

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

MAMATHEALIRA API
ERNEST MOLAPO
NKAU API

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 10th day of April, 1991.

The three accused are summarily charged with the murder of 'Mabolae Ranyali, it being alleged that between the 16th and the 22nd day of November, 1988 and at or near Ha Ramabanta in the district of Maseru they each or some or all of them unlawfully and intentionally killed the deceased.

When it was put to them, all the accused pleaded not guilty to the charge. Mr. Maqutu, counsel for Nos. 1 and 3 accused, and Mr. Nathane, who represents No.2 accused in this matter, informed the court that the plea of not guilty tendered by the accused was in accordance with their instructions. Consequently the plea of not guilty was entered in respect of all the three accused persons.

It is worth mentioning that at the close of the crown case both counsels for the defence applied for the discharge of all the accused persons on the ground that the evidence adduced, on behalf of the crown, had failed to establish a prima facie case for the accused to answer.

2/ Mr. Thetsane, counsel

Mr. Thetsane, counsel for the crown, contended that the evidence had established prima facie case. He accordingly opposed the application.

I pointed out that a distinction had to be made between two situations viz.

- (a) where an application for the discharge of the accused person was made at the close of the crown case and
- (b) where at the end of the defence case, the court was required to determine whether or not the accused had committed the offence against which he stood charged.

In the first situation the test to be applied was a rather lenient one viz. whether or not, on the face of it, the evidence adduced by the crown had established a prima facie case for the accused to answer. The test to be applied in the second situation was, however, a more stringent one viz. whether or not it had been proved beyond a reasonable doubt, that the accused persons had committed the offence against which they stood charged.

I further pointed out that I was not aware of any law that compelled a court of law to deal with the question of credibility of evidence in the first situation, unless, of course, it could be said that on the face of it the crown evidence was so hopeless that to decline to deal with credibility and refuse the application for their discharge would amount to asking the accused persons to go into the witness box and help build a case which the crown evidence had failed to establish.

3/ In my view,

In my view, all that the court of law was expected to do in the first situation was to consider the evidence adduced by the crown, and ask itself the question whether or not, on the face of it, the evidence had established a prima facie case against the accused. If the reply were in the affirmative the court was entitled to refuse the application and reserve the question of credibility to the end when the defence would have closed their case. That did not, however, mean that where, at the close of the crown case, the application for their discharge was refused, the accused were bound to go into the witness box or testify in their defence. They were perfectly entitled to close their case without adducing any evidence at all. It was only then that the court of law would be compelled to deal with the question of credibility of evidence and apply the more stringent test of proof beyond a reasonable doubt to determine whether or not the accused persons had committed the offence against which they stood charged.

When application for the discharge of the accused persons was made, in the present case, I applied the less stringent test of whether or not, on the face of it, the evidence adduced by the crown had established prima facie case for them to answer. I found that there was evidence indicating that prior to the disappearance of the deceased the accused persons might have attended a meeting at which a suggestion was made that the former should be

4/ ritually

ritually killed for the purpose of strengthening the business of a certain John Mahomed; during the time the deceased had disappeared and a search for her was being made the three accused were alleged to have been seen with her dead body in one of the rooms of a house belonging to No. 1 accused at the village of Niceville; in the course of a house to house search for the deceased No. 2 accused was heard to have said it was common knowledge where the missing child was kept and the search was, therefore, a futile exercise and after she had been found dead and taken to the mortuary, the deceased was found to have one of her eyes and breast missing.

I reserve the question of credibility of evidence to the end when the defence would have closed their case and came to the conclusion that, on the face of it, the evidence adduced by the crown did establish a prima facie case for the accused to answer. As they were perfectly entitled to do the defence told the court that in that event they would call the accused persons into the witness box to testify in their defence.

The defence having closed their case, I shall now proceed to deal with the question of credibility and apply the more stringent test of proof beyond a reasonable doubt to determine whether or not the accused persons have committed the offence against which they stand charged.

5/ The court

The court heard the evidence of P.W. 13, Sgt. Ntsihlele, who, in as far as it is relevant, testified that on 17th November, 1988 he was posted at Ramabanta police post when he received a certain report following which he commenced a search for the missing child, 'Mabolae Ranyali - the deceased in this case. On 22nd November, 1988 he received yet another report as a result of which he proceeded to the homestead of No. 1 accused in the village of Niceville at Ha Ramabanta. He was in the company of P.W.14, D/Tper Mohale. On arrival at the homestead of No. 1 accused, P.W.13 and his companion found many people, including No.2 and 3 accused, already gathered there. As No.1 accused, who was allegedly still on her way to the place, had not yet arrived, P.W.13 and the other people waited outside the homestead. It was only after No.1 accused had arrived that the door of one of the rooms of her flat roofed house was unlocked. P.W.13 then entered into the room followed by P.W.14, No.1 accused, Petrose Makoetje, Nos. 2 and 3 accused.

Inside the room P.W.13 found the dead body of the deceased, 'Mabolae Ranyali, covered with "Moholu" blanket and lying on its left side on a bed. He examined the body for injuries but could not find any. He, however noticed that the deceased's body was in a high degree of decomposition. It was already swollen up, teeming with worms or margots, emitting unpleasant smell and the flesh peeling on touch. P.W.13 was positive that the deceased's organs, in particular the eyes and breasts were still in tact.

6/ Having

Having examined it for injuries P.W.13 left the body of the deceased with P.W.14 whilst he went to his police post from where he despatched a radio message to Maseru police. He then returned to the place where he had left the body. He, P.W.14 and the villagers kept a night vigil over the body until the arrival of the police from Maseru on the following day, 23rd November, 1988. The body of the deceased was conveyed in a police vehicle from Ha Ramabanta to Maseru for post-mortem examination.

The evidence of P.W.13 was, in all material respects corroborated by P.W. 14. However, both P.W.13 and P.W.14 testified that they did not accompany the body of the deceased whilst it was being transported from Ha Ramabanta to the mortuary in Maseru. They were not, therefore, in a position to tell the court whether or not it sustained any injuries on the way. According to P.W.13 one of the police officers who were transporting the body of the deceased to the mortuary in Maseru was D/L/Sgt Mathibela. He or, for that matter, any of the people who had accompanied the body of the deceased was not called to testify in this trial.

Be that as it may, P.W.15, Dr. Chetry gave evidence to the effect that she was the medical doctor who on 24th November, 1988, performed an autopsy on the body of the deceased at the mortuary of Queen Elizabeth II hospital. She compiled a post-mortem examination report (Exh C) at the time of examination. The hospital had only basic instruments for performing the autopsy i.e.

7/ instruments

instruments to cut or open the dead body. Her external examination revealed that the body of the deceased was in a high degree of decomposition. Due to its state of decomposition it was not medically possible to determine whether or not the body had had external injuries.

In her own evidence the medical doctor did not open the body for internal examination. It would have been a futile exercise because of the body's state of decomposition. As she was unable to detect any injuries on her body, the doctor concluded that it was not medically possible to determine the cause of the deceased's death.

However, in her evidence P.W.21, 'Matokelo Matabane, told the court that she was one of the people who came to the mortuary of Queen Elizabeth II hospital to collect the deceased's corpse for burial after the post-mortem examination had been performed. When she uncovered the corpse intending to wash it before it could be put into the coffin P.W.21 noticed that the deceased's left eye and the left breast were missing. She confirmed that the body was so decomposed that the flesh was peeling off on touch. Worms and margots were milling over it. She was, for that reason, unable to wash the corpse which was simply put into the coffin and carried home at Ha Ramabanta.

It is significant to observe that P.W.21's evidence that the deceased's left eye and breast were missing is contradicted by P.W. 13, P.W.14 and P.W.15 all of whom

&/ saw and

saw and examined the body for injuries before P.W.21 could see it at the mortuary. If it were true that at the time P.W.21 saw it at mortuary, the deceased's body had its left eye and breast missing the possibility that they went missing whilst it was being turned over during the post mortem examination cannot be ruled out. That being so, it seems to me, the evidence of P.W.21 does not advance the case for the crown any further.

Be that as it may, there can be no doubt from the evidence that the deceased 'Mabolae Ranyali, was, on 22nd November, 1988, found dead in one of the rooms of No. 1 accused's flat roofed house in the village of Niceville. The salient question for the determination of the court is how did she meet her death? i.e. Are the accused, the persons who killed her?

In this regard the court heard the evidence of P.W.1, Makopoi Ranyali, who testified that No. 1 accused was her own mother and the Principal Chief of Ha Ramabanta. She was married to Nyali Ranyali of Lesobeng by customary rites as his second or junior wife. The deceased was born of the marriage and 14 years old. Prior to 16th November, 1988 and following a misunderstanding between herself and the husband, Nyali Ranyali, P.W.1 left the matrimonial home (Lesobeng) and returned to her maiden home at Ha Ramabanta. When she thus left the matrimonial home for her maiden home P.W.1 took with her the deceased and other younger children. She and the children had, at all material times, been living in a roundavel at one of the homesteads of No. 1 accused in the village of

9/Niceville

Niceville within the area of Ha Ramabanta.

According to P.W.1, the deceased did not normally sleep with her in the village of Niceville. In the evening she used to go to another of No.1 accused's homesteads in a neighbouring village of Bochabela where she would put up for the night with her grand mother, 'Masalemone, the mother-in-law of No.1 accused. She would return to Niceville very early in the morning of the following day. The evidence of P.W.1 that the deceased used to put up for the night in the village of Bochabela is, however, denied by No. 1 accused, according to whom the deceased stayed with P.W.1 and always slept with her in the village of Niceville.

It is, perhaps, convenient to mention at this juncture, that 'Masalemone is now deceased and, for obvious reasons cannot be called as a witness in this trial. As it will be shown later in this judgment, the evidence of P.W.1 that the deceased used to go to the village of Bochabela for the night is, in a way, corroborated by Puleng Maboka and 'Masetori Ramarikhoane who testified as P.W.2 and P.W.3, respectively in this trial. No.1 accused herself is admittedly a sickly old person. She suffers from High blood pressure on account of which she spends most of her time in bed. Although she is ordinarily staying at her homestead in the village of Bochabela No. 1 accused may well have not been aware that the deceased was usually sleeping with her grand mother, 'Masalemone in the village of Bochabela because

10/ she

she (deceased) was allegedly going there late in the evening and returning to Niceville village early in the morning. I am inclined to accept as the truth the story of P.W.1, in a way, corroborated by P.W.2 and P.W.3 and reject as false No. 1 accused's version on this point.

In her evidence P.W.1 further told the court that on the late evening of 16th November, 1988 she and her children, including the deceased, were in her roundavel in the village of Niceville. She herself was preparing to go to bed when she heard a knock at the door and one Ramabanta Api, a relative of hers, saying he was just bidding her good night. A short while thereafter the deceased who had been washing dishes went out of the house and P.W.1 never again saw her alive.

It is significant that according to P.W.1, the deceased was in the habit of bidding her, and the other members of the family, good night before retiring for bed at the house of 'Masalemone in the village of Bochabela. When the deceased did not return after she had gone out of the roundavel P.W.1 believed she had left for bed in the village of Bochabela. She was, however, somewhat disturbed by the deceased leaving for bed without bidding her and the rest of the family good night as she was accustomed to do. Consequently, on the following day, 17th November, 1988, P.W.1 got up very early in the morning and went to the house in which 'Masalemone slept at the homestead of No.1 accused in the village of Bochabela, firstly to check if the deceased were there and secondly find out the

11/ reason why,

reason why, on the previous night, she had to retire to bed without bidding her good night as she was accustomed to do.

On arrival at 'Masalemone's house P.W.1 found that the deceased was not in and had in fact, not come to sleep there on the previous night. P.W.1 then went to the house in which No. 1 accused slept at her homestead in the village of Bochabela and inquired from the latter, about the whereabouts of the deceased. In reply No. 1 accused angrily told her to stop pestering her about her (P.W.1's) adulterous child who might be with the soldiers or boys who work at the vehicles of one Vincent Masoabi. According to P.W.1 she was standing outside the window of No.1 accused's bedroom as she talked to the latter who would not even open the door for her.

The evidence of No. 1 accused is slightly different on this point. According to her P.W.1 was inside her bedroom as she talked to her on that morning. However, she could not follow what P.W.1 was saying because she had taken tablets for her illness of High Blood Pressure and was feeling sleepy at that moment. In fact P.W.1 had to leave and return later in the day.

Be that as it may, No. 1 accused told the court that the deceased was a girl of rather loose morals. In the past she had had to stay with the deceased whilst her mother (P.W.1) was living at a place called Roma. One day during that period the deceased slept away from home. Following some information she had received, when the deceased came

home No.1 accused examined her private parts and found that she had been having sex.

Well, if No.1 accused's story, that on the morning in question she had taken tablets for the treatment of her high Blood Pressure illness and she was feeling so sleepy that she could not follow what P.W.1 was saying to her, were to be believed, I fail to understand how she could be so certain that P.W.1 was inside her bed room and not outside the window thereof as she talked to her. Assuming the correctness of No. 1 accused's evidence that she was, on the morning in question, so much under the sedation of tablets for the treatment of her illness that she could not even follow what P.W.1 was saying to her, it seems to me reasonable to infer that her evidence is less reliable than that of P.W.1 who was not, at the time under the influence of drugs. I am prepared, therefore, to accept the story of P.W.1 as the truth and reject No.1 accused's version as false on this point.

According to P.W.1 when No. 1 accused could not be of assistance to her, she returned home and started making inquiries from other families in the village of Niceville. At the home of one Isaac Ramarikhoane she was told by the latter's daughter, 'Masetori (P.W.3) that the deceased had been at her house until late on the previous night, 16th November, 1988. I shall return to the evidence of P.W.1 in a moment.

P.W.3 confirmed the evidence of P.W.1 and testified that the deceased was her play mate. On the late evening

of the day in question, 16th November, 1988 the deceased called at her house. She was carrying an empty water bucket. Later on the same evening she (P.W.3) and another young girl by the name of Fuleng Maboka (P.W.2) with whom she stayed at the home of 'Malisema Ramarikhoana, presumably the wife of Isaac Ramarikhoana, accompanied the deceased on her way to the village of Bochabela where she normally put up for ^{the} night. When they came to a place called Sekiring P.W.3 and P.W.2 returned home whilst the deceased continued alone towards the village of Bochabela.

Although she told the court that she was 13 years old P.W.2 looked younger than her age. She neither had an idea as to who God was nor did she know the difference between telling the truth and a lie. Although she did not know what was wrong with telling a lie she knew that it was a good thing for a child to tell the truth.

I was not satisfied that P.W.2 appreciated the nature of the oath normally administered before the courts of law and the significance thereof. She was accordingly admonished to speak the truth which she had said it was a good thing for a child to tell. In as far as it is relevant the evidence of P.W.2 corroborated that of P.W.3.

It is however, significant to bear in mind that the ages of P.W.2 and P.W.3 are 13 and 14 years, respectively. Due to their tender ages, there is,

14/ therefore

therefore, the need to approach the evidence of P.W.2 and P.W.3 with special precaution. As Hoffmann puts it at page 416 of his work The South African Law of Evidence 1970 (ed):

"The danger is not only that children are highly imaginative but also that their story may be the product of suggestion by others."

Having duly cautioned myself about the danger that is inherent in the evidence of young children, I am of the view that the point that on the evening in question the deceased, who was their play mate, called at the house of P.W.2 and P.W.3 for a brief period before they accompanied her half way to Sekiring on her way to the village of Bochabela seems to be quite an innocent one. I fail to see what the motive could be behind P.W.2 and P.W.3 telling a false story on such apparently innocent issue. I am, therefore, inclined to believe that P.W.2 and P.W.3 were testifying to the truth on this point.

Returning to her evidence, P.W.1 testified that from the home of Ramarikhoana she proceeded to the home of No.3 accused. When she reported the disappearance of the deceased to him No.3 accused took the matter very lightly and told her that the deceased had eloped with her boy friend. Asked who could elope with a child of the deceased's age No.3 accused simply laughed and said the boy friend had taken the deceased to where P.W.1 would never see her again.

In his evidence No.3 accused confirmed that at about 7 a.m. on 17th November, 1988 P.W.1 did come to his

15/ home and

home and reported the disappearance of the deceased. He denied, however, that he took the matter lightly and told her that the deceased had eloped with a boy friend who had taken her where she (P.W.1) would never see her again. According to No.3 accused P.W.1 was not definite about where the deceased had gone to. She at first said the deceased had eloped with Ramabanta. She then said the deceased had a love affair with a certain boy who worked at the buses of Vincent Masoabi but might have gone to her paternal grandmother at Ha Mofoka.

It will be remembered that in her evidence P.W.1 testified that shortly before the deceased left the roundavel in which P.W.1 lived in the village of Niceville, Ramabanta Api had knocked at the door and said he was just bidding her good night. Shortly thereafter the deceased disappeared for good. It may well be that P.W.1 suspected that the deceased had gone away with him. That being so, it seems to me most probable that P.W. 1 told No.3 accused that the deceased had eloped with Ramabanta and she may not be honest with the court in her denial that she told No.3 accused that the deceased had eloped with Ramabanta.

Be that as it may, it is not really disputed that from No.3 accused's place P.W.1 returned to No.1 accused. According to P.W.1, she was disturbed by what No.3 accused had said to her and she intended to report the incident to No.1 accused. It will be remembered,

16/ however,

however, that No.1 accused had told the court that when P.W.1 called at her house earlier on that day she (No.1 accused) had taken tablets for the treatment of her High Blood Pressure and was under so much sedation that she could not follow what P.W.1 was saying. P.W.1 had, therefore, to return to her later in the day. The evidence of P.W.1 that from No.3 accused's place she returned to No. 1 accused seems to confirm the latter's story. Indeed, I must say I find P.W.1's story that she was over worried by No.3 accused telling her that the deceased had eloped rather unconvincing. According to the custom of our society when a girl has eloped her parents wait for the parents of the person with whom she has eloped to report the matter. They do not normally become overworried as P.W.1 seems to expect this court to believe.

In any event P.W.1 told the court that when she saw her approaching No.1 accused who had been sitting outside the house got up and quickly locked the door. She walked away in the direction towards No.2 accused's home. However, P.W.1 followed and caught up with No.1 accused. She reported what No.3 accused had said concerning the disappearance of the deceased. In reply NO.1 accused again angrily told her to stop bothering her. P.W.1 then proceeded to the home of Mafa Nkesi, the headman responsible to No.1 accused. She reported both the disappearance of the deceased and the attitude of No.1 accused. This is confirmed by P.W.8, Mafa Nkesi

17/ and his

and his mother, 'Mamafa Nkesi, who gave evidence as P.W.12 in this trial. In their evidence P.W.8 and P.W.12 testified that the latter was acting for the former in the headmanship of Ha Nkesi. Following the report made by P.W.1 a letter was written by P.W.12, acting for P.W.8, and handed to a messenger P.W.4, Peterose Makoetje with the instructions that he and P.W.1 should take it to the police at Ramabanta police station. According to P.W.1 the police received the letter but did nothing to investigate the matter.

On 18th November, 1988 P.W.1 again went to No.1 accused's place to report that the deceased was still missing. When she saw her coming No.1 accused left her house and walked away in the direction towards Makhaleng river where she sat on a small mountain. According to her, P.W.1 followed and reported to, No.1 accused that there was still no trace of the deceased. In reply No. 1 accused told her to leave her alone as she had already reported the matter to the police. She was clearly unconcerned about the disappearance of the deceased. In her evidence P.W.1 was astonished by the indifferent attitude of No. 1 accused and the police over the disappearance of the deceased. She continued to search for the deceased whilst the police and No.1 accused did nothing about her disappearance.

This is, however, denied by P.W.13, P.W.14 and No1 accused. According to the evidence of the police officers, P.W.13 and P.W.14, investigations

were mounted immediately P.W.1 and P.W.4 reported the disappearance of the deceased on 17th November, 1988. All the police at Ha Ramabanta were alerted. P.W.14 himself went to look for the deceased at the living quarters of Vincent Masoabi's bus conductors. P.W. 13 dispatched radio messages to other police stations and sent for Ramabanta Api who was suspected to have eloped with the deceased. According to her, No.1 accused also went to Ramabanta police station on 18th November, 1988 and reported the disappearance of the deceased. As it will be shown later in the judgment she did not oppose the suggestion that a search should be carried out in all the houses, including her own houses in the villages of Bochabela and Niceville. There is, in my view, ample evidence that the police and No.1 accused did take steps about the report that the deceased had gone missing. P.W.1's criticism that the police and No. 1 accused were indifferent and did nothing about the disappearance of her child is, therefore, unfair.

It is common cause that on the evening of 19th November, 1988 No.1 accused came to her homestead in the village of Niceville and called P.W.1 to the flat roofed house. On arrival P.W.1 found No. 1 accused in the company of No.3 accused in one of the rooms of the house. No.1 accused then told P.W.1 to go and call one Majosepha Api, the wife of No.3 accused. When P.W.1 came with Majosepha Api, No.1 accused informed them that she intended slaughtering a pig at her homestead

in the village of Niceville on the following day, 20th November, 1988. She instructed them to get up early in the morning in order to draw water for the slaughtering of the pig. P.W.1 and 'Majosepha did comply with the instructions of No.1 accused in the morning of 20th November, 1988. The pig which had been fastened to a tree outside No.1 accused's flat roofed house in the village of Niceville was slaughtered by No.3 accused assisted by two other men viz. Puseletso and Matooane.

On the instructions of No.1 accused a young man by the name of Nthofeela Ntoko carried the carcass of the pig together with its head to her house in the village of Bochabela whilst the viscera (internal organs) were cooked and eaten by all the people who had prepared for, and taken part in, the slaughtering of the pig. On the following day 21st November, 1988 No.1 accused instructed P.W.1 to fetch the pig's head from her home in the village of Bochabela. When she brought it to her No.1 accused told P.W.1 that she was giving the head to her so that she and her children could eat it. No.1 accused who had, since 19th November, 1988, been staying at her flat roofed house in the village of Niceville returned to her other home in the village of Bochabela on 21st November, 1988.

According to P.W.1, during the night of the day on which No.1 accused left for her other home in the

20/ village

village of Bochabela she was sleeping in her roundavel when she heard a knock at the window. She asked who it was and then heard a man's voice saying: 'Ausi Makopoi, what are you really intending to do with this child?' When she asked which child it was, the voice replied: " It is 'Mabolae. Here she is still locked up in the house of Ntate Lekhetho."

According to her, P.W.1 frantically got out of the bed and called at the man to wait so that she could open the door for him. When she eventually opened the door and went out P.W.1 found nothing. She only heard dogs backing away as if they were chasing after someone. She ran in the direction of where the dogs were going but could not see any person. She had to return to her house.

Early in the morning of the following day, 22nd November, 1988, P.W.1 went to the village of Bochabela and reported the incident to No.1 accused who, however, dismissed her as being drunk. The evidence of No.1 accused is, however, slightly different in this regard. According to her, it was around 4 p.m. when P.W.1 who appeared to be under the influence of intoxication came to her at her house in the village of Bochabela. She reported that she was arriving from a mill when she heard a person asking, from outside her roundavel, what they intended doing with the deceased ('Mabolae) who was still locked up in Lekhetho's house. However, when she went out of the roundavel P.W.1 could not see that person.

According to her No.1 accused found it incredible that P.W.1 could have failed to see a person who had said such a thing to her in a broad day light. She conceded that she had, therefore, to dismiss P.W.1 who was, in her observation clearly under the influence of intoxication. As it will be shown, in a moment, the evidence of P.W.1 that it was at night, and not 4 p.m., when she heard a person asking what they intended doing with the deceased who was allegedly locked in Lekhetho's house is corroborated by P.W.8 and P.W.4. There is no doubt, in my mind, that No.1 accused was not being honest with the court on this point.

In her evidence P.W.1 went on to tell the court that when No.1 accused dismissed her as being drunk she immediately proceeded to P.W.8's place and again reported the incident. P.W.8 quickly caused a letter to be written and handed to the messenger, P.W.4, with instructions that he (P.W.4) should accompany P.W.1 and hand the letter to the bugle of Niceville village, one Mojapela Ntoko or, in his absence, No.3 accused who was the right hand man of the bugle. P.W.8 himself left for No.1 accused's office in the village of Bochabela.

Both P.W.1 and P.W.4 testified that they found Mojapela Ntoko not in. They then proceeded to No.3 accused's place and found him in. When P.W.4 tried to hand the letter to him No.3 accused refused to take it. The letter was, however, read to him

by P.W.4. The contents of that letter were, in a nutshell, that a search should immediately be mounted for the deceased. After No.3 accused had refused to take the letter, P.W.1 and P.W.4 decided to return to P.W.8. They accordingly proceeded to the village of Bochabela where they found P.W.8 and No. 1 accused at the latter's office. P.W.4 reported to P.W.8 what had transpired when he tried to hand the letter to No. 3 accused. In turn P.W.8 reported to No.1 accused who instructed him to look for men so that a search for the missing child could be carried out. Amongst the people who were assembled to carry out the search were Francis Matsabisa, Mahase Mahase, P.W.4 and P.W.1. Mahase Mahase was not called to testify in this trial.

It is common cause that a house to house search started in the village of Bochabela. The first house visited by the search team could not be searched because the owner thereof was not in. The search team then proceeded to the home of No.2 accused. According to P.W.1, P.W.4 and P.W.5, Francis Matsabisa, when he was told about the mission of the search team No.2 accused expressed a surprise that they were being required to open their houses to be searched whilst it was well known where the missing child was, or words to that effect. He told P.W.1 to speak out when her child would be found. All the houses of No.2 accused were, however, searched but nothing found. No.2 accused

who, is the bugle in the village of Bochabela, then joined the search team which proceeded to No.1 accused's houses in the village. A search was likewise carried out in all her houses but nothing found.

It is worth mentioning that according to P.W.1 and P.W.4 after he had joined the search team No.2 accused is said to have remarked that although they were going (to carry out the search) he did not have a sjambok. Shortly thereafter one Tsepiso Lelimo came and handed to No.2 accused the keys for No.1 accused's flat roofed house in the village of Niceville.

This is confirmed by Tsepiso Lelimo who testified as P.W.6 in this trial. He told the court that he was a political messenger at the administrative office of No.1 accused. After the search team had left her homestead in the village of Bochabela No.1 accused sent him to hand the keys to No.2 accused so that her house in the village of Niceville might be opened and searched. Having handed the keys over to No.2 accused P.W.6 returned to his work at the administrative office of No.1 accused.

In their evidence P.W.1 and P.W.4 told the court that after he had received the keys No.2 accused expressed the satisfaction that he was then holding the sjambok. It can reasonably be assumed therefore, that what No.2 accused meant by sjambok was the keys.

In his evidence No.2 accused told the court that before the search party came to his house P.W.1,

24/ who was

who was going to take some maize from the home of Masalemone, had informed him that the deceased had eloped with Ramabanta Api. When he inquired from P.W.4 what the search party was all about P.W.4 told him to find out from P.W.1. In reply P.W.1 said the search Party was looking for her daughter whom she had earlier informed him had eloped with Ramabanta. No.2 accused denied, however, that he ever said their houses were to be opened and searched whilst it was well known where the missing child was. Nor did he utter the words attributed to him regarding the sjambok.

Notwithstanding his denial, the evidence is, in my opinion, simply overwhelming against No.2 accused. I reject his story and accept as the truth the version of P.W.1 and P.W.4 on this point.

According to P.W.1 after receiving the keys from P.W.6 No.2 accused told the search party to follow him and he let them straight to No.1 accused's flat roofed house in the village of Niceville. This is, however denied by P.W.4 who testified that before coming to the homestead of No.1 accused in the village of Niceville the house of Lekhetho Ntoko had also been searched. At the homestead of No.1 accused in the village of Niceville, the search actually started in P.W.1's roundavel where only the pig's head was found. the search party then consisted of P.W.1, No.2 accused, Francis Matsabisa and P.W.4 himself. He (P.W.4) did not know what had happened to

the rest of the other members of the search team.

This is denied by No.2 accused according to whom all the members of the search team were still present. As it has already been pointed out earlier, Francis Matsabisa testified as P.W.5, He told the court that on the way to the village of Niceville he had stopped to talk to some women and the other members of the search party left him behind. He only joined them when they were already at the flat roofed house of No.1 accused in the village of Niceville. That being so, it seems to me NO. 2 accused cannot be correct in his evidence that all the members of the search team were present when the search was carried out in P.W.1's roundavel.

It is common cause that No.1 accused's flat roofed house in the village of Niceville has two rooms with a separate door leading into each of them from outside. One of the rooms is used by No.1 accused herself, when she is in the village of Niceville. The other room is used by P.W.7, Ikaneng Api, an illegitimate son of P.W.1 to whom she gave birth before she was married to Nyali Ranyali. It is further common cause that P.W.7 was at all material times, working in the mines of the Republic of South Africa. The last time P.W.7 was at home for a month-end was around Thursday, 3rd November, 1988. It follows, therefore, that when, on 16th November, 1988 the deceased went missing at Ha Ramabanta P.W.7 had long returned to his place of work in the Republic of South Africa. No.1 accused assured the court that the

26/ last time she

last time she entered into the room used by P.W.7 was before the latter returned to his place of work in the mines of the Republic of South Africa.

It is not really disputed that whilst approaching No.1 accused's flat roofed house the search party detected a bad smell and noticed flies coming in and out through the window of the room normally used by P.W.7. On arrival at the house, No.2 accused unlocked and opened the door of the room. As he did so, No.2 accused, himself, P.W.4 and P.W.5 noticed a dead person lying on a bed. According to P.W.1 and P.W.4 No.2 accused exclaimed: "here is the person. Where is Nkau (No.3 accused) when things are like this?" He(No.2 accused) quickly went out and locked the door. When she heard NO.2 accused uttering those words P.W.1 started screaming and ran away. She was held and assisted to her roundavel by some of the people who had gathered on the forecourt of the flat roofed house.

According to him, P.W.4 left to make a report at the police station. No.2 accused and P.W.5 admittedly went to report to No.1 accused at her home in the village of Bochabela. She was shocked by the news that a person had been found dead in her house. She immediately accompanied No.2 accused and P.W.5 on their way back to her flat roofed house in the village of Nireville. On the way they met a boy who was going to report to No.1 accused that the police were already waiting at her homestead in the village of Niceville.

The evidence of P.W.13 and P.W.14 as to what happened when No.1 accused eventually arrived at her flat roofed house in the village of Niceville, was, by and large, confirmed by P.W.5, P.W.4 and No.2 accused. It is worth mentioning that in her evidence No.1 accused testified that she did not know^{how} the body of the deceased came to be in the room in which it was found. However, the lock for that room was of a common type usually found in many houses in the village. It was not a far fetched thing, therefore, that an intruder could have opened the room and left the body of the deceased in the room.

In support of the crown case heavy reliance was made on the evidence of P.W.9, Nthofeela Ntoko, who was declared an accomplice witness.

Briefly stated the evidence of P.W.9 was to the effect that he was illiterate although he had attended school up to Std IV and was above average in his class. He knew all the three accused persons who lived in the area of Ha Ramabanta. He did not, however, know the name of the village in which No.3 accused lived at Ha Ramabanta.

One day during the disappearance of the deceased, 'Mabolae, he went to her home in the village of Niceville to ask for piece job from No.1 accused. On arrival he noticed that the door of No.1 accused's room which was normally used by P.W.7 was left slightly ajar. Without even knocking at the door P.W.9 entered into the room which was illuminated by a candle light.

28/ As he entered ...

As he entered into the room he noticed the three accused persons. No.1 accused was seated on a chair whilst Nos 2 and 3 accused were seated on the floor. He also noticed the deceased ('Mabolae) lying on a bed facing towards the door. As she lay on the bed 'Mabolae was motionless, her face swollen and her eyes wide open. He concluded, therefore, that she was already dead. Apart from the three accused and the deceased P.W.9 also noticed a whitish billy-can containing blood behind the door of the room. He was scared to the marrow by the sight of what he had found in that room.

In his evidence P.W.9 further testified that after he had entered into the room No.3 accused told him that he had already caught them red handed and suggested that he should, therefore, be scarified. However, P.W.9 refused to be scarified and hurried out of the room. He returned home. He reported the incident to neither his mother with whom he lived nor to the headman of his village. He only reported it to the C.I.D. police after the latter had called him for interrogations. However, he did not know where he was when the police called him for interrogations. Asked why he did not report the incident P.W.9 said it was because of the confusion in which he was and the fact that the accused had threatened to kill him if he disclosed what he had seen. The threats were made to him by the three accused on the day following the one he had found them with the deceased. He had gone there just for a visit and they

29/were in a

were in a room next to the one he had found the accused and the deceased on the previous day.

Inasmuch as it relates to them the evidence of P.W.9 was denied by the three accused who told the court that they did not know the reason why he was falsely incriminating them in this matter.

It has already been point out earlier, that P.W.9 was declared an accomplice witness. S.239 of the Criminal Procedure and Evidence Act, 1981 provides:

"239. Any court may convict any person of any offence alleged against him in the charge on the single evidence of any accomplice, provided the offence has, by competent evidence other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of the court to have been actually committed."

Notwithstanding the provisions of the above cited section of the Criminal Procedure and Evidence Act, supra, a court of law properly advising itself must, in my opinion, warn itself against inherent dangers of the evidence of an accomplice. As Schreiner, J.A. once put it at page 405 of the leading case of Rex v Ncanana 1948(4) S.A. 399

"an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped by reason of his inside knowledge of the crime to convince the unwary that his lies are the truth."

Lower down on the same page the Learned Judge of Appeal went on to say that the risk of a wrong conviction will also be reduced:

" if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

In his evidence P.W.9 said he had been to school up to Std IV and was above average in his class. He was not, therefore, being truthful when he told the court that he was illiterate. He knew that the deceased lived in the village of Niceville and yet on the same breath told the court that he did not know the name of the village of No.3 accused who lived in the same village as the deceased did. On his evidence, a candle was used to light the room in which he allegedly found the three accused with the dead body of the deceased. He was, however, able to see that the billy can which was placed behind the door contained blood. In my view the room must have been so poorly illuminated that P.W.9 could not say with certainty that the contents of the billy-can was blood. The evidence of P.W.9 that on the day following the one on which he had found the accused and the dead body of the deceased in No.1 accused's house in the village of Niceville he visited the accused at the same house simply does not depict him as a person who was frightened by what he had seen at that house on the previous day as he wants this court to believe. In my finding

31/ P.W.9 has

P.W.9 has contradicted himself so much that it cannot be properly held that the merit of his evidence is beyond question.

It is common cause that after the deceased had been found dead in No.1 accused's house in the village of Niceville the latter immediately caused a radio message to be dispatched to Nyali Ranyali at Lesobeng advising him of the death of his daughter. According to Nyali Ranyali, who testified as P.W.11 in this trial, it had rained heavily and the rivers were in flood at the time. He could not, therefore, proceed to Ha Ramabanta until a week or more had passed. When he eventually came to Ha Ramabanta he was in the company of P.W.10, Linkoane Linkoane.

In their evidence P.W.10 and P.W.11 told the court that on arrival at Ha Ramabanta, they went to the village of Bochabela where they met No.1 accused. When they learned from No.1 accused that the dead body of the deceased was found locked up in her house in the village of Niceville P.W.10 and P.W.11 became suspicious that the deceased had been murdered. This they made clear to No.1 accused who referred them to the police at Ha Ramabanta police station.

According to them on their way to the police station P.W.10 and P.W.11 met No.2 accused next to a tap in the village. After they had greeted and introduced each other No.2 accused asked P.W.10 and P.W.11 what condolences No.1 accused had given them. When

32/ P.W.10 and

P.W.10 and P.W.11 told him that No.1 accused had informed them that the deceased was found dead in her house in the village of Niceville No.2 accused confirmed but expressed a surprise that No.1 accused was still hiding the obvious. P.W.10 and P.W.11 then continued on their way to the police station where they reported what Nos 1 and 2 accused had said. They also told the police that they had a suspicion that the deceased had been murdered. In reply the police assured them that the matter was under active investigations.

From the police station P.W.10 and P.W.11 proceeded to Ha Mofoka in the area of Koro-Koro to inform the latter's parents about the death of their grand daughter, the deceased. From Ha Mofoka the two men returned to No.1 accused's home in the village of Bochabela. As a result of a certain information they proceeded to the police station where they found No.1 accused allegedly under arrest. They were, however, allowed to greet and talk to No.1 accused after which they returned to her home in the village of Bochabela.

Shortly thereafter No.1 accused arrived home and told P.W.10 and P.W.11 that she had been correctly arrested because of her house and the keys. She would, however, rather die than disclose the person who had killed the deceased. She also vowed to engage the services of a lawyer. When they heard this P.W.10 and P.W.11 then became more suspicious about the death of the deceased and decided to return to the police station

33/ where they

where they reported what No.1 accused had revealed.

From the police station P.W.10 and P.W.11 returned to the home of No.1 accused in the village of Bochabela. On the following day they left for their home at Lesobeng. They took with them P.W.1's other young children and the deceased's personal clothings. They left P.W.1 behind because the police still required her for questioning. She too has since returned to her matrimonial home at Lesobeng.

It is significant that according to them P.W.10 and P.W.11 spent altogether 4 days at the home of No.1 accused. They were sleeping in the room normally used by No.1 accused in her flat roofed house in the village of Niceville but receiving their meals from No.1 accused in the village of Bochabela. Asked how he could accept meals, for four days, from No.1 accused whom he suspected of being involved in the murder of his daughter, the deceased, P.W.11 replied that there was nothing he could do because he was away from home and stranded.

It is, however, worth mentioning that in his own evidence P.W.11 told the court that when he left home for Ha Ramabanta he had in his possession an amount of M600.00 with which he intended to cover the expenses of transporting the deceased's corpse for burial at Lesobeng. When he found that the deceased had already been buried at the expenses of No.1 accused who was, however, not prepared to be refunded those expenses because she felt the deceased was also

her child and she had a duty to bury her, P.W.11 decided to use part of the money to pay "bohali" for the marriage of P.W.1. He admittedly gave No.1 accused about M100 as bohali so that he still had about M500 in his possession. That being so, I find his story that he was stranded rather unconvincing. The fact that P.W.10 and P.W.11 spent 4 days at the home of No.1 accused, sleeping in her house and receiving meals from her coupled with the fact that before leaving for Lesobeng P.W.11 even gave No.1 accused money as bohali for the marriage of P.W.1 does not, in my view, depict them as people who, at the time, seriously suspected No.1 accused as a person who was involved in the murder of their child. This is, perhaps, an afterthought.

In her evidence No.1 accused conceded that when they returned from Ha Mofoka P.W.10 and P.W.11 found her at the police station where she had been called for interrogation in connection with the death of the deceased. When she was released to go home and found P.W.10 and P.W.11 at her house in the village of Bochabela she told them that as the deceased had been found dead in her house and the keys to that house belonged to her, she found nothing wrong in being interrogated by the police. She would, however, engage the services of a lawyer so that her guilt or otherwise might be fully investigated. No.1 accused denied, therefore, the evidence of P.W.10 and P.W.11 that she had said she knew the person who had killed the deceased but would rather die than disclose that person.

In my view, No.1 accused's version sounds more sensible than the story of P.W. 10 and P.W.11. They probably did not properly follow what No.1 accused was saying.

According to No.2 accused it was after 13th January, 1989 that he met P.W.10 and P.W.11 for the first time. He was taking his horse for grazing when he noticed them standing outside No.1 accused's homestead in the village of bochabela. P.W.1 then introduced them to him and pointed out that P.W.11 was her husband. He thanked her and continued on his way to the grazing area. No.2 accused, therefore, denied ever meeting and talking to P.W.10 and P.W.11 next to a tap in the village of Bochabela, as alleged.

The question of P.W.1 introducing P.W.10 and P.W.11 to No.2 accused was never raised under P.W.1's cross-examination which was very exhaustive and lasted for several days. I have a feeling that this is yet another of No.2 accused's afterthoughts in an attempt to cover up the truth that he did meet and talk to P.W.10 and P.W.11 in the manner they have described in their evidence.

It is common cause that during the beginning of 1989 the three accused were arrested and kept at various police stations where they were interrogated for several days by a number of police officers including P.W.14, P.W.16, D/Tper Selebalo, P.W.19, P/woman Chabalala and P.W.20, Lt II Mapeshoane. Nos 1 and 3 accused were

36/ kept at

kept at Roma police station whilst No.2 accused was kept at Matela police station. The reason advanced by P.W.20 for taking the accused to various police stations away from Ramabanta police station was lack of office space at the latter police station.

According to the accused they were insulted or tortured by the police during the interrogations in an attempt to force admissions from them. They were even promised to be made accomplice witnesses if they admitted to have killed the deceased. All this is, of course, denied by the police witnesses.

It seems to me that in January, 1989 when they were interrogated by the police the accused were already regarded as suspects. The police need to be reminded that people who are regarded as suspects have a right to remain silent. They cannot be interrogated unless they consent after they had been duly cautioned in terms of the judge's Rules. On the evidence there is no indication that this was done in the present case. Failure to do so has, in my opinion, rendered whatever admissions were made by the accused inadmissible evidence.

It is worth noting that No.1 accused told the court that during her interrogation she was insulted and threatened to be burned with a red hot brick unless she associated herself with a statement allegedly made by Lekhetho Ntoko to the effect that she, the late 'Masalemone, P.W.17, Lekhetho Ntoko, and P.W.18

John Mahomed took part in a meeting in which a conspiracy to ritually murder the deceased in order to strengthen the businesses of P.W.18 was hatched. In order to save her skin No.1 accused agreed to associate herself with the statement.

It is common cause that No.1 accused was eventually taken before a magistrate apparently to make a confession. Once before the magistrate No.1 accused denied that any such conspiracy ever took place and the magistrate declined to record her statement.

Lekhetho Ntoko and John Mahomed were called to testify, on behalf of the crown as P.W.17 and P.W.18, respectively. They too denied to have conspired, with No.1 accused and 'Masalemone, to kill the deceased for purposes of ritual murder.

As I see it the evidence that is alleged to connect the accused with the commission of the offence against which they stand charged is the alleged conspiracy of No.1 accused, the late 'Masalemone, P.W.17 and P.W.18 to kill the deceased for ritual purpose; The evidence of the accomplice, P.W.9, that he found the three accused persons with the dead body of the deceased in one of the rooms of No.1 accused's flat roofed house in the village of Niceville; the utterances of No.2 accused during the house to house search and to P.W.10 and P.W.11; the alleged indifferent attitude of Nos 1 and 3 accused over the disappearance of the deceased and the evidence of P.W.21 that the body of the deceased was found to have a missing eye and breast at the mortuary.

38/ I have

I have dealt with this and the other evidence in the course of the judgment.

By and large, I am not convinced that considered in its totality the evidence is reliably sufficient to connect the accused with the commission of the offence against which they stand charged. The answer to the question I have earlier posted viz. whether or not the accused are the persons who have killed the deceased must, therefore be in the negative.

In the circumstances the three accused ought to be acquitted and discharged. I accordingly order.

B.K. MOLAI
JUDGE.

10th April, 1991.

For Crown : Mr. Thetsane,
For Defendant : Mr. Maqutu for Accused No.1 and 3
Mr. Nathane for Accused No.2.