

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

NDODENI DLAMINI  
VUMELANI NGWANE

1st Accused  
2nd Accused

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola  
on the 2nd day of August, 1991.

The accused are charged with the murder of Polaki Mothaki on the 26th day of February, 1989 and at or near Khabele in the district of Mokhotlong.

In Count II the accused are charged with the murder of Lethola Lengoea on the 24th day of February, 1989 and at or near Khabele in the district of Mokhotlong. The accused pleaded not guilty to both charges.

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Mathibeli Mathinyane (P.W.1) is a herdboyc who cannot read or write. In February, 1989 he was herding animals at a cattle-post at a place called Ntjana-tsa-Morake. One day in February, 1989 he left for Natal in the company of Mosoeunyana and Lethala (deceased in Count II). The purpose of their mission was to steal dagga on the fields on the Natal side of the border. They left at sunrise. On their arrival at the field they found dagga and started harvesting it and putting it in a sack. While they were harvesting a man with a light complexion suddenly appeared and they heard a gun report. They came out of the field and fled. Mathibeli says that as they ran away he fell into some bushes. The man with a light complexion caught him and dragged him down the slope. The man shouted at another man who was below the cliffs and also beckoned to him. That second man came and hit him (Mathibeli) with fists on the face. In cross-examination Mathibeli says that the light man hit him with a branch from a tree and he had a pistol in his hand.

Mathibeli says that the man with a light complexion was tall but not very much. He was wearing a dun jacket, a pair of jeans torn at the knees and North star shoes. The second man was dark in complexion. He was as short as the witness. He wore a black jacket, a dun trousers and black shoes. The first man was wearing a cap with flaps on both sides of the face.

The two men pulled him and took him next to a dam. They caused him to put off his blanket which they spread on the ground and poured the dagga on it out of the bag. They put his head into

the bag down his body as far as the bag could go. They dropped him into the dam. They left him into the dam for a long time. He was suffocating and at last lost consciousness. When he came to he noticed that he was lying on the side of the dam and the sack had been removed. The first man was holding his arms and stretching them till he fully recovered. He raised him and led him up the hill and then let him go. Mathibeli says that he spent about thirty minutes with those two men. His clothes remained at the dam.

After he was released he walked up the mountains towards the pass leading into Lesotho. He was shouting and calling the names of his colleagues because it was raining and misty so that he could not see very far. When he approached the pass Mosoeunyane answered the call. They did not see Lethala again until they reached their cattle-post. They never saw him again.

He eventually went to Mapholaneng Police Station where he made a statement in which he described his assailants. Subsequently he came to Mokhotlong Police Station. On his arrival he was kept in an office whose front windows were high up on the wall so that he could not see outside. The door was closed. He was asked if he could identify his assailants. His answer was in the affirmative. He was called by a policeman outside the office. When he came out that policeman asked him if he could identify the people who assaulted him in Natal if they were there in a line of people near the fence. He said yes. He had not seen the formation of the identification parade because he was sitting down in the office and the windows were high up on the wall. The policeman explained

that if his assailants were amongst those people in the line-up he must identify them by touching them on the shoulders. There were about fifteen people in the parade. Some wore dun blankets while others wore green blankets. The blankets were pinned and were worn in such a way that he could not see their trousers. He walked along the line and identified the man light in complexion and identified him in court as A1. He then returned to the office in which he was before. Mosoeunyane was not there on that day.

The second man was not there in the identification parade. Under cross-examination, <sup>he</sup> says that when A1 appeared he heard a gun report and not an explosion. He told the police at Mapholaneng police station that the man with a light complexion had a flat nose and curled whiskers. When it was put to him that A1 has conspicuous tribal incisions on his cheeks Mathibeli said that he then saw the marks but he had not seen them or observed them at the time of the assault in Natal and at the identification parade in Mokhotlong. He said that at the parade A1 did not have those marks. He admitted that he was frightened when the two men assaulted him. Although it was raining and misty when they went to Natal, it had cleared when A1 arrived. At the identification parade A1 was wearing a green blanket with black colours. It was his first time to see A1 wearing a blanket. Mathibeli denied that he was mistaken when he says A1 is one of the men who assaulted him. The complexion of A1 is no longer as light as it was when he first met him in Natal and when he attended an identification parade in Mokhotlong.

Lesita Sakoane (P.W.2) is a shepherd who was looking after his sheep at Ha Khabele cattle-post. During February, 1989 he was in the company of Polaki (deceased in Count I) who was herding cattle. While they were herding their animals four men came and beckoned to him to come to them. Those men were about thirty or forty paces from him. At the relevant time Polaki was rounding up the cattle. Those men had a gun and they shot at P.W.2; he ran away towards his cattle-post. He heard another gun report and heard a person crying and recognized the voice as that of Polaki. It came from where he had been with Polaki before the four men arrived. He ran away and hid himself amongst the rocks some distance from his cattle post hut. Before he ran away he had noticed that one of the men had a light complexion but he cannot identify that man.

Those four men were not wearing blankets. Three of them were holding sticks while the fourth had a gun in his hand. On that day it was cloudy and misty. The visibility was about four hundred to five hundred yards. On the fourth day he found the corpse of Polaki at the same spot from where he had seen the four men. His face was covered with blankets. There were sticks around the corpse. He reported the presence of the corpse to some herdboys and the body was carried to the cattle-post hut.

Tholang Ramokobo (P.W.3) was a shepherd and looked after his sheep at the cattle-post at Ha Khabele. One day in February, 1989 he was herding the animals in the veld. He was alone and it was before 4.00 p.m. Four men arrived and assaulted him with sticks.

They hit him on the head and body and one of them asked him in Sesotho where the dagga was. He said he knew nothing about dagga. One of the men was light in complexion. He was wearing a dun jacket, the witness could not remember the colour of that light man's trousers and shoes. He was tall and of medium build. He had beard. He was holding a small gun in his hand.

The second man was darker in complexion, he was of medium height and build, one of his eyes was damaged, he had beard. He was holding a stick from a "seotloana" tree which grows in Natal and not in Lesotho.

The third man was light in complexion, he had pimples on the face, he was of medium height and build. He was holding a "seotloana" stick.

The fourth man was young and had a brown complexion. He also held a "seotloana" stick. Tholang says that in addition to the gun the first man also had a similar stick and they were all hitting him with those sticks and the one-eyed man was asking him about the dagga during the assault. They escorted him to his cattle-post and when they arrived there they searched the cattle-post area and the hut but found no dagga. They drove him to a place below the cattle post where they found one Masilo who was returning from the veld. They assaulted Masilo and took his money totalling M70.00.

While the four men were assaulting Masilo Tholang says that he managed to escape and hid himself near his cattle-post. Just before sunset he went to his cattle-post and took another blanket.

He went to the cattle post of one Tholang Nkhabu. They went to the top of the mountain and met P.W.2 on their way. He did not see Polaki on that day.

The police came to his cattle post and he made a statement in which he explained what had happened. Subsequently he went to Mokhotlong accompanied by Masilo and P.W.1. They were kept in the same office with windows high up in the wall so that they could not see outside as the door was also closed. He was called by a policeman who showed him a line of more than ten people and ordered him to go there. When he arrived there another policeman explained to him that he must look carefully at the people in the line and if his assailants were there amongst the people in the line he must identify them by putting his hand on their shoulders. Some of the people in the line wore donkey (dun) blankets and others wore "masolanka" blankets. He identified the tall man with a light complexion. He pointed out A1 in court as that man.

From there he was taken to another office. The curtains were drawn and he could not see outside. Even if the curtains were not drawn he could not see the formation of the parade because that office was in the middle of other offices. A policeman came and called him back to the identification parade. It was again explained to him that if his attackers were in the parade he must point them out by touching them on their shoulders. He pointed out the man whose one eye was damaged. The people in the parade had closed their right eyes apparently in an attempt to look like the man whose eye was actually damaged. He pointed out A2 as the one-eyed man who attacked him. The other two of his assailants were not there in the identification parade.

Tholang says that he assumed that the closed eyes were damaged like that of A2. He was of the view that the A2 was able to manipulate his damaged eye to suit his convenience. IN Court he was opening it in such a way that the white part inside the eye was visible; but at the time of the assault and at the identification parade the eye was closed. He says that he went straight to A2 without taking any careful look at the other people in the line-up because he knew him very well and was distinct from the others. He saw for the first time at the identification parade that A2 had tribal incision marks on his face. He could not see such marks during the attack. He did not observe how many bearded people were there in the parade because he had no difficulty in identifying A2 and went straight to him.

The evidence of Masilo Lesiea (P.W.4) confirms that of Tholang that he came to him accompanied by four men. One of the men asked him where the dagga was. All the men held sticks from a tree that grows only in Natal. He described the first man as light in complexion, of medium height and slim. He was wearing a brown jacket and a brown trousers. He wore black and white canvass shoes, a brown cap with flaps on the sides. He was holding a gun and two sticks.

The second man was short and slightly stout. He was light in complexion and had p'ples on his face. He wore a black and white woollen hat and mine boots.

Theird man was a young man of about twenty years of age. He was dark in complexion. The fourth man was also dark, fat and of



medium height. He was one-eyed and is the man who asked him about the dagga. They searched him and found a sum of M70.00 which they took. They belaboured him with their sticks and took him to two different cattle-post huts and searched but found no dagga. In one of them they found a pot and broke it.

After a period of about two weeks police came to his cattle-post for the burial of a person he did not know. They showed the plice the decomposed body of that person. Subsequently he went to Mokhotlong Police Station where <sup>he</sup> identified A1 and A2 as some of his assailants. I am of the opinion that the identification parade in which he (P.W.4) was conducted in the same manner as in the case of the first three witnesses. I shall therefore not repeat what transpired. He says that he is forgetful sometimes but as far as the identity of the accused is concerned he has not forgotten their features. A2 was the only one-eyed man in the identification parade. He saw the tribal incision marks on the face of A1 for the first time at the identification parade.

Detective Sergeant Ntsika (P.W.5) testified that he is the investigating officer in this case and was assisted by other members of the Force. On the 3rd March, 1989 he received a report concerning the discovery of a dead body. He instructed some of his men to attend to that corpse. Two weeks later he received another report concerning the discovery of another dead body at the same area. Detective Warrant Officer Sakoane attended the scene of the crime.

On the 15th May, 1989 he went to Upper Tugela Police Station in Natal. He was accompanied by one Mosoeunyane. He reported himself to one Sergeant Lamola. They compared the statements they had already

obtained from witnesses and then decided who the suspects were. Sergeant Lamola arrested the suspects in his (Sgt. Ntsika's) presence. They were remanded on a charge in another case. He returned to Lesotho. Before he returned to Lesotho they had found another suspect named Ngwane who was the elder brother of A2. He was later turned into an accomplice but never testified in this Court although some witnesses say he was present when this case was postponed at the session held in Butha Buthe.

On the 2nd June, 1989 Sgt. Ntsika again went to Upper Tugela Police station where he again met Sgt. Lamola. They discussed the case and decided that the charge in Natal should be withdrawn. After the withdrawal of the case the suspects i.e. A1 and A2 were released to him. He introduced himself to them and he told them that he was investigating a case of the murder of Polaki and Lethala whose bodies were found on the top of the mountains. He cautioned them that whatever they wanted to say they would say in Lesotho. They agreed to come to Lesotho with him. He handcuffed them because he was alone. He arrived at his office on the 6th June, 1989 and cautioned the suspects in terms of the Judges' Rules.

A1 gave an explanation that at the relevant time they were chased by boys at that place. They had gone there to inspect dagga which they had grown on the Natal side of the border. He estimated that about six (6) boys attacked them. The explanation was made in zulu but he understood it because he knows a bit of Zulu. A2 gave a similar explanation.

D/Sgt. Ntsika says that he asked Warrant Officer Mofilikoane to hold an identification parade for him. On the 9th June, 1989 he formally charged the accused with two counts of murder. He took Mosoeunyane to Natal so that he could show them where the fight started. He admits that Mosoeunyane saw the suspects before he left Natal. The people who took part in the parade were collected by him, none of them was wearing a jacket. The suspects volunteered to come to Lesotho despite the fact that they were coming to face a charge of double murder. They have no passports and came into Lesotho through Monontsa border post.

The evidence of Ex Detective Warrant Officer Sakoane is that on the 11th March, 1989 he received a report from Letseng-La-Teral concerning the corpse found at Ha Khabele. He left his Mokhotlong station accompanied by a team of police officers. They arrived at Ha Khabele on the 12th March, 1989. The herdboys of the surrounding cattle posts showed them the corpse of a male person which was about five hundred yards from the cliffs which form the boundary between Lesotho and Natal. Near the corpse there was a plastic bag containing dagga. The corpse was covered with wood. The corpse was wearing two woollen hats and beads with something called "Theleli", a blue overall-top and a brown blanket (lesolanka). His left eye socket was hollow, the corpse was in an advanced state of decomposition and was full of maggots. It was so decomposed that it was impossible to identify it. W/O Sakoane decided to bury the corpse at the spot where he found it. He buried the corpse covered in the overall and the blanket. He seized the beads, "theleli and the

the hats (Exhibit 2). P.W.7 Nkokomi Thebe latter identified Exhibit 2 as the property of Lethala who used to work for him as a shepherd. The Crown has therefore proved conclusively that the corpse was that of Lethala Lengoea.

Warrant Officer Mofilikoane was stationed at Mokhotlong at the time in question. He was not one of the investigating officers in the instant case. On the 9th June, 1989 Sergeant Ntsika asked him to conduct an identification parade for him. Sergeant Ntsika had already found people who would take part in the parade. He instructed Trooper Pheko to act as an interpreter because the accused spoke Zulu. He instructed trooper Lelingoane to be in the office with the witnesses who could not see the formation of the parade because the office in which they were kept was at the back. He instructed Trooper Mabote to bring the witnesses one by one to the parade. There were ten people who took part in the parade. They wore dun blankets except two who wore "masolanke" blankets. Both accused wore dun blankets. All the people in the parade were wearing their blankets in the normal way.

He explained to suspects and the people in the parade that they were permitted to occupy any position they like. A1 occupied position 8. However in the identification parade (Exhibit A) Warrant Officer Mofilikoane has recorded that "1st suspect No.1 was between No.9 and 10". He says that he filled Exhibit A after the people had taken their places in the parade. He then ordered trooper Mabote to bring the first witness Tholang, just before Tholang came he had taken A2 back into the cell. Trooper Mabote was still in his view

when he called the first witness. When Tholang came to him he asked him to recall the events which took place at their cattle post. He must take his time and look at the people in the parade and see whether their attackers were there or not. If he saw one of them he must point him out by touching him on the left shoulder. Tholang stopped in the middle of the line and pointed out A1.

Warrant Officer Mofilikoane testified that the people in the parade of the same complexion and height. There were people who were light in complexion, there were brown ones and darkish ones. After Tholang had identified A1 he looked at the other people and said nothing. He was taken to another office different from the first one from which he had come. From that office Tholang could not see the formation of the parade because that office was at the back. A2 was brought to the parade and he was asked to choose any position he like. He chose position between 7 and 8. Masilo was called and the same explanation was made to him that if their attackers were in the parade he must point him or them by touching them on the left shoulders. Before then he had noticed that A2 had a damaged right eye. He asked all the people in the parade to close their right eyes. It was not Masilo but Tholang who was recalled to the parade and a similar explanation was made to him. He then identified both A1 and A2.

Masilo was called and it was explained to him that if the people who attacked them at their cattle post were there in the parade he must point them out by touching them on their left

shoulders. He identified A1 and A2. He deposed that after each witness had done its work he asked the accused if they wanted to change their position but they were satisfied with former positions.

Under cross-examination Warrant Officer Mofilikoane admitted that Exhibit A was not properly filled in that he has not shown at the back the results of each witness; he has not shown that trooper Phoko was his interpreter. The names of the accused do not appear anywhere on Exhibit A. He says that apart from his word there is nothing to show that the identification was in anyway connected with the accused before court. I do not think that the above statement is correct because we first of all have the evidence of Detective Sergeant Ntsika who asked Warrant Officer Mofilikoane to conduct an identification parade in respect of the accused before Court. In addition to that we have witnesses actually identified the accused as their attackers.

He deposed that in the parade there were some people who had the same complexion as that of A1 and others who had the same complexion as that of A2. He was of the opinion that although Exhibit A had some mistakes it was reliable. He made two people in the parade to wear blankets of a different colour to make sure that the witnesses knew the accused. He denied that two different "masolenka" blankets were worn by the accused. At the time of the parade he did not notice the incision marks on the face of A1 but in Court he could see them when he goes closer to A1.

One of the first questions to be decided by the Court is the reliability of the evidence of the identifying witnesses. The witnesses may be honest and have a strong belief that the person who committed the offence is the person they subsequently identify at an identification parade. In his heads of arguments Mr. Thabane, Counsel for the Crown, refers to South African Law of Evidence, 3rd edition by Hoffmann and Saffert at page 478. In my second edition of the same book the same quotation appears at pages 435 to 436 where the learned author says:

"It is generally recognised that evidence of identification based upon a witness's recollections of a person's appearance is dangerously unreliable unless supported by other evidence. The average witness's ability to recognise faces is poor, although few people are prepared to admit that they may have made a mistake. On a question of identification, therefore, the confidence and sincerity of the witness are not enough."

In S. v. Mehlapa, 1963 (2) S.A. 29 (A.D) Williamson, J.A.

said:

"The often patent honesty, sincerity and conviction of an identifying witness remain, however, ever snares to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence."

In R. v. Shekelele, 1953 (1) S.A. 636 (T) at p. 638

Downing, J. said:

"Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplained, untested and uninvestigated, leaves the door wide open for possibilities of mistake."

On page 437 of the South African Law of Evidence -  
supra - the learned author states the law as follows: "The  
accuracy of a witness's observation depends first, of course,  
upon his eyesight. Secondly, it will be affected by the  
circumstances in which he saw the person in question, the  
state of the light, how far away he was, whether he was able  
to see him from an advantageous position, how long he had him  
under observation. Thirdly, impressions of appearance may be  
distorted by the witness's prejudices and preconceptions. he  
may expect people who behave in a particular way or belong to  
a certain class to have some physical characteristic, which  
he will ascribe to such a person without having verified his  
belief by observation. Fourthly, his ability to form an  
accurate impression will be affected by his state of mind. Did  
he have any reason to take particular notice, or was his attention  
concentrated upon something else? Did he really see who was there,  
or did he think he was seeing the person whom he expected to be  
there? Was he in a state of mind to make a trustworthy observa-  
tion of anything? In R.v. T. the court said that the witness's  
identification should to some extent be discounted because she was  
suffering from shock at the time when she saw her assailant. Fifthly,  
the distinctiveness of the person's appearance. The court will be  
able to observe whether the accused has any peculiar features,  
but some people look distinctive to one witness and not to another."

Again in R.v. Turnbull (1976) 3 All E.R. 549 at p. 552

Lord Widgery, Cj. said:



"Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

P.W.1 Mathibeli was in the company of A1 for a considerable time in Natal when he was assaulted and finally put in a sack and dropped into the dam. He was with A1 and his companion for about thirty minutes and the two men were holding him. I agree with the submission that P.W.1 was frightened. However, he had enough opportunity to observe his assailants. At some stage they were not actually assaulting him but were stripping him of his clothes before they put him in a sack. I am of the view that P.W.1 had a very good opportunity to observe his captors because they were with him <sup>for</sup> a considerable time. The description of his captors to the police seems to tally with the actual appearance of A1. The visibility was good because although it had been raining and misty in the morning of that day, when the events described above took place the rain had stopped and the mist had cleared.

The evidence of P.W.1 is relevant to the present charges because it tends to connect A1 with the dagga fields in Natal from which the herdboys at Ha Khabele used to steal dagga. As a result of these thefts A1 and his colleagues decided to come to Lesotho in order to punish the herdboys at the cattle posts near the border between Lesotho and Natal.

P.W.1 impressed me as being a very honest and credible witness. I found his evidence to be very reliable inasmuch as he had a good opportunity to see A1 and his companion.

The evidence of P.W.2 Lesita Sakoane has some relevance to the present charges. When the four men came to where he was herding his animals, one of them beckoned to him to come to them. When they shot at him he ran away. As he was running he heard another gun report and heard Polaki crying. He never saw Polaki again until four days later when he found Polaki's corpse at the same place from where he had heard him cry. His evidence was criticized on the ground that it does not connect the accused with the offences charged and that he never recognized any of the people who attacked him. It is true that he did not see the four men at close range but he saw that one of them had a light complexion. Although he could not identify that man with a light complexion his evidence corroborates other witnesses that on that particular day four men were on the rampage in the area of Khabele. One of them was light in complexion.

The second criticism is that Khotsa who lived with Polaki was not called to say whether on the day in question he returned

to the cattle post. It was argued that the mere fact that P.W.2 heard Polaki cry when he (P.W.2) ran away does not necessarily mean that he died as a result of the assaults by the four men seen by P.W.2. The question is whether the only reasonable inference to be drawn from the facts is that Polaki was killed by the four men. I shall return to this aspect of the case after considering the evidence of other witnesses regarding the behaviour of the aforesaid four men.

P.W.3 Tholang Ramakobo was arrested by four men, two of whom were light in complexion while the other two were darkish in complexion. they assaulted him and finally escorted <sup>him</sup> to his cattle post where they searched the hut but found no dagga. While they were assaulting him they caught one Masilo (P.W.4) and assaulted him as well and took his money totalling M70.00. Masilo confirms what P.W.3 has said. Tholang was in the company of the men for a considerable time and had all the chance to see them well. The same applies to Masilo and Lesita. Masilo was assaulted and taken to two cattle posts where the four men searched for dagga but in vain. I found Lesita, Tholang and Masilo to be honest witnesses and their evidence is reliable because the accused and his companions did not cover their faces with anything in an attempt to disguise themselves. In the case of Mathibeli, Tholang and Masilo the accused and their companions held them at close range for a very long time.

It is common cause that at an identification parade held on the 8th June, 1989 P.W.1 identified A1 as the man who assaulted

him in Natal. P.W.3 and P.W.4 identified A1 and A2 as the people who assaulted them at Khabele cattle post.

The crucial point is whether the identification was conducted in a manner that was fair and which did not prejudice the accused in any way. The leading case on this subject is peboho Mohajane and another v. Rex, C. of A (CRI) No.7 of 1984 (unreported) in which Mahomed, J.A. (As he then was) said at pp. 3 - 4.

"There are important deficiencies in the evidence pertaining to the identification parade. The courts have over the years, set out a number of salutary rules, concerning the holding of identification parades, which are relevant to the present matter and which should not need repetition.

1. The prospective witness should be asked to give his description of the alleged offender at the earlier opportunity to avoid the risk of faulty recall and the risk of discussing recollections with other potential witnesses (R.V 1959 (2) A.S. 116 (W) ).
2. The identification parade itself should for this reason be held as soon as is reasonably possible.
3. There must be a sufficient number of persons present on the parade to make any consequent identification significant. 8 or more persons are generally necessary. (Hoffmann South African Law of Evidence 2nd edition p. 438).
4. The persons present on the parade must be substantially similar in appearance and dress. If by appearance, dress or otherwise, the accused stands out conspicuously, the identification of the accused might not only be unfair to him, but of little evidential value. More particularly, where the culprit is alleged to have worn attire of a distinctive colour or design at the time of the offence, there would be little significance in an identification taking place at a parade where the accused alone is attired in such colours or design.

R.v. Masemang 1950 (2) S.A. 488 (AD)

S. v. Mhlati 1984 (4) S.A. 629 (AD)

5. The accused person, on an identification parade should be given a fair opportunity if he chooses, to change his or her position on the parade.
6. An identifying witness should not be required to make his identification on the assumption that the culprit concerned is in fact on the parade. The witness should be asked to point out the person concerned "if such person is present" on the parade. (R.v. Nara Sammy 1956 (4) S.A. 629 (T) 1926 S.A.L.J. 287).
7. Care should be taken to ensure that the identifying witness does not see the accused before the identification parade is assembled, particularly in circumstances where he can get the impression that he is indeed the person suspected by the police. (Kola v. R 1949 (1) P.H.H. 100 (AD)).
8. Where there is more than one potential identifying witness, steps should be taken to ensure that such witnesses do not have the opportunity of discussing the identification. (R. v. W 1947 (2) S.A. 708 (AD) at p. 712).
9. It would often be salutary to hold more than one identification parade, and to include a "blank parade" on which the accused is not present at all. (Hoffmann (supra) p. 440).
10. Contemporaneous notes of any relevant circumstances accompanying any identification at such a parade, should be kept where it is possible e.g. if the witness shows hesitation or passes the accused a few times before finally identifying him or if he uses words indicating some uncertainty such as "I think it is him."
11. It is undesirable that the officer who is investigating the case should also be in charge of the parade (S. v. Narr Sammy (supra)).

12. A photograph of the persons assembled on the parade, preferably in colour, should be made available to the Court whenever possible so as to enable the court to appreciate the significance of the identification or any objection thereto."

In the instant case it was after only a few days that the statements of the Crown witnesses were recorded by the police. In those statements a description was given of the people who attacked the said Crown witnesses. I am of the opinion that the statements were taken at the earliest opportunity and that the minds of the witnesses were still very fresh as to the identity of their assailants. The risk of discussing recollections in the instant case does not exist because everybody's mind was still very fresh on the identity of their assailants.

The identification parade was held after a period of more than three months. I do not see any risk in this because the witnesses had already committed themselves in the statements they had made. Moreover the accused live in Natal which is far from Mokhotlong. There is absolutely no likelihood that during the period from February to June, the witnesses had the chance to meet the accused by any chance.

There were twelve people in the parade; ten of them wore blankets of the same colour and two wore blankets of different colour and type. Warrant Officer Mofilikoane testified that he deliberately made two people to wear different blankets to make sure that the witnesses knew the people who attacked them. It was suggested in cross-examination that A1 was one of the two people who wore blankets of different colour and type. Warrant Officer

Mofilikoane denied this and said A1 was wearing a dun blanket. I tend to believe him and reject P.W.1's evidence that A1 wore a green blanket. I do not think that Warrant Officer Mofilikoane could be so stupid as to make A1 distinct from the other people in the parade. P.W.1 must be mistaken on this point.

Regarding the appearance of the people in the parade Warrant Officer Mofilikoane said they were substantially similar although some were light in complexion while others were dark. I do not think that the accused were in any way prejudiced because A1 is light in complexion while A2 is dark. So the presence of people light in complexion is in favour of the A1 while the presence of the dark ones is in favour of A2. Be that as it may, I think it would have been much better that two different parades were held so that in each parade people of similar complexion could take part.

It seems to me that Warrant Officer Mofilikoane did his best not to give the witnesses the impression that the people who were to be identified were actually present in the parade. On the whole I think the identification was conducted in a just and fair manner and that the accused were not prejudiced in any way.

I do not agree with the suggestion that A2 was prejudiced because he was the only person whose right eye is completely damaged. I disagree with this suggestion. A2 has a peculiar feature of being one-eyed and this is the feature which Warrant Officer

Mofilikoane again did his best to be fair by asking the people in the parade to close their right eyes so that the witnesses may be confused. The witnesses pointed out the A2 without any difficulty.

I do not agree with Mr. Khaue that the incision marks on the faces of the accused particularly A1, are obvious. From the bench to the dock is a distance of about six paces but I could not see those marks. A1 and A2 had to come closer to a distance of about two paces in order for me to see the marks. I admit that my eyesight is not very good but even most of the witnesses could not see those marks from the witness-box. The witnesses saw the marks for the first time at the identification parade. I shall not place any great importance on the fact that the witnesses did <sup>not</sup> notice the marks when they were attacked by the accused inasmuch as I do not agree that they are so obvious that irrespective of the circumstances under which the witnesses saw the accused for the first time they ought to have seen them.

During the conduct of the identification parade Warrant Officer Mofilikoane was supposed to have filled an identification parade form (Exhibit A). He obviously had no idea of how that form has to be filled. He did not show the names of the accused, the complainant, the R.C.1 Number and the entire back part showing the result of each witness, occurrence book entry number, the name of the interpreter and the language used. I have already stated above that in his evidence before Court he described in a satisfactory manner what he did and his evidence is confirmed by the witnesses who pointed out the accused as well as the investigating officer.



At the end of the Crown case the defence close their case without calling any witness after an application for their discharge was refused on the ground that there was a prima facie against both accused in count 1. They were found not guilty and discharged on count II. The question is whether the Crown has proved its case beyond a reasonable doubt. The accused's failure to testify is only a factor to be taken into consideration to determine whether the prima facie case can now become conclusive.

This aspect of the law was made clear in S. v. Theron, 1968 (4) S.A. 61 (T.P.D.) at pp.63 -64 where Trollip and Trengove, JJ. said:

"Generally, in regard to an accused's failure to testify, a useful, practical distinction can be drawn between situations in which the State's case is (i) the direct testimony of a witness or witnesses and (ii) circumstantial evidence. In (i), if the testimony is wholly credible or non-credible, no problem arises, for in the former case the accused's failure to contradict the credible evidence must inevitably result in the prima facie becoming conclusive proof, and, in the latter case, it would be irrelevant: there would then be no prima facie proof, and the accused's silence could not make or restore the State's case. It is only when the State's evidence, although amounting to prima facie proof, creates some doubt about its credibility that the accused's silence become important, and may be decisive, for his failure to contradict the State's evidence may then resolve the doubt its credibility in the State's favour. Of course, if the accused adduces other evidence to contradict the State's, his silence would then usually lose much, if not all, of its importance. Similarly in (ii), if the inference of the accused's guilt or innocence can be drawn with the requisite degree of certainty the accused's silence is unimportant. It is only of importance if, although there is prima facie proof of his guilt, some doubt exists whether, that proof should be now regarded as conclusive, that is, that the only reasonable inference from the facts is one of guilt. His silence then becomes a factor to be considered along with the other factors, and from that totality the Court may draw the inference of guilt.

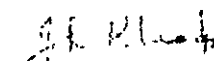
The weight to be given to the factor in question depends upon the circumstances of each case" (per HOLMES, J.A., in S. v. Letsoko and Others, 1964 (4) S.A. 768 (A.D.) at p. 776 C-E). See also R.v. Ismail, supra at p. 210; S.v. Masia, 1962 (2) S.A. 541 (A.D.) at p. 546 E-H)."

The defence of the accused is that of mistaken identity. I have already found that the evidence of the Crown on that point is reliable and that the people who attacked them are the two accused before Court and two others who are not before court. We know that one of them was going to be used by the Crown as an accomplice but he failed to turn up on the day of the trial and could not be found at his home. The defence of mistaken identity involves an element of alibi. Unfortunately the defence did not indicate where the accused were on that fateful day despite the fact that the evidence of Detective Sergeant Ntsika was to the effect that when he interrogated the accused their explanation was to the effect that on the day in question they were chased by boys at that place. They had gone there to inspect dagga which they had grown there. That explanation seems to coincide with the occasion <sup>regarding</sup> P.W.1, Lethaha and Moseunyane. The second occasion was when the accused and his companions crossed the border into Lesotho and assaulted almost every hardboy they came across. On this occasion they raise the defence of mistaken identity. I reject that defence and come to the conclusion that the accused were properly identified in a parade conducted in a fair manner which did not prejudice them.

Now coming back to the question whether the only reasonable inference to be drawn from the fact when Lesita

Sakoame ran away after seeing the four men he heard Polaki cry, is that he was killed by those four men. I am of the opinion that that is the only reasonable inference to be drawn from the facts ( R. v. Blom, 1939 A.D. 188). The corpse of the deceased was found four days later at the same place where P.W.2 heard him cry at the very time when accused were attacking every herdboy they came across. They obviously found the deceased when P.W.2 ran away. They hit him with their sticks until he died. The injuries found by the doctor who carried out a post-mortem examination are consistent with the use of sticks which were fresh and flexible as a whip or sjambok. He found fracture of the skull and bruises on the chest and back. (See Exhibit 8).

I come to the conclusion that the Crown has proved its case beyond a reasonable doubt. The accused foresaw that assault of Polaki might cause his death but they were reckless as to whether death occurred or not. I find the accused guilty of murder.

  
J.L. KHEOLA  
JUDGE

2nd August, 1991.

EXTENUATING CIRCUMSTANCES

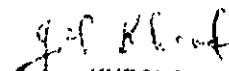
In the view that I take the only extenuating circumstance is the fact that this is an case of dolus eventualis. The appellate Division held in S.v. Sigwahla, 1967 (4) S.A. 566 (A.D.) at p. 571 that:

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

I find that there are extenuating circumstances.

SENTENCE: Twelve (12) years' imprisonment each.

My assessors agree.

  
G.L. KHEOLA  
JUDGE

12th August, 1991.

For Crown - Mr. Thetsane  
For Accused - Mr. Khaueo.