

CRI/T/51/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

KUBUTU KUBUTU

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 30th day of September, 1994.

The Accused is charged with the crime of murder:

"In that upon or about the 27th day of August,
1990 and at or near Mohalalitoe Township within
the Maseru City, in the district of Maseru, the

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said accused did intentionally and unlawfully
kill Bathobakae Mokhothu."

The indictment was issued on the 27th day of May, 1991. This matter was brought for trial before this Court on the 29th March, 1994. It was postponed to the 16th May, 1994 because Crown witnesses had not been served. On the 17th May, 1994 the trial commenced almost three years after the date of the indictment.

The first Crown witness (P.W.1) was Walter Rakhoabe. He told the Court that on the 27th August, 1990 there was a teachers' strike and children were not at school. Several children had gone to the bus stop and later even more children came back running from the direction of the bus stop to Mohalalitoe where P.W.1 was. There were those who went towards Malikoche's house where some boys were.

P.W. 2 and others were sitting outside, next to the fence some boys were standing. Three minutes later three young policemen came. Two of them had whips while one of them had a gun. A policeman who looked senior came. He was carrying a whip.

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P.W.1 was 60 metres from Malikoche's house. P.W.1 heard that the door of Malikoche's house was being kicked and the policemen wanted to enter. Mampesa Letsie was trying to plead with the policemen who were now in a violent mood. Three boys emerged from the house running and the three policemen gave chase. The policeman who appeared to be an officer ordered the policeman with a gun to shoot the boy they were chasing. This officer who gave the order was Leuta. The boy who was being chased and who was to be shot according to the order was Bathobakae Mokhothu. There was a gun report, Bathobakae Mokhothu staggered and fell.

As P.W.1 and Rantšeli went towards the fallen Bathobakae Mokhothu, P.W.1 saw one of the policemen assaulting the mother of the fallen Bathobakae Mokhothu. Then the policemen just calmly walked away leaving Bathobakae fallen on the ground. A vehicle was later found to convey Bathobakae to hospital. When deceased reached the hospital he was either dead on arrival or died soon thereafter.

During cross-examination it emerged that P.W.1 could

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not have seen much that occurred at Malikoche's house and the fact that there were 15 policemen there, P.W.1 says he already knew Leuta the police officer in charge. According to P.W.1 several shots rang, but not in the village. P.W.1 was not in the list of witnesses supplied to the defence. P.W.1 did not see other policemen who might have been carrying fire-arms.

P.W.2 Steven Rantšeli says almost the same thing as P.W.1 about children who came running into Mohalalitoe. He says there was later a lot of activity at Malikoche's where people were being assaulted by policemen who had followed the children who were running away. P.W.2 says he went into the house as they had been sitting outside with P.W.1 and others. He was called by P.W.1 to go and see Deceased who had fallen down. Two policemen were standing next to the fallen Deceased, they turned their backs and left. P.W.2 and others looked for a vehicle and took Deceased to hospital. Deceased was covered with blood, P.W.1 was not sure if Deceased was still alive.

P.W.3 Mahase Mofelehetsi, says Deceased and others were outside when they saw police chasing young people who

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were running down Mohalalito village. They went into the house and closed the door. While they were in there they heard a whip sound as the police were assaulting the lady next door demanding that she should open the door. This lady was crying. Someone unlocked the door. Soon thereafter there was a gun report. He went out through the window. The whipping had stopped. P.W.3 found two policemen and asked them what was wrong and they did not reply. One of these policemen was holding a firearm which was two and half to three feet long. He heard some children saying they have shot him.

P.W.4 Liteboho Mpholo in his evidence says he had been with Deceased 30 minutes before he was shot. Deceased went to Malikoche's. He saw some young people running after a while he saw about 8 policemen chasing these young people four had whips, four had guns. Some policemen were at Malikoche's. P.W.4 says he saw Deceased get out of Malikoche's, the policemen whipped Deceased and Deceased ran away. He heard a report of a firearm, saw Deceased jerk upwards and fell. The mother of Deceased got to Deceased. When he got to Deceased and tried to pull out the tongue of Deceased the police had left. A

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police vehicle came and took the policemen away. P.W.4 says he heard another gun report after Deceased had been shot. P.W.4 could not recognise any of the policemen.

P.W.5 in her evidence concentrates on the fact that Malikoche's house was occupied by Matsie and Teboho Khosi. The police who were over five in number knocked at Matsie's rooms and at Teboho Khosi's door. Teboho Khosi opened her door. The police demanded that she should open Matsie's rooms. When she told them she could not do so as that was not her house, Teboho Khosi was then assaulted by the police and ordered to take out the children that had locked themselves inside. P.W.5 went to the police to plead with them to stop assaulting Teboho Khosi but they would not listen.

P.W.5 Mampesa Letsie says Teboho Khosi was forced to break the window of the room in which the children were. Some policemen went in through the window and assaulted them, the result was that the children inside opened the door and ran out. Deceased was the first to go out, the policemen at the door got hold of him and whipped him. Deceased managed to escape. One of the policemen said let

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me hold him. P.W.5 heard a gun report, Deceased lifted up his hands ran forward and fell. P.W.5 says the policeman who said let me hold him actually aimed a 2½ feet long gun at deceased.

P.W.5 then opened the gate for a police vehicle. None of the boys was arrested, but one of them who was her relative was wounded on the chin.

P.W.6 Khotso Makae carried Deceased to hospital. He realised Deceased was dead before he arrived at the hospital. He had to take a round-about route to avoid the police who were all over.

P.W.7 Mabathobakae Mokhothu is the Deceased's mother. She says Bathobakae, the Deceased, asked to be allowed to go to a football practice session. Ten minutes later he heard a report of a firearm. She met some children running and crying saying Bathobakae was in Malikoche's house. As she went towards Malikoche's she saw policemen in brown uniform whipping her son (the late Bathobakae). Bathobakae ran into P.W.7's arms. The policemen assaulted her as well. She noticed her son was bleeding. The police

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then went away in a Government vehicle. She looked for a vehicle to take Deceased to hospital. They took a round-about route to hospital for fear of meeting the police. She says on arrival in hospital she asked the doctor to help her son live, but she was told her son was already dead. In cross-examination P.W.6 says she only heard one gun report.

P.W.8 was Mr. Letšela Mapetla the Chief Magistrate. He produced a statement made by the Accused styled a confession. This by all parties was found not to be a confession although it was styled a confession. It certainly was a statement made before a magistrate. The relevant portion reads:

"when we got below the road that goes into Mohalalitoe below Lesotho High School we found many people - adults and youngsters. As we jumped off the vehicle they fled into the Township of Mohalalitoe, we chased after them. When we got near the LOIC school, we saw some of them enter a certain house. We went there and found a certain young woman whom our officer-in-

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charge, a police member of the band ordered to open the door of that house. That lady took a stone and broke open the window. When we looked inside, I saw 5 or 6 boys in there. When they noticed the window was open they opened the door and went out. We apprehended two of them while the rest got away. While they fled I fired into the air and in fact did so. I do not know what happened but I realised there was some one shot when he fell down. We got into the Traffic Department vehicle and went back to Lakeside. We then continued our work. I am the only person who fired and a person fell down. We did not go to that person because then many people were going upwards, hurling insults and picking stones. That is all I say."

Initially Mr. Mahlakeng, Counsel for Accused, was going to object to the statement that had been made as having been made under duress despite the fact that it was not a confession. It seemed there was going to be a trial within a trial. That did not materialise. That being the case it is admissible. The Accused has not suggested this

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statement was made under duress.

The Crown brought the evidence of P.W.9 Detective Warrant Officer Mokoroane. He says on the 28th August, 1990 he went to Mohalalitoe to Malikoche's house as part of the investigation of the case. He found a window broken. He inspected the area around the place. He found an empty shell of a 9mm pistol. He took it. Fifty paces down the road, he found drops of blood. He then went to Queen Elizabeth Hospital where he found the body of Deceased. He describes the wounds on Deceased.

After that P.W.9 went to Captain Rikabe who was in charge of the armoury. Captain Rikabe gave him a Kommando firearm together with 21 live bullets.

The Kommando rifle was handed in as Exhibit 1, its serial number is 78KA001822 and it was marked Exhibit 1. The empty shell was marked Exhibit 2. The Magazine with 18 rounds of ammunition was marked Exhibit 3.

Under cross-examination P.W.9 revealed that the late Malephane played an important part in the investigation. P.W.9 does not know what happened to the other three

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bullets. P.W.9 gave Accused a charge.

P.W.10 Detective Trooper Kaibe says on P.W.9's instructions he went to fetch Accused from Central Charge Office in order to take Accused to P.W.9. Accused had no injuries.

P.W.11 Teboho Khosi was working at the hospital at the time. As P.W.11 was doing night duty, she had to sleep during the day. While she was lying down in the room she had rented from Malikoche, she heard footsteps of people running and he heard people getting into the room next door. After a little while there was a gun report. As it was a day of riots she looked out.

P.W.11 must have got out of her room because she met a policeman who sent her to go and tell the boys to get out of the next room. P.W.11 did so by knocking at the door and telling the boys that the police had said they should get out of the house. Just then a group of policemen came on the spot and began hurling insults at her ordering her to open the door. They then assaulted her and she cried. The beating went on for along time

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until neighbours intervened.

At that stage one of the policemen drove her to the window and ordered her to break it, but she refused. That policeman broke the window with a rifle butt, pointed a gun at the boys inside the house and said they should get out of the house otherwise he would shoot them. The boys got out. One of the boys who got out was the Deceased Bathobakae Mokhothu. He and the others were assaulted with whips and they had to run away. Bathobakae ran in the direction of his parents' home. As Deceased did this one of the police officers shouted shoot him. A policeman shot deceased. Two policemen were chasing deceased at the time he was shot. P.W.11 saw one of those policemen hit Deceased after Deceased had fallen. The other policeman hit Deceased's mother with a fist.

All the policemen got into a motor vehicle and left after Deceased had been shot and they left Deceased lying there. P.W.11 went to the police as they got into a motor vehicle and asked them to take her with them as she was injured. Those policemen drove away. A different police vehicle, a combi came and took her to go and get medical

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treatment.

In Cross-examination. P.w.11 denied she broke the window with a stone. She said she was also assaulted inside her own house after she had requested the police to go in and search it. When the door was opened she and the police rushed to the front of the house. The police were just whipping people, they were not arresting them.

P.W.12 Sergeant Lemphane is a police-woman. She told the Court that she was working in the armoury on 9 August, 1990. P.W.12 said an exercise book was used as a fire-arms register. In it was recorded the date, name of the policeman, number of the gun, number of bullets issued and the policeman would then sign for the firearm. When the firearm was returned the same process would be repeated and the particulars of the gun together with the number of the bullets returned and the date would be recorded.

P.W.12 says on the 28th August, 1990 she remembers dealing with the Accused. Accused was returning a fire-arm he had taken on the 13th August, 1990. During that period there was instability in Maseru. On the 28th

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August, 1990 Accused was among the police who returned firearms. P.W.12 says she never touched the firearm that was being returned nor did she count the number of bullets that were being returned. She says she took Accused's word that he had returned twenty-five bullets and recorded what Accused told her, in the register.

The next policeman Lefu who took the firearm that Accused had returned together with the bullets, queried the number of the bullets. Lefu said the bullets were 21 not 25. P.W.12 says when this mistake was discovered both Accused and Lefu were in the room. P.W.12 drew Accused's attention to this fact, but she did not alter the register nor did she report this fact to the superiors as she was expected to.

Later P.W.12 was ordered to make a report by the late Lieutenant Colonel Malephane who was then the Divisional Commander. P.W.12 was answerable to Captain Rikabe. She puts the reason for her failure to do her work properly to the fact that there was a lot of work and the unsettled state of the country which caused her to forget. The procedure is that when a bullet has been used a written

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report has to be made. The firearm register was not available for the court's inspection because it had last been taken by the late Lieutenant Colonel Malephane. P.W.12 says she was referring to the fire-arms' register when she wrote her report because it was still there.

Under cross-examination P.W.12 told the Court that she was made to write more than two reports about the incident because Major Malephane (as he then was) was not satisfied because there were omissions. P.W.12 denied she was doing this under pressure.

On the 28th August, 1990 Trooper Lefu, P.W.13, in his evidence said he took the firearm Accused had just returned as he was about to go on special duty. P.W.13 says he was just behind Accused when Accused returned the fire-arm. After the Accused had signed the register, P.W.13 took the gun and the magazine Accused had just returned, counted the bullets and found they were 21 not 25. P.W.13 recorded this fact in the register after drawing this to the attention of P.W.12. Accused had gone out when this happened. Accused had taken an SLR rifle. The following day P.W.13 was told to return the rifle.

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Then followed the evidence of Trooper Ntšonyana P.W.14 who was then a recruit. He told the Court that he knew the Accused. He joined a patrol of about 8 policemen at Lakeside. Five were recruits. There were riots in the city. The recruits were carrying whips while the regular policemen were carrying firearms. These were not small fire-arms. He did not know their type. The Kommando rifle or pistol before Court might have been among the fire-arms that were carried by the regular policemen that day, but he is not sure. P.W.14 said he does not know and still does not know who was in charge. Among these regular policemen was the Accused. He did not know Accused at the time but he was able to recognise him. P.W.14 also saw Sergeant Leuta at Lakeside. From Lakeside they went to Mohalalitoë following a report they received. When they got to Mohalalitoë they saw boys running into a house. They chased them. When they got to the house they found the boys had locked themselves in. There was a woman outside who was asked to open the house but she did not initially co-operate. She eventually opened that house. How she opened the house he does not know. As the boys inside the house got out through the front door, he went to the back of the house. He with Rachere then

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chased down the road some boys who had got out. There were some gun reports. These gun reports came from the left. He does not remember the number of gun reports. The boy they were chasing began to bleed. Rachere who had got to the boy left the boy there because he was bleeding. P.W.14 says when he said blood he got frightened.

P.W 14 denies hitting the boy and says there was on the scene a woman coming towards them as they were chasing the boy asking what her child had done. The woman picked up a stone and tried to hit Rachere. Rachere lifted his hand towards the woman and the woman fell. P.W.14 is not sure whether Rachere hit her. They rushed to the police vehicle that took them to Lakeside. The wounded boy was where he could be seen from the police vehicle. The police vehicle nevertheless drove off with P.W.14 and the others leaving the wounded boy behind. He went to the identification parade where he pointed out the Accused as one of the people he was with at Mohalalitoe. This was in fact what the Officer conducting the parade had asked him to do. P.W.14 was asked to make a written report. He made several of them. P.W.14 says he was among other things told by the late Lieutenant Malephane, to say it

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was the Accused who fired.

P.W.15 Trooper Rachere a fellow recruit with P.W.14 and Mofolo went to Mohalalito as part of the same patrol. They chased the boys they saw spontaneously because the boys began to run when they saw them. He says the boys got into a house. They found a woman who would not open the house forcing them to beat her. There were members of the police band among the policemen who were there. He chased a boy after the door had opened. P.W.15 said he chased the boy merely because he came out of the house. While he was chasing the boy he heard four gun reports. The firing was from where he came before he chased the boy. The regular policemen were armed with an assortment of firearms including Kommando rifles which were two or three. P.W.15 says it was at the time of the firing that he heard some say "soaea" which means get out of the way. The person he was chasing seemed to stop and look back. P.W.15 got to this person and got hold of him; he noticed this person was bleeding. The blood was spurting out some of it got to him. P.W.15 retreated a little, the mother of the bleeding child got hold of the boy and hit P.W.15 with a stone. P.W.15 hit her with a fist on the face and

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she fell down and P.W.15 left her there. The woman was saying P.W.15 and others should kill her as well now that they had killed her child.

P.W.15 left the place hurriedly as members of the public were beginning to gather and were becoming aggressive. P.W.15 says there was no need to report anything to the police at the police vehicle where they were gathering because in his opinion they could see for themselves what had happened and was in fact happening to the boy who was wounded. This spot where the boy and the woman had fallen was where the other policemen who were next to the vehicle had a clear view of the bleeding boy and the woman. Leuta was with them when they left the bleeding boy behind. He identified the Accused at an identification parade as one of the policemen who were with them at Mohalalitoë. He had been carrying a Kommando rifle that day.

P.W.16 Sergeant Leuta was the next witness. He admitted he was also at Mohalalitoë. He says he was in charge of 13 to 15 policemen that day. He was a trooper at the time. Some had horse whips, some had Kommando

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rifles, SLR rifles and M16 rifles. P.W.16 was from the P.T.C. with recruits. They were meant to stop crime. He only remember the Accused as one of those policemen present in his group apart from P.W.14 NtSonyana and P.W.15 Rachere who were police recruits. P.W.16 says when they saw boys throwing stones at the police the young policemen left him behind as they chased those boys. P.W.16 says he found the young policemen at a house where a woman who appeared to be the owner had quarrelled with the police. She took a stone and hit the window. P.W.16 was five to six paces away. This woman had blood stains around the nose. Her hand was cut by a glass after hitting the window. The boys in the house got out of the house and ran in all directions. He was able to catch a boy and a girl at the door. A motor vehicle came and P.W.16 decided he wanted to interrogate the boy and girl at the Charge Office. P.W.16 did not see the wounded child. He says there might be some policemen who were chasing the boys who came with them in the police vehicle. when they went to the Charge Office. Several shots were fired during the chase. He later came back from the Charge Office to collect his men.

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P.W.16 later that day went back to Mohalalitoë that day where he found nobody. He was shown some blood, he alighted from the vehicle. P.W.16 says he was with the C.I.D. policemen who walked ahead of him at all times. Three days later P.W.16 was asked to write a report. He was told it was irrelevant.

Some days later P.W.16 says he met Accused who told him he had been charged merely because he had fired his firearm at Mohalalitoë. He asked Accused why Accused had not told him this. Accused said he was afraid. This conversation was mentioned to Crown Counsel at the Law Office several years later.

P.W.17 Trooper Mofolo was also a recruit. According to him when they got near Mohalalitoë they saw many boys and began to chase after them and they ran away when they saw them. No one had ordered them to chase them. The driver of the vehicle had merely pointed at them. Some of the boys got into a house in Mohalalitoë by the road. He claims they scolded a lady who broke the window of that house and the boys inside came out running. He gave chase, there was a sound of fire-arms. It was the sound

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of several fire-arms. They were called back and he found several policemen already gathered next to the police vehicle. They got in and drove off.

P.W.18 Sergeant Koma stationed at the headquarters held an identification parade in which what was wanted of the witnesses P.W.14, P.W.15 and P.W.17 is not clear. According to the witnesses they were supposed to point out the policemen who were present at Mohalalitoe. Sergeant Koma sometimes says the witnesses were supposed to identify the person who shot Deceased. Sometimes he said what witnesses had said, that is identify a person or persons in the parade who were present at Mohalalitoe when Deceased met his death.

Then followed the evidence of P.W.19 Major Tlhabi J. Telukhunoana. He handed in a statement that was sworn to before a Commissioner of Oaths E.M. Masupha. At paragraph 2 of the statement P.W.19 describes himself as follows:

"I am employed as a firearms examiner attached to the forensic ballistics section of the Police Technical Services Department. I have been

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trained in the microscopic examination of fire-arms bullets and cartridge cases."

The expectation I had was that photographs that show the magnified particular characteristics of the particular hammer of the fire-arm in question would be made available to the Court and Captain Telukhunoana would compare them with those on the empty shell found at the scene of crime. This is done by firing two or more control bullets to facilitate comparison by actually comparing the imprints on the shell from the scene of crime with those on the two control empty shells from bullets fired by the examiner.

Captain Telukhunoana did not take the photographs as he was expected to do. I had difficulties with his conclusion to the effect that:

"due to lack of sufficient marks used for comparison purposes I was not able to determine whether the fired case 3(2) was fired by the pistol para 3(1) or not."

The statement did not have the particulars of the serial

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number of the Kommando pistol under examination. This was explained as having been an oversight. Such mistakes do occur.

The cause of the problems surrounding the "lack of sufficient marks of identification" was explained as caused by the fact that the fire-arm was not in good order. The problem I had with this explanation was that P.W.19 had found the weapon in good working order. He then blamed the people who went to the scene of crime. I could not follow how this could have been relevant.

The Court pressed for an explanation of P.W.19's failure to detect sufficient marks for comparison. The truth came out clearly. The empty shell lacked the class characteristics of a shell fired and ejected from a Kommando pistol. P.W.19 said these could be seen even with a naked eye. He showed us the two control shells which had a deep gash at the back of the shells which is always caused by a Kommando ejector. The shell found on the scene of crime did not have this gash caused by an ejector of a Kommando. The Assessors and I together with Counsel on both sides saw this gash with our own eyes.

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P.W.19 said it followed that once it was clear that the particular shell had not been fired and ejected from a kommando pistol there was no point in going for microscopic photography. The particular shell could be fired from several types of fire-arms.

From this evidence there was, according to P.W.19, 99.999% chance that this shell was not fired from the fire-arm under examination. I thought P.W.19's way of giving evidence displayed a modesty and avoidance of coming to conclusions that was unsettling. An error of .001% is in my view infinitesimal even for a scientist let alone the Courts which have to approach issues in a robust manner.

P.W.20 Captain Rikabe (now retired) was there to show he was not in charge but the late Lieutenant Colonel Malephane was. He did not know much concerning the case. He does not know what happened to the fire-arm register. These registers were kept properly but they were often misplaced after use in investigations or by Courts in criminal cases and other matters. There was no periodic follow up of what happened to the registers.

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P.W.21 Captain Sakoane said in his evidence that he came late to Mohalalito where he found a woman who had been assaulted by the police. He does not remember whether he heard any shooting. Sergeant leuta brought a boy and a girl to the vehicle they were in. The police were running. He decided to clear off the policemen being injured or causing injuries to the people. He left the injured woman there. P.W.21 says he did not hear of or see that a boy was lying there injured. He could not explain why he cleared away the police. The evidence of P.W.22 is in many respects the same as that of P.W.21.

On the 5th August, 1994, Mr. Mahlakeng had been invited to pursue the trial within a trial but he said he was not pressing for one and consequently he no more wants to cross-examine the Magistrate.

Accused applied for a discharge on the ground that a *prima facie* case had not been made. The application was refused. The Accused closed his case.

What has been established beyond the shadow of any doubt is that Bathobakae was killed by one of the

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policemen who were under the command of Sergeant Leuta P.W.16. But this is not the end of the matter.

In this case the greatest problem I had was that elementary procedures for the protection of the scene of crime were not followed or even attempted. The scene of crime is vital in the investigation of crime because clues and exhibits that often aid in the apprehension of the culprit are found at the scene of crime.

In this case on the 27th August, 1990, nothing was done to preserve the scene of crime for the Criminal Investigation Department to collect clues and potential exhibits. P.W.16 Leuta says he went to the scene of crime later and found nobody. He says he was in the company of the C.I.D. The C.I.D. were certainly not walking in front. These C.I.D. policemen never gave any evidence or explain what they were doing with a suspect such as P.W.16 at that place.

If there was firing by several policemen in the group as some witnesses say there was, there must have been several shells in the vicinity. What happened to these

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shells? P.W.1 Walter Rakhoabe says P.W.16 ordered the shooting of the deceased. If P.W.16 did so, then he should have been the first accused. The possibility of the disturbance of the scene of crime by P.W.16 and any of the five other policemen who carried fire-arms that day cannot be ruled out because the scene of crime was not guarded and timeously combed for clues and exhibits. The empty shells from fire arms that were fired that day may even have been picked up by the children. The combing of the scene of crime by P.W.9 on the 28th August, 1990, several hours later was highly negligent and unprofessional.

The Accused and four of five other policemen carried fire arms that day. Virtually all the policemen who were there at about the time Deceased was shot say that several shots were fired. Why were these other policemen not timeously identified. If they had been, even the fire-arm that fired and ejected the empty shell that P.W.9 found at the scene of crime might have been found. I have already suggested that in the 20 hours that elapsed before the scene of crime was combed.

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No independent investigator was timeously appointed. Lieutenant colonel Malephane, whose men were being investigated, should not have been the investigator. P.W. 14 says Lieutenant Colonel Malephane was forcing him to say Accused fired at Deceased when he could not have seen. Lieutenant Colonel Malephane is dead, so he cannot defend himself. If this was the way he behaved, the police force was unfortunate to have such an officer. Why did the Commissioner of Police not see that an independent investigator is timeously found?

This case really revolve around the identity of the killer. That is what is in dispute in this case.

P.W.1 Walter Rakhoabe says P.W.16 Leuta (the senior officer on the spot) ordered a policeman to shoot Deceased. The policeman did so. Who was this policeman? Why did the police not investigate the Deceased's death around P.W.16? The policemen who went to Mohalalitoe were never interrogated. All that was done was to make them write reports. Could it be that the police did not look for witnesses who could shed light? P.W.1 was drinking his beer under a tree. P.W.1 and P.W.16 agree on the fact

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that there were 15 policemen in P.W.16's patrol. This is so, despite the fact P.W.16 was a very untruthful witness with a lot to hide.

P.W.1 says several shots rang but not in the village. P.W.3 Mahase Mofelehetsi says he heard only one gun report. P.W.2 Steven Rantseli was called by P.W.1 from the house below whose tree they were drinking outside. P.W.2 does not seem to have heard any firing. P.W.4 Liteboho Mpholo said he heard two gun reports, one that reported and caused Deceased to fall and another one immediately after he had got to the fallen Deceased. P.W.5 says she heard the sound of only one fire-arm. P.W.6 Khotso Makae a builder says while he was working, he heard two gun reports after that there were people running all over saying "he has shot him". P.W.6 was then asked to take Deceased to hospital.

P.W.7 'Mabathobakae Mokhothu (the mother of Deceased) says she heard a gun report and she went up the road in the direction Deceased had taken. She was told Deceased had got in Malikoche's house. It was the only gun report she heard. P.W.11 Teboho Khosi says as the people came

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out running she heard a gun report and this caused her to go out of her house to see what was happening. After Deceased had got out of Malikoche's house she saw and heard one policeman ordering another to shoot Deceased and this policeman shot the Deceased who was running away from the police assault.

Among the civilian witnesses P.W.4, P.W.6 and P.W.11 say they heard two reports of fire-arms within the village of Mohalalitoe with five minutes of the time Deceased was shot. It is therefore clear that there must have been at least two empty shells of bullets that were ejected from firearms when they were fired. There is only one shell that is being produced and it is not from the firearm of the Accused. It seems we need evidence to connect Accused's firing with the death of Deceased. It could be the other man who hit Deceased.

Crown Counsel says in the statement before the magistrate Accused said he fired that day at Mohalalitoe. Virtually all the police witnesses on the spot say there were several shots fired. There are grounds to say the policemen lied a great deal and concealed evidence. They

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even conveniently lost the fire-arms register. If Accused concealed the fact that he used several bullets that day, he did what five other policemen did. If this case had been properly investigated and the police had written reports accounting for every bullet they used, the Court would have had the assurance to accept that Accused had been properly nailed. His statement that he was sent to repeat before the Magistrate is no different from the reports that other policemen were made to write reports over and over again by the late Lieutenant Colonel Malephane. Could it not be that he was under pressure like P.W.14 to simplify Lieutenant Colonel Malephane's task by saying he fired one of those bullets at Mohalalitoe when he fired them somewhere else?

I am mindful of the fact that the evidence of P.W.11 Teboho Khosi clearly shows that one policeman gave another policeman the order to shoot Deceased. I believe P.W.11 on this point. There are two policemen who know very well the person who fired the fatal shot. These are the person who gave the order that Deceased be shot and the one who actually shot Deceased. Perhaps P.W.16 is the person who gave the order that Deceased should be shot, if we are to

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believe P.W.1. The disturbing fact is that P.W.1 was not among the list of witnesses supplied to the Court by the Crown as it is the practice in Summary Trials. Could this failure to direct investigations towards P.W.16 be deliberate?

This case is a sad testimony of lack of training and discipline among the police. The police were badly led by officers who should have known better. Violence and intimidation was their method of maintaining law and order. They had not been in the habit of painstakingly investigating crimes. They could not speak to the public without threatening them. What the death of Bathobakae reveals is that the police of 1990 did not care for members of the public. They shielded Bathobakae's killer without caring for the reputation and the good name of the police force in general.

The fact that the police shot Bathobakae and left him there fatally wounded and they cleared away from there after committing this atrocity chills the marrow of any law abiding person. P.W.21 and P.W.22 admit that they saw their own policemen as a threat to law and order. These

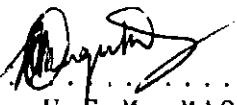
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policemen had turned the police force into a bandit co-operative which assaults, despoils and takes the lives of the public at will although it is employed to protect it.

This court can only dispense justice if it is provided with evidence, not if it is denied the evidence to work with.

The Accused is given the benefit of the doubt and is discharged because it is only the Accused who knows if he is guilty or not.

My Assessors agree.


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W.C.M. MAQUTU
JUDGE

For the Crown : Mr. A. Lenono
For the Accused : Mr. T. Mahlakeng