CRI/T/26/91

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

1. OAKHENG MONARE
2. EDWARD MOLIBELI

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai

on the 4th day of November, 1991.

The two accused appear before me on a charge of murder, it being alleged that on or about 6th July, 1989 and at or near Ha Mokhalinyane, in the district of Maseru they both or either of them unlawfully and intentionally killed Litaba Mokete.

When the charge was put to them the accused tendered a plea of guilty to Culpable Homicide. Mr. Matoaone and Mr. Matete who represents A1 and A2, respectively, informed the court that the plea was in accordance with their instructions. Mr. Lenono who represents the Crown in this case told the court that the crown did not accept the plea of guilty to culpable Homicide tendered by the defence. The plea of not guilty was accordingly entered.

It may be mentioned that at the commencement of this trial the depositions of Malebo Mokete, Tsukutlane Khotseng, Sgt Sekantsi and Captain Telukhunoana who were respectively P.W.1, P.W.2, P.W.4 and P.W.11 at the proceedings of the Preparatory Examination were admitted on behalf of the accused persons by the defence counsels who also told the court that the post-mortem examination report compiled in respect of the deceased would not be disputed by the defence. In addition counsel for A2 also admitted the depositions of 'Matanki Mohata and Matsitso Mohata who were P.W.7 and P.W.9, respectively, at Preparatory Examination proceedings. The crown counsel accepted the admission made by the defence counsels.

In terms of the provisions of S.273 of the Criminal Procedure and Evidence Act, 1981, the depositions of Malebo Mokete, Tsukutlane Khotseng, Sgt Sekantsi and Captain Telukhunoana as well as the Post-Mortem Examination Report became evidence. It was unnecessary, therefore to call the deponents as well as the medical Doctor who had compiled the Post-Mortem Examination Report as witnesses in this trial.

Briefly stated Captain Rikabe and D/Tper Ramakeoane who testified before this court as P.W.3 and P.W.4, respectively, told the court that on the day in question, 6th July, 1989, they were stationed here in Maseru when they received certain

information following which they proceeded to Ha Mokhalinyane police post. They were accompanied by Tper Kumi who was the driver of the Police vehicle in which they were travelling. At the police post they found Sgt Sekantsi who was the officer commanding police at the post. There were also other police officers from Morija police station viz. Captain Molumo, Tper Makhakhe and another whose name they no longer recalled. The police from Morija have, however, not been called to testify as witnesses in this trial.

P.W.3 and P.W.4 further told the court that from Mokhalinyane police post they, together with Sgt Sekantsi and the police officers from Morija proceeded to the home of one Mphou Mphou in the village of Mokhalinyane. They found a large number of people already gathered there. Three (3) empty shells were handed to them by the chief's representative who was, however, again not called as a witness in this trial. P.W.4 took possession of the three empty shells.

The police officers were then shown a flat roofed house. It had two windows in front. The door of its entrance was the type which is divided into two halves. The upper portion was broken and fallen on the floor inside the house. On entering into that house P.W.3 and P.W.4 found the deceased lying dead next to a bed behind the door. There was a lot of blood on the floor, more especially next to the spot where the deceased

was lying dead. There were stains of what appeared to be blood and brain matter on the wall opposite the door entrance. P.W.3 and P.W.4 also noticed what appeared to be bullet holes on the door, window, wall, trunk and suitcase inside the house. On the wall opposite the door way alone, P.W.4 counted altogether eleven (11) holes apparently caused by bullets. Indeed, he found and took possession of two spent bullets on the floor of that house.

On examining the deceased for injuries P.W.3 and P.W.4 found that he had sustained a big wound on the right side of his head. It was the only injury they observed on the deceased. They conveyed the dead body of the deceased in the police vehicle from the home of Mphou Mphou to Mokhalinyane Police Post from where it was transported to the mortuary at Queen Elizabeth II hospital here in Maseru. I shall return to the evidence of P.W.3 and P.W.4 later in this judgment.

The evidence of Malebo Mokete was to the effect that the deceased who lived with Mphou Mphou was his own son. One day in July, 1989 he received a report following which he proceeded first to the home of Mphou Mphou and then to the mortuary of the Government hospital here in Maseru. He identified the body of the deceased before the medical doctor who conducted the post-mortem examination. He was in the company of Tsukutlane Khotseng. That was confirmed by

Tsukutlane Khotseng who, as it has already been pointed out earlier, gave evidence as P.W.2 at the proceedings of the preparatory examination.

According to the post mortem examination report, on 7th July, 1989, a medical doctor examined a dead body of a male African adult at the mortuary of Queen Elizabeth II hospital in Maseru. The report confirmed that the body was identified by Malebo Mokete and Tsukutlane Khotseng as that of the deceased. The external examination revealed that the deceased had the whole of the right side of his head, i.e. from the forehead to the occipital, blown out. Other parts of his body were intact. The internal examination also revealed that the right parietal, frontal to occipital and the brain substance were blown out.

From these findings the medical doctor who compiled the post-mortem examination report formed the opinion that the deceased had died as a result of massive brain damage and fracture of the right parietal frontal/temporal bones.

I can think of no good reasons why the opinion of the medical doctor that the deceased's death came about as a result of the injury that had been inflicted on his head should be doubted. That being so, the salient question for the determination of the court is whether or not the accused

are the persons who inflicted the injury and, therefore, brought about the death of the deceased.

In this regard the court heard the evidence of P.W.1, 'Matanki Mohata, who testified that at about 1 O'clock in the afternoon of Sunday 25th June, 1989, she was selling beer when A1 came for drinking at her house in the village of Auplass at Mokhalinyane. As he was drinking in her house A1 had his head bandaged. A1 told her that he had been assaulted and injured on the head by the deceased at a concert which had been held at L.E.C. school in the village on the previous day which was Saturday, 24th June, 1989. A1 then threatened that he would hunt for and chase the deceased on horseback until he (deceased) got tired and drank water. He knew that if the deceased drank water, after he had run and got tired, he would die.

According to her, P.W.1 advised A1 to report the incident to Mphou Mphou who would take the deceased to the police post but Accused 1 simply kept quiet. P.W.1 recalled that whilst Accused 1 was telling her that he would chase the deceased on horseback one 'Matsitso Mohata came into the house in which she was selling beer.

'Matsitso Mohata gave evidence as P.W.2 and told the court that the house in which P.W.1 was selling beer on the

Sunday in question was the home of her-in-laws. On that day there was a time when she went to the home of her in-laws. She entered the house, collected a strainer and went out. P.W.2 confirmed that she had, found P.W.1 sitting with Accused 1 in that house. She then heard Accused 1 saying he had been injured at a concert by the deceased whom he would go and fetch on horseback. Both P.W.1 and P.W.2 told the court that in July, 1989 they learned of the death of the deceased.

The evidence of Sgt Sekantsi was to the effect that at the material time he was stationed at Mokhalinyane police post as the officer commanding police at the post. The two accused were his only subordinates at the police post. On 3rd July, 1989 he returned to Mokhalinyane police post from a one month leave. After he had returned to Mokhalinyane police post from his leave Sgt Sekantsi noticed that Accused 1 had a wound on his head. The wound had been sutured. When he questioned him about the injury on his head Accused 1 informed Sgt Sekantsi that he had been on duty at a concert held at L.E.C. School at Ha Mokhalinyane when he was assaulted and injured by the deceased. Sgt Sekantsi checked and found that a docket had, indeed, been opened against the deceased for his alleged assault on Accused 1. It was R/C/1 40b1.6/89. He then instructed Accused 1 to assist Accused 2 to go and arrest the deceased for the offence he had committed. Later on the same day Sgt Sekantsi checked the patrol book and found that the

two accused had gone to carry out his instructions.

As it will be seen later in this judgment at the time he was instructed to go and arrest the deceased Accused 2 had been posted at Mokhalinyane police post for about only 2 or 3 weeks. In all probabilities he did not know the deceased. Nor was he conversant with the various places in the area of Ha Mokhalinyane. That may, perhaps explain the reason why Sgt. Sekantsi had to instruct Accused 1, who was the complainant to assist A2 to arrest the suspect in R.C./1 40b1.6/89.

Be that as it may, Sgt Sekantsi went on to tell the court that at dawn, at about between 3.00 and 4.00 a.m. the two accused came to him and reported that they had not been able to arrest the deceased because he was fighting them. They had tried to frighten him with firearms but to no avail. He fought by throwing at them any objects he could lay his hands on in his house.

At about 8'Oclock in the morning of that day, 6th June, 1989, Sgt Sekantsi received a certain report from the deceased's chieftainess 'Mathato Bereng who has, however, not been called as a witness in this trial. Following the report Sgt. Sekantsi immediately dispatched a message to Morija police who, in turn, apparently notified the Maseru police.

He confirmed that later on that day the police from both Morija and Maseru arrived at Mokhalinyane police post. On the instructions of P.W.3 rifles AD 7007859 and AD6806725 belonging to A1 and A2, respectively were handed to P.W.4 together with their rounds of ammunition. He confirmed the evidence of P.W.3 and P.W.4 that he and the other police officers from Morija and Maseru accompanied them to the scene of crime and as to what happened there at. Sgt Sekantsi assured the court that he had not instructed the two accused to go and kill the deceased. He himself did not accompany the body of the deceased when it was being transported from Ha Mokhalinyane police post to the mortuary at Queen Elizabeth II hospital.

It is common cause that Mphou Mphou and Likonelo Mphou who testified before this court as P.W.5 and P.W.6, respectively, are husband and wife. P.W.7, 'Ma-Oriel Mphou is their daughter. The deceased who was a relative of theirs stayed with P.W.5,6 and 7. On the night of 5th July, 1989 P.W. 5, 6 and 7 were sleeping in the same house whilst the deceased was sleeping alone in another of P.W.5's houses.

According to P.W.5, 6 and 7 at about 12 mid-night they were still sleeping in their house when they heard dogs barking at something outside. P.W.5 then went out to investigate what it was that the dogs were barking at.

In his evidence P.W.5 told the court that when he got out he noticed the two accused standing on the forecourt and flashing a torch at the door of the house in which the deceased was sleeping. They were each carrying a rifle. When P.W.5 inquired from the accused persons what it was that they wanted, A1 replied that they were police officers from Morija and had come to arrest the deceased for having assaulted a police officer. As a police officer stationed at Mokhalinyane police post A1 was a known person to P.W.5 who had, therefore, no difficulty in identifying him. P.W.5 did not, however identified A2 who was a stranger to him. He learned for the first time that the deceased had assaulted a police officer.

As it was at night and the accused were not accompanied by the chief P.W.5 pleaded with the two accused to leave the deceased to him and promised to bring him to them in the morning. However, A1 told him that they would not leave that place before they had made a decision, whatever that means. Realising that he could not easily persuaded the accused to leave the deceased to him, P.W.5 who was not properly dressed returned into his house to put on his trousers. As he entered into the house P.W.5 heard gun reports. This is confirmed by P.W.6 and P.W.7. When they heard the gun reports P.W.5, 6 and 7 rushed out of the house and found the two accused still standing on the forecourt.

According to him, P.W.5 went to the door of the house in which the deceased was sleeping, knocked on the door and called out the deceased by name so that he could hear that it was him (P.W.5) at the door. There was no reply from the deceased.

P.W.5 again pleaded with the two accused to leave the deceased with him until in the morning when he would bring the boy to them. A1 then told P.W.5 to move away from the door if he did not wish to die with the deceased. P.W.6 also tried to plead with the accused to leave the deceased until in the morning when P.W.5 would bring him to them but A1 angrily told her to go to bed as she was wasting their time. She then went to P.W.5, pulled him by his blanket telling him to move away from the door of the house in which the deceased was sleeping. They returned into their house.

According to her, when her parents returned into their house P.W.7 remained outside leaning against the wall of a roundavel next to the house in which the deceased was sleeping. She told the court that after P.W.6 had pulled P.W.5 away from the door of the house in which the deceased was sleeping A1 went to the back of the house. On his return A1 went to the door of the deceased's house, banged it with the bud of his rifle and started firing several shots through the door. The deceased did not come out of his house even

after A1 had stopped shooting. The two accused then left the place and as they did so P.W.7 heart A1 saying: "We have now made a decision." P.W.7 went to her parents and reported what had happened. This is confirmed by P.W.5 and P.W.6 who told the court that after the shooting had stopped they too heard A1 saying they had made a decision.

Having reported to them P.W.7 took some matches and paraffin lamp and went out followed by P.W.5 and P.W.6. She went to the house in which the deceased had been sleeping. She found the upper portion of the door broken and fallen on the floor inside the house. P.W.7 entered into the house and put on the light. She noticed a pool of blood on the floor. The wall opposite the door way was also splashed with stains of blood and what appeared to be brain matter. When she looked behind the door she noticed the deceased lying in a pool of blood next to the bed. He was still wearing his blanket. P.W.7 got a shock and screamed out of the house.

P.W.5 and P.W.6 confirmed the evidence of P.W.7 and told the court that as they approached the house in which the deceased was sleeping they heard the screams of P.W.7. Inside his house they found the deceased lying in a pool of blood next to the bed. The whole of the right side of his head had been shattered and he was clearly dead. As a result of the screams made by P.W.7 many of the villagers gathered at the

house of P.W.5.

In the morning P.W.5 noticed, on the ground outside the door of the house in which the deceased was lying dead, 3 empty shells. He picked and handed them to the chief. P.W.5 confirmed that the police subsequently arrived and examined the body of the deceased for injuries. Thereafter, the body was carried away by the police.

Returning to their evidence P.W.3 and P.W.4 told the court that whilst at Mokhalinyane police post and before returning to Maseru 9 empty shells were handed to P.W.4 by Sgt. Sekantsi. They confirmed that on the instructions of P.W.3 rifles serial numbers AD7007859 and AD6806725 together with their rounds of ammunition were also handed to P.W.4 by A1 and A2 , respectively. A1's rifle was loaded with 12 bullets whilst A2's rifle was loaded with 13 bullets.

P.W.4 unloaded the rifles, took possession thereof together with their rounds of ammunition. He subsequently referred the two rifles, their 25 rounds of ammunition, the 12 empty shells and 2 spent bullets he had earlier received, to a Forensic Ballistic or firearm examiner for examination. They were later returned to him and had since been in his custody. He handed them in as exhibits and part of his evidence in this case.

The evidence of Captain Telukhunoana was to the effect that he was a qualified Firearms Examiner attached to the Forensic Ballistic Section of the Police Technical Services Department of the Royal Lesotho Mounted Police. According to him, on 19th July, 1989 he received for examination, rifles serial numbers 7007859 and 6806725, only 11 fired cartridge cases (empty shells) and 2 fired bullets. He examined the two rifles and found that they were both in good working conditions. He also subjected the fired cartridge cases and the fired bullets to a microscopic examination. He obtained the following results:

(1) Eight (8) of the cartridge cases had been fired from A1's rifle serial number 7007859 whilst four (4) had been fired from A2's rifle serial number 6806725.

(2) Due to damage and lack of sufficient marks for comparison purposes it was not possible to determine whether or not the two spent bullets had been fired from either of the rifles obtained from the accused persons.

Well, assuming the correctness of Captain Telukhunoana's testimony that of the cartridge cases he examined, eight (8) had been fired from rifle serial number 7007859 and four (4)

from rifle serial number 6806725 it must be accepted that he had received altogether twelve (12) cartridge cases. That being so, it stands to reason that he was wrong in his testimony that he had, on 19th July, 1989, received only eleven (11) cartridge cases for examination. I accept as the truth, therefore, the evidence of P.W.4 that twelve (12) cartridge cases were sent to (and received by) Captain Telukhunoana for examination.

The two accused gave evidence on oath in their defence. In his evidence A1 told the court that on 25th June, 1989 a concert was held at L.E.C. school at Mokhalinyane. He was alone at his police post as Sgt Sekantsi was away on leave and A2 had not yet arrived at the post. He, therefore, assigned himself for duty at the concert to ensure that there would be no trouble. At the concert he was, however, assaulted and injured on the head by the deceased for no given reason.

A1 conceded that on the afternoon of 25th June, 1989 he did go to the house of P.W.1. According to him he was going to look for a certain Pelo Makhele who looked after the police horses. he found Pelo in the company of other people at the house of P.W.1 and called him out for a talk. He asked him to bring the horses to the police post so that he could use one of them to go to Morija hospital for medical treatment. A1 immediately returned to the police post from where he

proceeded to Morija hospital on horse back. He denied, therefore, the evidence of P.W.1 that when he called at her house on the day in question his head injury was already bandaged and he sat in the house drinking beer or telling P.W.1 that he would chase the deceased on horseback for having injured him.

In her evidence that A1 had, on the afternoon of 25th June, 1989, been drinking beer in her house P.W.1 was, however, in a way corroborated by P.W.2 who, as it has already been stated earlier, testified that on the day in question she went to collect a strainer from the house in which P.W.1 was selling beer. She found her sitting with A1 whom she heard saying the deceased had injured him at a concert and he would go to fetch him on horseback.

I observed all the witnesses as they testified before this court. P.W.1 and P.W.2 gave their evidence in a straightforward manner. They impressed me as more reliable witnesses than A1. I am prepared to accept their story as the truth and reject A1's version as false on this point.

Now, assuming the correctness of Sgt Sekantsi's testimony that A1 had sustained a rather viscous head injury which had to be sutured I find it incredible that A1 could have gone to P.W.1's beer house and relaxed over a beer before taking the

injury for medical treatment. I am convinced that the truth is in P.W.1's evidence viz. that on 25th June, 1989 A1 told her that he had been injured by the deceased at a concert which had been held on the previous day, 24th June, 1989. When he came to P.W.1's house for drinking on 25th June, 1989 A1 had, therefore, already been to Morija hospital where his head injury was sutured and bandaged.

In their evidence both A1 and A2 conceded that on 5th July, 1989 they went on patrol to have the deceased arrested on the instructions of Sgt. Sekantsi. According to the accused persons A1 was the one to whom the instructions to arrest the deceased were given. A2 was to assist him in carrying those instructions.

It will be remembered, however, that in his evidence Sgt Sekantsi testified that he had instructed A1 to assist A2 to arrest the deceased. To that extent there is, therefore, a contradiction in the evidence of A1 and A2 on one hand and that of Sgt Sekantsi on the other hand. For the reasons I have earlier stated in this judgment I am inclined to accept as the truth the story given by Sgt Sekantsi and reject as false the version given by A1 and A2 on this point.

Be that as it may, the accused persons conceded that at about little after 12 midnight they came to the home of P.W.5

where they were to arrest the deceased. A1 was armed with rifle serial number 7007859 whilst A2 was armed with rifle serial number 6806725. The two rifles were each loaded to capacity i.e. with 20 rounds of ammunition. According to A1 the deceased was known to be a person who would resist arrest by fighting and/or running away. That explained why they went for him armed in the manner described.

It is significant to observe that although A1 wished the court to believe that the deceased was known to be a hostile person who would even run away from arrest he and A2 did not, on arrival in the village, first report themselves to, and seek assistance of, the local chief as it is usually the practice of the police in this country. They instead, went straight to P.W.5's home to arrest the deceased. I find the reason advanced by A1 for going to arrest the deceased at 12 midnight, armed in the manner described rather unconvincing.

In any event A1 went on to testify that when he and A2 arrived at the home of P.W.5 at about a little after midnight they found P.W.7 still cooking outside the house. They told her to call P.W.5 for them and she obliged. After they had introduced themselves and explained their mission to P.W.5 the latter took them to the house in which the deceased was sleeping. He knocked on the door and called the name of the deceased who came out holding a stick with which he tried to

assault the accused. As the deceased came out of the house armed in the manner described P.W.5 moved away from the door way. He in fact returned into his house saying he was afraid of the deceased when he was in that belligerent mood. However, A1 fired a shot in the air with his rifle. The deceased then returned into the house and closed the door behind him. A2 then went to the back of the deceased's house to investigate the existence of any windows through which he could escape out of the house. When A2 returned from the back of the house A1 ordered him to fire shots in the air. A2 complied but the deceased did not come out of the house. He (A1) then started firing a volley of bullets on the door and the wall which was built of stones. A2 also did so but he had not ordered him to fire. A1 told the court that although it was a dark night and there was no flush light with which to illuminate the place he was able to find and pick up the cartridge cases of the bullets he had fired from his rifle. He later handed them to Sgt. Sekantsi.

The evidence of A2 was slightly different. He denied A1's evidence that when they arrival at the home of P.W.5 they found P.W.7 still cooking outside the house. It will be remembered that P.W.7 told the court that at the time the accused persons arrived at her house, she was in bed in the house. I am inclined to agree with P.W.7's story that she was in bed for it was too late for her to be still cooking outside

the house as A1 wanted this court to believe.

According to A2 they found only P.W.5 on the forecourt of the house. When P.W.5 took them to the house in which the deceased was and knocked at the door the latter who was holding a stick merely opened the door but did not actually come out of the house. As the deceased thus opened the door A1 flashed him with a torch he was holding in his hand. The deceased then closed the door.

According to A2 when he returned from the back of the house where he found that there was no window through which the deceased could escape out of the house, he noticed P.W.5 returning into his house. He was with P.W.6. P.W.7, however, remained outside the house. When he came to the forecourt of the house A2 admittedly fired four (4) shots in the air on the instructions of A1. Thereafter A1 flashed his torch on the ground to enable him to collect the empty shells. He did find the shells of the four bullets he had fired in the air picked them and later handed them to Sgt Sekantsi. When the deceased did not come out of the house A1 then started firing bullets into the house through the door and windows. He (A2) himself remained standing on the forecourt and did not fire any shots.

According to the accused persons the reason for firing shots at the home of P.W.5 was to frighten the deceased and

make him tame so that he could be easily arrested in the morning. However, when they eventually left that place A2 was convinced that After A1 had been firing shots into the house in the manner he did, the deceased could not be still alive in that house. A1 himself believed that the deceased was still alive and merely hiding in the house.

The two accused confirmed the evidence of Sgt Sekantsi that at about dawn on the night in question they arrived back at their police post and reported that they had been unable to arrest him because the deceased was fighting them. However, at about 8.00 a.m. they learned that the deceased had passed away. If it were true that the reason why they fired shots at the home of P.W.5 was to tame the deceased so that they could easily arrest him, the accused would not have remained at the police post until 8.a.m. They would have proceeded to deceased's house earlier than that so as to be able to arrest him before he had had a chance to get up and run away.

Considering the evidence as a whole, there seems to be no dispute that other than the two accused nobody had, on the night in question, been firing, into the house in which the deceased was, bullets that could have inflicted the injury that resulted in his death.

In the contention of A2 the only four (4) bullets he

discharged from his rifle were fired in the air to frighten the deceased out of the house he had closed himself in and that was admittedly on the instructions of A1 who was senior officer at the time. He was positive that he never fired, into the house in which the deceased was, any bullet that could have injured him. A2 was, in a way, supported in his contention by P.W.7 who told the court that she was leaning against the house next to the one in which the deceased was when shots were being fired into the decease's house. Only A1 was the person who was doing the shooting. Indeed, P.W.5 and P.W.6 told the court that A2 was passive all the time he and A1 were at their home. The only evidence implicating A2 in this case is that of A1 who told the court that at the time he started shooting indiscriminately at the house in which the deceased had closed himself A2 joined him.

It must, however, be always borne in mind that A1 and A2 are jointly charged as co-accused in this trial. The legal principle, as I see it, is that the evidence of one accused cannot be used against his co-accused.

As regards A1, I have already indicated that he was seen by P.W.7 shooting into the house in which the deceased had closed himself. In his own month, A1 told the court that after the deceased had closed himself into his house he fired

bullets with his rifle indiscriminately at the door, windows and the wall of that house. He would not deny, therefore, that some of the bullets he fired entered into the house in which the deceased was. That being so, I find it reasonable to infer that the deceased was fatally injured by a bullet or some of the bullets indiscriminately fired, into the house in which he was, by A1.

Assuming the correctness of my finding it must be accepted that in firing bullets indiscriminately into the house in which the deceased was, as he did, A1 was aware that some of the bullets might hit the deceased with fatal results. He, nonetheless, did so reckless of whether or not the deceased was fatally hit by the bullets. In the circumstances, I find that A1 had the requisite subjective intention to kill, at least in the legal sense.

It has been argued that when he went with A1 to the home of P.W.5, A2 was aware that A1 was armed with a lethal weapon viz. a loaded rifle which he might use to injure the deceased. On the principle of common purpose A2 was, therefore, equally liable for the criminal act which A1 had committed with that weapon.

I do not agree. To be equally liable for the criminal acts of A1 there must be an overt act done by A2 as an

indication that he associates himself with the criminal acts of A1. In the instant case, there is no admissible evidence indicating that A2 did anything to associate himself with the criminal acts of A1. The only thing A2 admittedly did was to fire four shots in the air to scare the deceased out of the house. That cannot, even by a stretch of imagination, be regarded as an overt act indicating that A2 was associating himself with the criminal acts of A1.

However, what I consider to be of some importance is the evidence that when the two accused left P.W.5's home, where A1 had been indiscriminately firing bullets into the house in which the deceased was, A2 was, in his own words, convinced that the deceased could not be still alive. That is, he firmly believed that A1 had killed the deceased. Notwithstanding his firm belief that A1 had committed this horrible offence A2 did not report to any one. Indeed, rather than tell Sgt Sekantsi the truth of his belief viz. that A1 had killed the deceased, A2 teamed up with A1 to cover the commission of the offence by falsely reporting that they were unable to arrest the deceased because the latter was fighting them. By so doing A2 has, in my opinion, rendered himself guilty as accessory after the fact to murder.

In the premises, I would return the following verdicts:

A1 - guilty of murder as charged.

A2 - guilty as accessory after the fact to murder.

B.K. MOLAI

JUDGE

4th November, 1991.

For Crown : Mr. Lenono,

For Defence: Mr. Matooane for Accused 1

Mr. Matete for Accused 2.

EXTENUATING CIRCUMSTANCES

Having convicted A1 of murder, the court is enjoined by the provisions of Section 296 of the Criminal Procedure and Evidence Act, 1981 to state whether or not there are any factors tending to reduce the moral blameworthiness of his act. In this regard there is evidence that prior to 5th July, 1989 A1 had been assaulted by the deceased. That may well have served as provocation to the accused. Such provocation could not exonerate the accused or reduce murder to a lesser offence. It is, however, a factor to be properly taken into account for purposes of extenuating circumstances.

I have found, in the course of my judgment, that in killing the deceased, as he did, A1 had intention in the legal sense, i.e. there was no convincing evidence that he premeditated the death of the deceased. On the contrary, the evidence points to the fact that the accused went to the home of P.W.5 on a lawful mission viz. to assist in the arrest of the deceased who had allegedly committed a criminal offence. The absence of premeditation is also a factor to be properly taken into account for purposes of extenuating circumstances.

In the result, I come to the conclusion that there are, in this case, extenuating circumstances viz. provocation and

the absence of premeditation. The proper verdict is, therefore, that A1 is guilty of murder with extenuating circumstances.

Both my assessors agree.

SENTENCE

For the benefit of the accused persons the court has taken into account that they are first offenders. The court has also been invited to consider a number of factors in mitigation of the accused's sentences. They have been eloquently enumerated by the defence counsels and there is no need for me to go over them again. Suffice it to say they have all been taken into account in assessing what sentences will be appropriate for the accused persons.

This court has, time and again, warned that firearms are dangerous weapons which must not be allowed into the hands of irresponsible people. This warning does not seem to be heeded. Too many lives have been lost through the use of firearms by irresponsible people. I am utterly surprised to find that even policemen like A1 can no longer be trusted with possession of firearms.

It must be brought home to A2 that even if A1 were his senior police officer, he cannot be allowed to team up with him to cover the commission of a criminal offence.

In the circumstances of this case, the sentences that are appropriate to the accused persons are that A1 must serve a term of 9 years imprisonment. A2 must also go to gaol for 18 months.

The accused are, accordingly sentenced.

M.K. MOLAI

JUDGE

4th November, 1991.

For Crown : Mr. Lenono

For Defence: Mr. Matooane for A1

Mr. Matete for A2.