoi and Ha 'Mapane to the fact that instead of running towards Ha 'Mapane which is her home 'Mannena fled from her husband towards Ha Rampeli which was nearer to Sehlabana-sa-Rannoi than was Ha 'Mapane.

PW2 and PW3 heard the accused say he had done something bad and a short distance ahead of them they discovered the body of 'Mannena which the accused ordered PW2 help carry and

/dispose of.

dispose of. When he expressed his fear and disinclination to do so PW2 was threatened by the accused. PW3 supports this version of PW2.

After the body of 'Mannena had been disposed of her jersey which had been left at the scene was taken by the accused who flung it in the deceased's direction.

The accused took "Senokonoko" shrubs and swept the blood left where the deceased had been removed from and further placed stones there. These two witnesses support each other again up to this point also.

They also testified that from there they proceeded to the second body. There they saw the accused search the deceased's body for items of property referred to earlier.

Then PW2 was ordered to carry the dead body and when he objected he was once more threatened with death by the accused, he said. He told the Court that he carried the body by its feet while the accused held it by the head-end. PW2 is again supported by PW3 in this regard.

The Crown's evidence further indicated that the second deceased's watch was taken from the dead body by the accused and given to PW3 who was asked to throw it away but she only effected a mock execution of that movement. After the body was deposited in the tall bush the shrub was uprooted to sweep blood from where the body had been lying before being hidden behind the bush. As this make - shift broom was not equal to the task the accused used his feet to kick sods on to the blood.

The Crown case further indicated that the accused

/ordered

ordered that this party which ^{he} had joined should go along with him home. The first port of call was PW4's place where the accused called out PW4's name and gave her a report about the fate of the two deceased. PW4 testified to this report and PW2 and PW3 confirmed that such a report was made within their hearing by the accused to PW4.

These people were then asked by the accused to go to PW5's place. The accused using these people to entice PW5 to come out as he falsely said they were her visitors obtained entrance into PW5's flat roofed hut as well as her audience. Thus within the hearing of PW2, PW3 and PW4 he repeated what he had reported to PW4 that he had killed the two deceased.

Asked why he did so he is said to have replied that Paballo was making life difficult for him. Asked why 'Mannena also was killed he is said to have replied that 'Mannena had seen him kill Paballo so he feared that she had recognised him for she even called out his name. The Crown submitted that it would seem the main or only reason 'Mannena was killed was to silence her. Witnesses who had testified up to this point are agreed on it including the accused's aunt PW5 who is not only his relative but appears to have also been the accused's bread ticket as well as providing him with shelter for evidence showed that in those rare intervals when he could be said to be working he would be selling oranges for PW7 a mean job that could hardly meet a man's needs. Little wonder that most of the time he was seen ordering drinks on tick at PW4's beer selling place. It is difficult to see how in the absence of bad blood between PW5 and the accused she could come and lie about him as it was

/suggested

suggested through cross-examination on the accused's behalf.

As a further mark of absence of any grudge borne the accused by PW5 when she heard the accused's story she advised him to surrender himself to the police. But the reply, I am told, was "why go to the police? who would reveal this?" I was further told that the accused went further to threaten that whoever would disclose his secret would suffer the consequences for the accused would turn state witness and the culprit would find himself charged with the murders committed.

The accused who the witnesses say had reported that he had killed the two deceased had threatened that he would turn state witness against whoever would reveal this dark secret.

Mr. Qhomane accordingly submitted that it would appear a scare had surrounded these people for none of them reported quickly.

As stated earlier one positive proof of a report made was by PW2 whose act is confirmed by PW7. The latter said he in turn took this up with the chieftainess though only the following day. In the sharp twists and turns of events PW7 failed to achieve his mission which would have helped discover the dead bodies before anybody else had done so because when he went to the chieftainess's he followed the clarion call stating that the bodies had been discovered. He only went a day after the discovery to the chieftainess's place about what PW2 had told him.

The feast had been on Saturday. The bodies were discovered on Monday. This is the day which the police

/testified

testified they came to the scene on and found people already gathered at the scene. It would seem despite the vigorous cross-examination he was subjected to as to dates PW7's story is consistent with the true sequence of events and dates of their occurrences.

Trooper Seeiso testified that subsequently the accused took him to a spot around the scene and pointed out a knife handle which the accused said was used in the killing of 'Mannena. An attempt was made to disallow the evidence relating to the accused's alleged statement that he used this knife to kill 'Mannena but it appeared that the Authority of Rex vs Petlane 71-73 LLR 85 militated against that attempt for no evidence showed that in making the statement the accused conveyed the meaning that he did so intentionally or not for purposes of defending himself.

The accused had according to Trooper Seeiso indicated that this knife had got broken in the process of use in the killing of 'Mannena.

PW2 was also subjected to vigorous cross-examination the tenor of which was that the accused denies meeting PW2 that day at the scene. Further that the accused denies having been at the scene at all. His shield against PW2's implications against him being that he had accompanied PW4 and never came back there.

The Crown accordingly expressed the view that with this background and consistently with questions put to the Crown witnesses one would expect the accused to rise to the occasion and tell the Court differently from the Crown witnesses to whose testimony his challenge through his Counsel suggested these Crown witnesses were framing him. The law

/however

however places no burden on the accused to prove his innocence. The onus is on the Crown throughout to prove the accused's guilt beyond reasonable doubt. Even if the Crown's evidence is an unshakeable edifice of truth any reasonable doubt that can arise is to redound to the accused's benefit which should lead to his acquittal.

The Crown pointed out that PW2 was adamant that the accused was there and he saw him as well as heard him say things he is alleged to have said and do things he is alleged to have done.

It was alleged that PW2 had falsely implicated the accused because PW2 had designs over a girl the accused loved. But PW2 said he had no such intentions towards that girl. He explained that the accused is merely making a scape-goat of him.

Indeed if PW2 and PW3 can be said to have some motive to implicate the accused falsely PW4 and PW5 cannot, because PW5 is the accused's aunt who has been shown to live with the accused providing him with shelter and who has been shown to be particularly favoured by the accused who it has been shown would suffer nobody to make her life difficult. Thus PW5 and the accused are shown in these proceedings as people who maintained very cordial relationships. Likewise PW4 cannot be accused of bearing the accused any bad blood for their relationships have been shown as friendly so much so that the accused was allowed to drink at PW4's place on credit. Furthermore evidence of his having left his hat at PW4's has been established. No suggestion has been made that he had been forced by PW4 to pledge that hat because of his failure to pay up for drinks at her place.

It was submitted on behalf of the Crown that the evidence adduced must be considered in its totality instead

of piecemeal in order to determine its credibility. It was pointed out that time and again the Crown witnesses were taunted as to times and lengths of distances and their respective differences. The submission made in the circumstances was that the Crown evidence stands unchallenged and further that it is also credible. The Court was told that all of the Crown witnesses acquitted themselves well with regard to credibility contrary to suggestions made on behalf of the accused.

Indeed credit is well - earned by the defence Counsel's ability to perform the task of putting the accused's version to the Crown witnesses consistently with the principle laid down in Phaloane vs Rex 1981(2) LLR at 246 and Small vs Smith 1954(3) at 434.

The version thus put was that the accused was going to say he was never there and that there were never any meetings at PW5's and PW4's where he participated. The Crown contended that even if it were to be assumed that there were contradictions in the Crown's version of events they were of such a minor nature as not to detract from the main thrust of the Crown case and the underlying substratum of the truth upon which it is based. The Crown submitted that contradictions pointed out as to what was said at PW5's or PW4's were so minor as not to be lightly allowed to deflect the course of justice.

In response to the defence's attempt to discredit as lies PW5's version on the basis that what she had said at P.E. fell far short of what she said before this Court, I was referred to CRI/T/73/89 Rex v. Lepphoto (unreported) cited with approval by this Court in CRI/T/58/90 Rex v. Mohola.

/Thus

Thus the Crown submitted that in this case whatever can be said to be some new matter cannot properly be regarded as an afterthought because it was elicited under cross-examination. Thus the perennial adage is in point here namely that a fisherman should not blame his nets if in sinking them in the water with the hope of catching fish they come up containing serpents instead.

It was submitted that the crux of the matter is that the Crown witnesses' version is not only credible but is corroborated in all material respects. PW2 has been corroborated by PW3 about the events that took place at the scene. PW4 and PW5 corroborated them that the accused admitted having killed the two deceased. Therefore any apparent contradictions are of no significance.

In cross-examination of the Crown witnesses it appeared that the accused denied everything. At the end of the day, as indeed is his right, he chose not to go into the witness's box and testify. The Crown submitted that if indeed the Crown's evidence is credible and a strong prima facie case was made by the Crown it would have been to the accused's credit if he made an attempt to answer what the Crown witnesses said against him more especially, if I may add, that his story need not be true as long as it is reasonably possibly true.

Pointing out that silence is no admission of the commission of the offence the Crown submitted that however, if the Crown's case was made at that time the accused should have stood up to rebut it. In doing so, provided the Crown had made its case at that stage, it could not be said that the Crown was looking forward to having its case supplemented by the defence's version.

The Crown submitted that the accused was perfectly entitled to remain silent if he thought the Crown had not made out a case against him. But the Crown had in this case, Mr. Qhomane submitted.

In support of the above submission the Crown reposed its faith in the statement appearing in Criminal Law and Procedure Through Cases (by Mofokeng J as he then was) at page 216 where under the title ACCUSED'S RIGHT TO SILENCE AND INFERENCE WHICH MAY BE DRAWN THEREFROM appears the following :

"..... The failure of an accused to give evidence may, in certain circumstances, be taken as a factor in determining whether his guilt has been proved beyond reasonable doubt."

Reference in S. vs Khomo & Others 1975(1) SA 344 at 345-346 shows that :-

"It is well known that an accused person, although not obliged to say anything, may nevertheless assist the State case when he remains silent. When I say he may assist the State case, I mean no more than that his silence is one of the factors which may be taken into account in assessing the weight of the evidence in its totality, and may be given some weight, depending upon the facts and circumstances. In general, greater weight will be attached to silence where there is direct testimony implicating the accused, which the Court could reasonably expect he would explain away if it were not true, than in a case where there is no such direct evidence, and where the question of his guilt or otherwise depends upon inferential reasoning..... In such a case an accused person might well take up the attitude that he concedes all the facts proved, but he challenges the ability of the Court to draw an inference of guilt from the facts, and, if that is his view, his failure to give evidence may not be attributable to any consciousness of guilt on his part, but to his confidence that the evidence does not establish guilt and does not require to be answered."

The Crown accordingly submitted that the accused's failure to testify has assisted the State case within the qualified meaning of that phrase in the above authority but in so saying Mr. Qhomane was quick to say the accused's silence had not helped supplement the Crown's case because at the close of the case for the Crown strong prima facie case was already firmly in existence.

Having addressed the Court on burden of proof learned Counsel for the Crown submitted that such proof rests on the Crown but there is also the question of evidential burden in respect of which the Court was referred to Evidence by S.E. van der Merwe et al at page 417 saying :

"The State will have established a prima facie case; an evidential burden (or duty to adduce evidence to combat a prima facie case made by his opponent....) will have come into existence i.e. it will have shifted, or been transferred, to the accused. In other words, a risk of failure will have been cast upon him. The onus still rests on the State; but, if the risk of losing is not to turn into the actuality of losing, the accused will have the duty to adduce evidence, if he wishes to be acquitted, so that, at the end of the case, the Court is left with a reasonable doubt....."

In C. of A. (CRI) No.5 of 1980 Khoabane Sello vs Rex (unreported) at p.4 Schutz J.A., as he then was, said :

"There was therefore, in my view, not merely a prima facie Crown case, but one of considerable weight to which a reasonably acceptable answer could be expected. But then the appellant did fail to give evidence which would have left the Court to decide whether speculative explanations could reasonably possibly be true...."

I have also had reference to SOUTH AFRICAN LAW OF EVIDENCE by HOFFMANN 3rd Ed. at p.386 where the question of onus as distinct from evidential burden has been discussed.

The Crown accordingly submitted that the accused had a duty to rebut evidence adduced by the Crown in order for the evidential burden which had shifted to him to be discharged.

It was argued by the Crown that even assuming the tenor of his instruction to his Counsel had an element of truth in it to the effect that he was not there (meaning he pleads an alibi) the accused should have called evidence supporting him. I doubt the validity of this submission. In support of the other proposition regarding failure to give evidence I was referred to page 470 of the invaluable works of Hoffmann. See S. vs Theron 1968(4) SA at 61. In support of this proposition Hoffmann and Zeffertt say :

"If a witness has given evidence directly implicating the accused, he can seldom afford to leave such testimony unanswered. Although evidence does not have to be accepted merely because it is uncontradicted, the court is unlikely to reject evidence which the accused himself has chosen not to deny. In such cases the accused's failure to testify is almost bound to strengthen the case for the prosecution.

An accused's failure to testify can be used as a factor against him..... only when..... the State has prima facie discharged the onus that rests on it it cannot, therefore be used to supply a deficiency in the case for the State where there is no evidence on which a reasonable man could convict".

It is important to note that going further the

/learned

learned authors say at 470 :-

"The situation is rather different when the evidence against the accused is not direct but circumstantial. If the prosecution has proved suspicious circumstances which the accused, if innocent, could reasonably be expected to answer or explain, his failure to testify will strengthen any unfavourable inferences which can properly be drawn from the prosecution evidence".

The Crown further reposed some reliance on consequences of failure to call witnesses and accordingly submitted that even if the accused testified his explanation would not carry weight unless he explained where he was and doing at the time in question. See R. vs Beguidenhout 1954(3) SA at 188.

The Court was referred to State vs Kelly 1980(3)(AD) at 301 to counter-attack the defence's criticism of Crown witnesses as unimpressive. The famous statement to be extracted from this authority is that credibility cannot be a substitute for evidence adduced. Learned Counsel for the Crown invited the Court so to find. See also R. vs Ramatla CRI/T/15/88 (unreported).

The learned Counsel for the Crown submitted that on the basis that the accused failed to avail himself of the opportunity to explain away serious allegations made against him by Crown witnesses who outlined circumstances in which the accused's conduct was at issue, adverse inference should accordingly be drawn against him.

Indeed PW2 was introduced as an accomplice who acted as an accessory after the fact in both murders. See Section 239 of our Criminal Procedure and Evidence. However in his final address Mr. Qhomane submitted that ample evidence showed

/that

that it is the accused alone who is accountable for the two murders. He further stated that even if PW2 whom he reluctantly refers to as an accomplice was the only one who testified the Court would have been entitled to convict on his sole evidence. But as a credit to the Crown's case PW2 has been corroborated by three other independent witnesses besides PW3.

See page 88 of Mofokeng J's reference where the position extracted from statute is laid down at page 89 as follows :

"Any Court which is trying any person on a charge of murder or any offence may convict him of any offence alleged against him on the single evidence of any accomplice.

Provided that the offence has, by competent evidence, other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such Court to have been actually committed".

The Crown submitted that PW2 should be regarded as a reliable witness who stood vigorous cross-examination for two days without his credibility being shaken. Instead he was corroborated by other independent witnesses.

The Court has been alive to the submission by the Crown that while treating PW2's evidence with due caution the Court should not overlook the existence of other corroborative evidence.

I should point out that references, ^{during} /submissions, to portions of an affidavit deposed to by the accused when applying for bail and which tended to contradict the version put to Crown witnesses that he was not at the scene are ruled

/out

out because the Crown did not bring this by way of evidence which the accused should properly have felt disposed to challenge if he wished.

The Crown nonetheless submitted that even without reference to that affidavit the Court should find that its case stood on firm ground.

It is common cause that the defence closed its case immediately at the close of the Crown case.

Mr. Phoofolo in reply to the submissions made by the Crown submitted that the case being dealt with here is a circumstantial one in that nobody witnessed the killings; or found the accused at the scene, nor were there any tell tale indications in accused's possession to link him with the deaths of the two deceased. He submitted that from the manner described of how the deceased were carried and the fact that they were said to have been bloody one would have expected the witnesses at PW4's and PW5's to have noticed blood on the accused.

With respect to the deceased Paballo Lehlohonolo Moloche the medical report which was handed in marked "B" just before the Crown closed its case and in terms of Section 223(7) of the Criminal Procedure and Evidence Act it was shown that death was due to open head injury. As to external appearances the doctor observed an open cut wound on fore head. The skull was cracked on left side and the mandible was fractured. The doctor's observations concerning the skull are that the left temporal bone was grossly cracked up, and extending to frontal bone. There was extensive damage to brain tissue.

/With regard

With regard to the death of Mannena the doctor's post mortem report shows that it was due to an open head injury.

External appearances revealed cracked skull on left side and laceration of the upper lip. The report further indicated that the left temporal bone was grossly cracked with brain tissue sticking out.

Mr. Phoofolo took issue with the police who testified for the Crown on the question of the nature and number of injuries observed by them as against those observed by the doctor and recorded in his two post mortem reports. The learned counsel submitted that the contradictions between the doctor's version and these two witnesses' versions was too wide.

It was submitted that because the doctor's finding as to the cause of death in both cases was most perfunctory describing the cause of death in both cases as an "open head injury" learned counsel submitted the examination was not satisfactory therefore in the event the Court concluded that the accused was liable the scales must be tilted in his favour because the doctor had failed to conduct thorough forensic examinations of the dead bodies. It was pointed out the doctor did not say where exactly the injuries which caused the deaths were. See Letuma vs Rex 1976 LLR(1)at 11.

It was indicated that while PW10 at PE said the woman's body was found in a stream among bushes, under cross-examination he said it was found below the stream. PW9 on the other hand denied that it was in a stream, and stated that it was outside the stream. PW7 said it was in a stream called Mohlakolaneng.

/Much

Much issue was made of the disparities about the testimony of various witnesses regarding how far apart the bodies were. The estimated distances ranged from 100 to 500 paces. I must say with regard to the reckoning of distances by witnesses who time and again give evidence in this Court vast differences in that regard are very common. However the Court having paid particular attention to the witness's agonised attempts to give a fair estimate of these distances it was persuaded to take 400 to 500 paces as the fair estimate of the distance between the bodies.

Likewise the distances between the respective pools of blood on the path and the places where these bodies were disposed of, through the demonstration made by PW2 who was actually holding each body it would seem the woman's body was disposed of 20 paces away from the path while the man's was disposed of only 5 paces away from the path.

I have had benefit of considering heads of arguments prepared and argued with commendable thoroughness by learned counsel for defence. The arguments raised therein are centred mainly on contradictions and conflicts in the Crown evidence all of which relate to credibility of those witnesses.

At page 11 of his heads Mr. Phoofolo contended that the Crown had failed to dispel the following improbabilities

- (a) For what good reason did the accused acting alone and unseen by anyone, could he have elected to remain in the scene only to confess to his enemies that he had done the deed, and to point out the bodies to them.
- (b) Even if he did "confess" to PW2 and PW3, why did he and PW2 hide away the bodies, and nonetheless go on to report his crime to PW4 and PW5, instead of urging PW2 and PW3 to keep it their own secret.

/(c) Why

- (c) Why did the accused decide, if at all, to steal Paballo's money, purse and a watch in the presence of both PW2 and PW3.
- (d) Why knowing full well that PW2, PW3, PW4 and PW5 know about his misdeed was the accused visibly present at the scene while police examined and removed the bodies.
- (e) Why had the accused the audacity to remain in the village until his arrest almost six days after the incident.

Starting with the last question it is not unknown for criminals to put on acts of bravado.

Going to question (d) it is not to be ignored that even though the accused was making public to them what he is alleged to have done, he had dared them to go and report to the authorities and later face the consequences. PW2 and PW3 had actually seen the dead bodies whose fate they would suffer if they did not toe the line. PW4 and PW5 had apparently believed that the accused's threats that he would frame anyone with commission of the crimes, were capable of execution and they feared the prospects of being sent to jail. REGARDING being had to the fact that they said they had never been to jail their fears are not to be brushed aside as unfounded.

With regard to questions (a) (b) - which in part has been covered in the answer to the question in (d) - and (c); the words of Schutz J.A. as he then was in C. of A. (CRI) No.2 of 1982 Khokoane Manamolela & 8 Others vs Rex (unreported) at page 34 may be instructive in that :

/"Moreover,

"Moreover, it would have been a singularly stupid way of trying to throw people off the track if it was indeed immediately apparent that the injuries had been so caused. Suspects do, of course, do stupid things in moments of panic or desperation"

At page 35 of the same case the learned Judge said -

"Again, of course, I must concede that suspects sometimes do behave stupidly under the pressure of events".

In CRI/T/8/89 Rex v. Naro Lefaso (unreported) at p.12 in response to a statement postulated by Counsel that "it would be doubtful that a man who is said to have used the weapon "Exhibit 1" could leave it at his house and make no attempt to dispose of it, and further that there was no drop of blood on it yet it is shown in evidence that the deceased was bleeding" this Court said "..... it is not unusual for people who commit crimes to do strange things. Next, absence of blood from a blunt instrument cannot serve as proof that it was not used".

In relation to the instant case one may go further and state that absence of blood from the accused's clothes would only serve to show that they did not come into contact with any. But with regard to blood which was likely to stain the hands which handled the deceased there was no suggestion that the accused had held them out to the witnesses to see them for themselves.

I consequently derive comfort from the words of Malan J in R. vs Mlambo 1957(4) SA 727 at 738 relied on by Maisels P. (sitting in the Republic of Botswana) in APPEAL case no.4/1984 Clement Kobedi Gofhamodimo vs The State (unreported) at 11 that -

/"it

"it was unrealistic to have regard to the realms of conjecture when there was at hand material which furnished a perfectly sound, rational, common sense solution of the problem".

With regard to the count involving theft I take solace in the words of Malan J.A. in Mlambo above at 737 that, in response to the conclusion that after killing the male deceased the accused stole his possessions

"The only objection to this conclusion may be the fact that the stolen articles were of comparatively small value, but it is found that murders are frequently committed for very small gains".

With regard to the plea of alibi that was raised it is trite that the accused bears no onus to prove his alibi, but taking into account the fact that credible evidence was adduced and corroborated in the important respect that he was near the scene when PW2 and PW3 were approaching it, an inference can justifiably be drawn that he prefers to place himself as far away from the scene as possible. In my view that plea must fail.

A vast range of possibilities was raised in the detailed heads of arguments applied to the Court in an endeavour to create doubt that should redound to the accused's benefit. The Crown was criticised as having failed to address itself to these in evidence and law. But again Malan J.A. at 738 says

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probabilities is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged".

/Relying

Relying on the evidence adduced that the accused was closer to the scene where 'Mannena had laid than where Paballo had, it would not be unfair to infer that 'Mannena was caught in her flight from where she had been when she alerted the accused that she had seen him kill her husband. It was logical that in her flight she would head for the village nearest to the scene of her husband's death, namely, Ha Rampeli village.

Even if for argument's sake, it could be said the evidence led as to motive for the killing was false there is authority for the view that -

"Proof of motive for committing a crime is always highly desirable, more especially so where the question of intention is in issue. Failure to furnish absolutely convincing proof thereof, does not present an insurmountable obstacle because even if motive is held not to have been established there remains the fact that death resulted either immediately or in the course of the same night".

Reacting in similar vein Schutz J.A. as he then was in Sello above at 4 said

"..... there is no room in the circumstances of the case before the Court to embark upon speculative inferences in favour of the appellants".

In his reply Mr. Qhomane emphasised that contradictions in the Crown case were minor and that the law lays down that in a case based on circumstantial evidence the best approach is not to treat evidence piecemeal but to have regard to the cumulative effect of the totality of evidence adduced.

Although proof of the actual killings is based on circumstantial evidence the question of the accused's reporting to various witnesses is a matter of direct evidence.

/In

In S. vs Masia 1962(1) SA 541 it is stated

"Each item of evidence is not to be taken in isolation".

In R. vs De Villiers 1944 AD 493 at 508 it is said

"Evidence as a whole is inconsistent with innocence".

This was submitted in response to the charge levelled at the Crown that its evidence is full of inconsistencies.

It was further stated that the argument on behalf of the accused as to improbabilities and inconsistencies was based on speculative assumption that the credibility of the Crown's witnesses had been shattered. But Kelly above shows that credibility is no substitute for evidence. Credibility serves as a yardstick in weighing up the merits and demerits of either side. But in this case the accused stuck by his right to remain silent. In the result only one side was matched against questions left hanging in the air. It is fundamental that a criminal trial cannot be decided on speculation. With regard to the test applied concerning credibility the Court is left with the Crown's witnesses to go by.

To the charge that PW2, PW3, PW4 and PW5 are all accomplices it was contended that the Court should determine that by looking into the minds of these witnesses. The Court should then be able to appreciate that they were so terrified of the accused that their free will was suppressed. Therefore it must be concluded that they did not conceal the matter of the unlawful killing wilfully. Duress under which they were had vitiated their free will.

/With

With regard to probabilities and improbabilities to be weighed and considered in making a determination in criminal proceedings reference to CRI/T/22/88 Motamo Sehlabaka (unreported) at 70 onwards would be productive.

I am alive to the statement of Scoble in The Law of Evidence in South Africa 3rd Ed. at 250 that -

"the statements, although actually made as deposed to, may be false, for the prisoner, oppressed by the calamity of his situation, may..... be induced by motives of hope or fear to make an untrue confession and the same result may have arisen from a morbid ambition to obtain an infamous notoriety..... or from anxiety to screen a comrade or it may even be the result of the delusion of an overwrought and fantastic imagination".

Reliable and available evidence in the instant case excludes the above set of possibilities. The accused confessed to Crown witnesses that he killed Paballo. His reason for doing so was that Paballo was making life difficult for the accused's aunt PW5. The accused further killed 'Mannena because it was necessary to silence her for the accused feared she would expose the culprit who perpetrated the crime against Paballo.

Trooper seeiso testified that accused took him to the spot where he pointed out the knife handle. The cut on female deceased's lip was consistent with use of a sharp instrument. Inferential reasoning leads to this conclusion. R. v. Samhando 1943 AD 608 shows that evidence of pointing out will be admitted as showing that an article used to commit a crime or itself a subject of crime, was discovered as a result of the accused's pointing it out. This leads the

/man

man pointing out being linked with the offence being investigated.

The accused is found guilty of the unlawful and intentional killings of

- (a) Lehlohonolo Moloche in Count I; and
- (b) 'Mannena Moloche in Count II.

He is also found guilty of theft preferred against him in Count III in respect of woollen purse and the M1-50 only.

PW2 is freed from any of the crimes charged.

My assessors agree.

J U D G E

20th September, 1991

RULING ON EXTENUATION

The accused after conviction on all counts gave evidence in an attempt to establish on a balance of probabilities that in respect of Counts I and II involving the deaths of Lehlohonolo and 'Mannena respectively, extenuating circumstances exist..

These are factors that the Court takes into account in an endeavour to see whether the reprehensibility of the offence committed, and in respect of the accused having been found guilty, can be palliated morally speaking.

It stands to reason therefore that the test to apply in order to make a determination in that regard is a subjective one.

Holmes J.A. in S. vs Letsolo 1970(3) SA 476-477 enumerated samples of factors which can be relevant to extenuation in a case and stated that the list thereof is not exhaustive. It was with this in view that when Mr. Qhomane sought to rise and raise an objection to hear-say evidence that the accused embarked on when giving evidence that the Court urged patience on the part of the Crown in case the hear-say would help the accused unwind and perhaps in the course of doing so alight on what could be regarded as extenuating.

The accused told the Court that he was born in 1962. He said relations between him and Paballo were cordial. The person to whom the accused is related and who was not in good terms with the deceased Paballo was the accused's aunt 'Mantsie PW5. He further stated that the fact that this was so, did not affect him.

/Indeed

Indeed the accused referred to an occasion when PW5's stock were impounded from the reserved pastures by the deceased Paballo. The relevance of this occasion was, as far as I could determine, that PW5 would have had cause to dislike Paballo because Paballo's stock was never impounded by him for the same trespass as had been committed by PW5's stock. One would have expected that the accused would detest this unfair treatment given to his aunt but he did not refer to it as having soured relations between him and Paballo.

The upshot of the accused's evidence has not helped us know any more than what the cross-examination in the main trial exposed. It is strange that despite having undertaken when led that he was going to make a clean breast of what occurred on 18th March 1989 at Hlabaneng-sa-Rannoi, he stuck to the version that was advanced on his behalf through cross-examination.

If as he stated the Crown witnesses including his aunt were lying about him when their evidence associated him with the crime, the testimony that he gave in his affidavit when applying for bail would scarcely lie about him because it was given by him to his lawyer Mr. Mda and sworn to before a Commissioner of Oaths - an officer Commanding at the Mohale's Hoek prison on 29th May 1989 as borne out by the date stamp.

The accused acknowledged the hand-writing of the deponent's name as his but said he was made to sign in a case where his lawyer had said he was going to fight for him to get bail even though the accused had told that lawyer that he had not killed the two deceased.

/I find

I find this a pathetic lie. The accused acted out his drama of lies before this Court by also suggesting that even though he instructed his present Counsel Mr. Phoofolo to bring a witness who would support his alibi his Counsel did nothing about it.

The sworn statement made in the accused's application for bail was put to him. He denied its contents save that he told this Court that his then lawyer had received from him names of the two deceased ^{and} the name of the place Ha Maqoala which appeared in the charge facing him. With regard to the rest of the statement appearing in his affidavit he said he did not know where his lawyer got the story from that tended to place him at the same place as the deceased along the way to Ha 'Mapane. He denied the sworn version ascribed to him that he had been challenged by the deceased Paballo during the course of whose struggle with him Paballo's wife 'Mannena entered the fray and held the accused by his testicles as well as hitting the accused with a stone on the arm.

Indeed as both Counsel submitted before me resort can be and is often had to evidence in the main trial even at this latter stage of trial.

In the main trial reference was made to the fact that PW5 and PW4 asked why 'Mannena was also killed. This would give credence to the fact that understandably even though not reasonably it was not that reprehensible morally if Paballo died. This is an important factor when determining the question of extenuating circumstances because the question of the social milieu of which the accused is a product is

of great importance subjectively speaking. The only problem that the accused is faced with regarding Paballo's death is that in his web of lies he told this Court that he never attacked or even killed Paballo. The Court is however not bound to go by false evidence in the face of the evidence that it accepted as true.

Mr. Phoofolo argued that there was no premeditation in these killings. Indeed no evidence showed any scheming of any kind to suggest premeditation. The type of premeditation that one can discern is of a general nature, namely that the accused was not happy in the manner that Paballo was behaving towards his aunt. This is a factor that would serve neutralise the learned Counsel's attempt to advance the question of beer drinking as having played a part in the killing of the two deceased. In any event the accused said he had taken very little drink while PW4 who knows him very well and had been accompanied by him said the accused did not appear drunk at all.

The accused was asked why in particular PW5, his aunt, should join forces with PW4, PW2 and PW3 in lying about him. His answer was "They are implicating me". The Crown accordingly submitted that PW5 was the accused's aunt and their relations were good.

Reacting to a more or less similar situation Schutz P in C. of A. (CRI) No.3 of 1984 Vincent Monaheng Musetse Thebe vs. Rex (unreported) at 20 said :

"He was then asked whether the witness had anything against him to which the answer was 'NO'. The trial court by clear implication accepted the evidence of this witness. To my mind the evidence should be accepted as true. It is very difficult to believe that the witness would have fabricated this story against his own cousin to whom he bore no hostility".

/In

In this case the evidence of PW5 was expressly accepted as true. The accused enjoyed her hospitality.

Mr. Phoofolo in argument submitted with greatest respect that the Court had not stated whether ^{murder}/convictions were on the basis of dolus directus or dolus eventualis. To highlight the importance of these two elements of criminal liability Schutz P. in Sello above said at 6

"That would lead to a finding of dolus eventualis. Such a finding is sometimes a basis for finding extenuation, but in my view it is not sufficient in this case".

The fact that the motive would appear to be theft from the deceased's person would not ordinarily reduce the accused's blameworthiness. However there was evidence that the accused had complained that Paballo made life difficult for the accused's aunt PW5. The plunder that was effected seems to me to have been secondary.

To this extent I would be inclined to think extenuating circumstances existed in respect of the killing of the deceased Paballo.

With respect to the killing of the deceased 'Mannena the position seems different. Abundant evidence shows that she was killed because she would report the culprit in her husband's death to the authorities. I am far from being inclined to think that even in the social background from which the accused comes a killing effected in such circumstances could be said to palliate the moral reprehensibility of such act. On the contrary it would aggravate it.

/In

In CRI/T/19/74 Rex v. Kopo (unreported) at 24
Cotran C.J. as he then was said :

"The subjective test to the accused's state of mind is ^{of} paramount importance for not only is it a factor to be taken into account, but is indeed a more important one to consider in this regard than the objective test for the factual basis for this state of mind".

In S. v. Ndlovu 1970(1) SA 430 at 433 Holmes J.A.
said :

"there must be a factual foundation for a trial court's finding of such circumstances, on a preponderance of probability This does not necessarily mean the accused must give evidence : in a proper case the trial court may be able to find the required degree of probability from the evidence as a whole or from so much thereof as it has accepted. But there must always be a foundation of probability before the court can exercise what is in effect a moral judgment in the matter of extenuating circumstances".

See CRI/T/38/78 Rex v. Sello Lemphane & 2 Others (unreported).

I have been referred to CRI/T/40/90 Rex v. Sekhobe Letsi and Another (unreported) where I was told the facts relating to 'Mannena are similar to those relating to some of the victims in the above case.

I am of the firm opinion that there are no extenuating circumstances in respect of the killing of the deceased 'Mannena.

My assessors agree.

S E N T E N C E

In respect of Count I accused sentenced to

/15 years'

15 years' imprisonment.

In Count III sentenced to three(3) months' imprisonment

(suspended for a year on condition that he be not convicted of a crime involving dishonesty committed during period of suspension.)

Registrar will accused say why death sentence should not be passed.

ACC. : "I wish to be given prison term. I ask for mercy."

COURT : In respect of Count II the sentence of the Court is that you will be removed from the box in which you are and taken to a place of custody where on an appointed day and time you shall suffer death by hanging by your neck until you are dead.

May God have mercy on your soul.

My assessors agree.

J U D G E

23rd September, 1991

For Crown : Mr. Qhomane

For Defence: Mr. Phoofolo