

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

SAMUEL MOTLATSI MOTAUNG
LETHULA LELUMA
JIMMY NHLAPO

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 8th day of August, 1995.

Three accused were charged with murder. Evidence was led but at the end of the Crown case, there being not enough evidence against Accused 3, he was acquitted.

The accused are charged with murder and attempted robbery.

"COUNT 1: In that upon or about the 26th day of January, 1990 and at or near Thabaneng in

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the district of Mophale's Hoek, the said Accused, each or the others or all of them, acting in concert did unlawfully and with intent to kill, assault Kekeletso Samuel Thai and inflict gunshot wounds on him from which he the said Kekeletso Samuel Thai died on the 4th day of February 1990.

COUNT II: In that upon or about the 26th day of January, 1990 and at or near Thabaneng in the district of Mophale's Hoek, the said Accused each or the others or all of them, acting in concert, did unlawfully and with the intention of inducing submission by Kekeletso Samuel Thai to the taking by the said Accused of property unknown to the prosecutor, threaten the said Kekeletso Samuel Thai that, unless he consented to the taking by the said Accused of the property or refrained from offering any resistance to them in taking the said property, they would then and there shoot him and in fact did so.

P.W.1 Litaba Mokoena was the first witness. He says

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he was deceased's night watchman. On the day in question, at about 10 p.m., deceased was counting money. P.W.1 asked for money and was given a pound or R2.00. P.W.1 then went to the toilet. As he was about to get in, he heard a gun report. Deceased shouted calling P.W.1. There was a second gun report. When he got to deceased, deceased who had fallen on the ground said there are some people. P.W.1 did not see those people. Deceased had many injuries and fallen at the door of his office. Deceased's wife was called and Deceased asked her to check the money. She did so and said the money was still there. Police were called.

P.W.2 was Marefiloe Thai aged 36 years. She says while she was sleeping she was called by P.W.1 and given a report. She went to deceased's office and found deceased lying on the ground outside his office bleeding.

She called for help. She then got into the office where she found two bags of money. The following day she opened the bags and found the money was there, the amount totalling over M6000.00.

Deceased was taken to the Mohale's Hoek hospital after the police had arrived. P.W.2 asked for deceased to be released to her so that he could be taken to a

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hospital in Bloemfontein. P.W.2 did this because she was afraid his assailants might come and finish him off. Deceased was transferred to Bloemfontein on the 28th January, 1990. Deceased's belly was swollen and he did not accept food. P.W.2 says she could say deceased's condition was critical. P.W.2 used to visit deceased in Bloemfontein. Deceased was operated upon on a Tuesday by Saturday following the operation, deceased was able to speak. The following Monday she received a message to the effect that deceased was dead.

P.W.2 says on the 26th January, 1990, during the day, she had heard a person with male voice over the telephone. That person said they had asked deceased to help him over a long time, but deceased had failed to help. They would visit him. She passed on the message to the deceased but deceased did not say anything.

P.W.3 was Sergeant Tšepe of the Royal Lesotho Mounted Police. He says he got a report over the telephone from a lady. He rushed there with a fellow policeman, Trooper Khosana. He found deceased lying on the ground outside his office. He had blood on the chest. P.W.3 says he spoke to the deceased. Deceased told him that he had been shot. There had been two men there and one of them

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was shooting. They rushed deceased to hospital in deceased's own vehicle. The police Charge Office is about 250 metres from the deceased's place. A person who shouted from accused's place can be heard at the Police Charge Office. The deceased was a former policeman.

P.W.3 says he undressed deceased and observed a wound above the right breast. There was another wound on the left upper arm. The third wound was about the left breast towards the arm-pit. P.W.3 said these were gunshot wounds. He then opened a docket and gave it to the Criminal Investigation Division of the police.

P.W.4 was Detective Sergeant Jonas. He told the Court he knew the three accused. Accused 1 he knew as Leluma, accused 2 was Motlatsi and accused 3 was Jimmy Nhlapho. Deceased was known to P.W.4 and deceased was a retired policeman. P.W.4 says he was from Mohale's Hoek Hotel at about 10 p.m. When he got near the police Charge Office he heard gun reports in the direction of where deceased lived. When he got to the office which is 200 metres from the deceased's place, P.W.4 got a report.

By the time he got to the deceased's place, deceased had been taken to the Mohale's Hoek hospital. He went to the hospital where he found deceased bandaged. Deceased had

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three wounds, one on the right chest, the next wound below the left breast and the last wound on the left upper arm.

The wounds on the chest were entry wounds.

P.W.4 talked to deceased. Deceased told him he had been shot at his place of business by a young man with a light complexion. P.W.4 said deceased said he could identify the man if he saw him again. That was the last time he saw the deceased.

The following day P.W.4, Major Petlane, ex Lieutenant Ramonate, the late Trooper Hlaele and Lieutenant Polanka went to deceased's place. They found three shells of 9 millimetre calibre that had been fired from a fire-arm. They picked them.

On the 15th February, 1990, P.W.4, ex Major Motene (a soldier) and Sergeant Mongali (a policeman) went to Motsekuoa to look for suspects. They did not find them.

On their way back in Mohale's Hoek, major Motene alerted them to the fact that the people that he regarded as the suspects were following them in a white cressida. When they got to Monaleng Garage, they stopped the white cressida and found it was driven by Jimmy Nhlapho. He was with the second accused Leluma. There were two girls

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travelling with them. P.W.4 says they took Accused Number 2 and 3 to the Police Charge Office where interrogations began. After that they cautioned Accused 2 and 3 and gave them a charge in connection with the death of deceased. This was on the 15th February, 1990.

P.W.4 and the other officers searched the vehicle in which the two accused were travelling. They found some fire-arms in the vehicle. They also found a 7.65 mm pistol on the waist of Accused 3. A 9 mm fire-arm was found under the back seat of the vehicle. Its numbers appeared to have been erased. The 7.65 mm fire-arm was released to Accused 3 as it was licensed. The 9 mm pistol was seized to await their trial. Accused 2 and 3 were remanded to custody. Accused 1 had also been arrested and a removal warrant was asked for so that he could be brought to Mphahle's Hoek to face a charge of murder of deceased (Kekeletso Thai) along with the other two accused.

Trooper Hlaele took the 9 mm pistol found in the vehicle in which the Accused 2 and 3 were travelling for forensic tests. The gun was later returned to him where he was working. The gun was handed in as Exhibit "1". Although Mr. Pheko and Mr. Monyako, who appeared for

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Accused 3 and 2 respectively, put an objection on record stating Sections 52 and 55 of the *Criminal Procedure and Evidence Act* of 1981 had not been followed. The shells that had been found at the place of deceased were also taken for microscopic examination. Unfortunately, although according to P.W.4 the shells were also returned with their LMP 12, they cannot be found because they have been misplaced.

According to Exhibit "B" which is a sworn statement of the fire-arms examiner Captain John Telukhunoana, the fire-arms and the shells were handed to him on the 26th February, 1990. Yet he only made his report on the 28th September, 1990 and appeared before the Commissioner of Oaths, to swear to its contents on the 2nd October, 1990. I am unable to understand why the shells and fire-arms were delivered on the 26th February, 1990 and the examination was only made on the 28th September, 1990, after over seven months had elapsed. Speed is essential in all investigations of criminal cases.

What is significant about Captain Telukhunoana's report is that he says:

"(b) due to lack of sufficient marks used for

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comparison I wasn't able to determine whether the fired cases Para 3(iii) have been fired from the pistol para 3(ii) or not."

I have serious problems with this type of microscopic examination. It certainly would disable the Court from making any finding adverse to the accused in these proceedings. Yet without hearing *viva voce* evidence and actually finding out why microscopic examination failed to help one way or the other, the Court is left with a feeling that microscopic examination is useless. Is microscopic examination of fire-arms and fired shells or cartridge cases a science at all? Could the delay of seven months have affected the microscopic examination?

In the past, microscopic examination of cartridge cases has been used with success in criminal proceedings to identify the weapon used. But of late it seem not to be helpful one way or the other. Not so long ago, in *Rex v Kubutu Kubutu* CR1/T/51/91 (unreported) the same Captain Telukhunoana when a cartridge shell and a fire-arm had been referred to him for microscopic examination reported as follows:

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

On that occasion when asked for an explanation he said this was caused by the fact that the fire-arm was not in good order. In that case like the present case, Captain Telukhunoana had written in his sworn statement that he had found the weapon in good working order. In the case of *Kubutu Kubutu* when I asked for photographs of the microscopic examination Captain Telukhunoana said they were not there. Captain Telukhunoana then said he did not need even to have a microscopic examination of the cartridge case because with the naked eye it could clearly be seen it had not been fired by a komando rifle, which was the fire-arm involved on that occasion. He then showed the Assessors and I a bullet fired from a Komando rifle. There was a gash that could be seen with a naked eye caused by the ejector of a Komando rifle. I was in the *Kubutu* case very critical of his failure simply to state the clear and obvious truth that the bullet had not been fired by the fire-arm before Court.

In this instant case I have unanswered questions

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because of the report of Captain Telukhunoana. I would like to know where the photographs of the microscopic examinations are. It is not a good thing to be told what transpired without the usual photographs of the microscopic examination, in the light of the *Kubutu* case. In the past we have always had photographs on which the comparison of the cartridge (found on the scene of murder by shooting) and the test cartridge (fired from the suspected weapon). Whatever conclusion is reached, the Court is shown the breech face markings on the two cartridge cases. I am left with a feeling that I have not been shown and told everything because there was a delay of over 7 months before a report was written, plus the fact that the cartridge cases are now missing.

The fact that there was this lack of clarity about the weapon and the two cartridge cases which the police expected to link Accused 2 and Accused 3 with the crime has partially derailed investigations. The reason being that right up to the day of trial the weapon found on white cressida could not be excluded. I am even more critical of the investigators of the case in not demanding a report within hours or days in order to be certain whether the weapon found in the vehicle of Accused 3 connected the two accused with the scene of crime. Why

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were the investigators so very lax? It seems they only asked for a report from Captain Telukhunoana after over seven months or not at all. Although P.W.4 Sergeant Jonase says the cartridge cases were returned to him, I doubt if this is the truth. He must be believing that they were returned to him when in fact they may not have been.

The next witness was P.W.5 Lesenyeho Motsoeneng who was declared an accomplice witness and to whom the Court explained the rights of an accomplice and warned him accordingly about what to expect. P.W.5 agreed to give evidence and was accordingly sworn in. P.W.5 said he knows all three accused and actually mentioned their first names. P.W.5 said he did not know all three of them before the 26th January, 1990. P.W.5 told the Court that he and these accused were brought together by Mojalefa Lehula who was his friend. According to P.W.5, Mojalefa Lehula had actually come to the home of P.W.5 at about 11 a.m. because he intended to introduce him to friends from Johannesburg.

He found four people at Frasers trading premises in a white cressida. Among them was Lisene. Mojalefa said they should get into the car and go to the hotel. All six

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of them went to the hotel. Lisene asked to go to his taxi after asking for M4.00 from Jimmy-Accused 3. Nothing was said between Frasers and the hotel. P.W.5 says in fact he introduced himself. The men he introduced himself to were those in the box, pointing at the accused. Mojalefa told the accused that P.W.5 was the man who would help them. P.W.5 says he is not sure who among the accused said they want money. As Accused 3 was coming in and out of the vehicle, P.W.5 is not sure if he was there when these words were said.

After this, the speaker (who could have been Accused 1 or 2) said they should go around shops and supermarkets in order to determine where money was. P.W.5 and Mojalefa agreed to do what they could to help. Mojalefa even said he would supply them with a van. P.W.5 could not say where Accused 3 was when all this was said. They were talking directly to Accused 1 and 2. After that they got into the bar to drink beer. P.W.5, Mojalefa and Accused 1 went into the bar leaving Accused 2 in the vehicle. Eventually Accused 2 also joined them in the bar leaving Jimmy in the car.

P.W.5 then passed on to the evening. Just as he was about to relate what happened, he remembered he had not

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related the events of the afternoon. P.W.5, Mojalefa and Accused 1 and 2 went looking for places with money. They divided into two. Mojalefa and Accused 1 went to Monateng while P.W.5 and Accused 2 went to Metro and Thabaneng where deceased's business premises are. Accused 2 asked what deceased's shop was. It was something like a supermarket. When they got there, they found it had a lot of money. It could have been between 2 and 3 p.m. at the time.

When they got back to the hotel they found Accused 3 absent. They found Mojalefa and Accused 2 there. Although there was a lot of money that Mojalefa and Accused 1 had seen at the Indians filling station, they decided there was more money at the deceased's shop. It was agreed they would go there in the evening. Accused 1 and 2 were to take the money while P.W.5 and Mojalefa would just accompany them. Accused 3 arrived with his girl friend. They all went to the private bar where they drank and danced. Mojalefa's girlfriend joined the group. Accused 2 did not actually stay in there, he would go in only to take beer which he drank at the car. According to P.W.5 all of them had money, therefore they could buy their own beer. At 7.40 p.m. they left the hotel. On the way Mojalefa said he was coming, he was

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only taking his girlfriend half-way.

The three of them (i.e. P.W.5, Accused 1 and 2) proceeded towards Thabaneng. One of the accused at a tree plantation produced two guns, two overalls, and two hats. One of the hats was a balaclava hat which covers the whole face leaving only the eyes and the mouth. The other one was a woollen skull cap. They said P.W.5 should walk ahead but should not run away. If P.W.5 did so, they would shoot him. They proceeded towards Thabaneng. They got into deceased's yard through the gate and waited next to the toilet behind the shop. They sat down and waited for deceased to arrive. The lights were off and the shop closed and people were in their houses, but a policeman passed.

After a while deceased headlights of the half truck flashed on the shop building. He was coming. He put his vehicle in the garage. He used his torch to light his way to the flats above the shop. He lit one of the rooms and then went to the office next to the shop. Accused 2 and 1 followed him. P.W.5 was told to wait there and they brought down their hats. Accused 1 brought down his balaclava hat while Accused 2 brought down his woollen hat to cover his ears and forehead.

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After they had gone, he heard a gun report. P.W.5 started running, then he heard the second gun report while he was running. P.W.5 ran on the road to Ralebese. After a while two people came running and asked him to wait for them, which he did. He went with them to the toilets. They then removed their hats.

From there they walked to a small river called Manyeleng and then to a tree plantation where they took off their overalls and put them in a plastic bag. Accused 1 said they should go and look for Mojalefa at Setjoetleng. They then went drinking. Accused 1 asked Accused 2 why he had shot deceased. The question was asked earlier when they got to the toilets. Accused 2 said he did so because deceased appeared to have overpowered Accused 1.

When they were at Setjoetleng, P.W.5 says Accused 2 said P.W.5 should act as if nothing had happened otherwise Accused 2 would shoot him. He added that if he reported what happened, the police would tell him. P.W.5 says he believed him because he knew Accused 2 was once a soldier.

Accused 1 got to Mojalefa's, went in and came out with Mojalefa. They then went to buy beer. Mojalefa and Accused 1 then went to drink at the home of Mojalefa's

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girlfriend. Setjoetleng is about 400 metres from the hotel. Accused 1 went with Mojalefa to Likhutlong where Mojalefa stays. Accused 2 took P.W.5 half-way and they parted. All these events occurred around 1 a.m. P.W.5 never met Accused 1 and 2 until October 1994 in Court.

P.W.5 says no one raised any objection to the taking of deceased's money. After 3 days, P.W.5 left Mohale's Hoek.

With all the other witnesses who preceded P.W.5 there had been no cross-examination. P.W.5 was extensively cross-examined by Counsels for all three accused.

Cross-examined by Mr. Putsoane for Accused 1, P.W.5 admitted that he had taken so much liquor that he could see some things but not others, but he was not very drunk. P.W.5 denied Accused 1 had come to Mohale's Hoek at 2.30 p.m. and said Accused 1 came before lunch. P.W.5 says they went to places out of town to look for money because in town there were many policemen. P.W.5 denied that a van was wanted in order to carry things they were going to sell, if that was what Accused 1 was going to say.

It emerged from Mr. Putsoane's cross examination that

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the site of P.W.5's home was adjacent to the deceased's premises. P.W.5 says the moon was shining that day but there were also clouds. Before they got to the tree plantation, he had not observed the plastic bag. P.W.5 says the plastic bag was yellow, he could see that because there were electric lights. At the tree plantation only the moon was shining. P.W.5 denied carrying the plastic bag. P.W.5 denied Accused 1 came to Mohale's Hoek and met Mojalefa at 7 p.m. P.W.5 denied that he must have heard Accused 1 talking to Mojalefa. P.W.5 says a gun was even put on his cheek by one of the accused who said when he took money from a person he did so. P.W.5 admitted that it was the first time under cross-examination that he disclosed that fact. P.W.5 said further he did not know that traders like deceased had guns and night watchmen.

P.W.5 said he does not know why being a stranger he was included in the plot to rob deceased. In his view neither Accused 1 nor 2 are not light in complexion. In short if Accused 1's defence is that he did not kill deceased nor had he done anything to do with the conspiracy to take money from deceased that was not true. If Accused 1 also said no such plan was made in his presence, that was not true.

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P.W.5 was then questioned by Mr. *Monyako*, Counsel for Accused 2. P.W.5 said on that day it was the first time he saw and talked to Accused 2. He was introduced to him by Mojalefa. No identification parade was ever held to enable P.W.5 to point Accused 2 to the police. The two Accused in the absence of Accused 3 and Lisene, straight away said they wanted money and told him their plans. P.W.5 said Accused 2 was involved in this crime despite his denial. Mojalefa said they should go in two's although he was not the originator of the plan. Accused 2 may not have known deceased's business premises he explained about them and Accused 2 gave him 60 cents with which to buy from deceased's shop. They assumed the money was being taken somewhere. P.W.5 says when they went to deceased's store, he did not think they would still find the money. It did not bother him whether or not they might be going there for nothing. All P.W.5 wanted to do was to go with the two accused.

When they left for the deceased's place, P.W.5 did not notice whether the plastic bag that contained overalls and the two guns was there. The balaclava hat was brown while the other woollen hat was blue.

P.W.5 says he did not see the person who opened the

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gate for deceased's vehicle. The home of P.W.5 was 40 to 50 paces from the flat of deceased. He did not run to his home when the firing began because going through the gate was easier. P.W.5 was also afraid if he went to his home the accused would think he was going to report.

P.W.5 was asked if he knew Paseka Mokemane, he said no. P.W.5 said he ran away to Maseru when he heard over the radio that the police were looking for him. This was in February. Sometime in February 1995, when P.W.5 was being interrogated by the police, he found Mojalefa also being at the police station. P.W.5 denied he knew Mokemane and that Mokemane confessed to killing the deceased. P.W.5 said he would deny it if Accused 2 said he was not in Mohale's Hoek that day. P.W.5 said if Accused 2 said he and P.W.5 had previously been engaged in some activities together, P.W.5 said he would deny this. P.W.5 said he only went to steal with the accused whom he did not know until then because Mojalefa had said he would come back.

Cross-examined by Mr. *Pheko* for Accused 3, P.W.5 said he had not taken part in the crime and he did not know what the accused were charged with. P.W.5 says he believes the police told him what was involved because

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they read him his statement. They also told him he was an accomplice. P.W.5 explained his uneasiness to be due to his fear of the lawyers who were asking him question. They also told P.W.5 that he was going to be charged with the murder of deceased although he did nothing. Accused 3 was not interested in what was being said. When they came back they found him asleep.

P.W.6 was Mathabo Lehlokoe who now resides in Maseru but comes from Mphahle's Hoek. She knew all the accused.

He came to know them some time in January 1990. she also knew deceased Keketso Thai. P.W.6 had been interviewed by the police after deceased's death and she had said she knew the accused. Accused 1 had proposed love to her at a private bar at the hotel and she had accepted his proposal. After that they drank and enjoyed themselves. They used to fetch her and take her home. She has forgotten many things even her statement is not accurate. They did this on two occasions if she still remembers.

P.W.6 stated that when he says they, he means Accused 1. He used a white cressida driven by one Mafa. Both Accused 1 and Mafa were polite and humble. P.W.6 knew the car belonged to Accused 3. P.W.6 said he could not

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relate the visits of Accused 1 to the death of deceased.

P.W.6 could not commit herself about dates. After the death of deceased he never met the accused.

P.W.6 says she did lend Moeletsi a blanket, afterwards the police said during questioning that her blanket had killed deceased. P.W.6 said the CID (Criminal Investigation Division) are not asked questions, therefore, she could not ask the CID how her blanket had killed deceased.

The medical evidence and its translation were handed in and marked Exhibit "A". The Ballistic (microscopic examination) report to which I have already referred to was handed in and marked Exhibit "B".

Exhibit "A" which was admitted by consent showed the wounds on the deceased were caused by a projectile. The cause of death was pulmonary saddle embolus after penetrating wounds in the chest and abdomen. There was no dispute that the wounds that killed deceased were gun-shot wounds. Even the cause of death was not disputed. The medical report was translated from Afrikaans.

Mr. Qhomane for the Crown signified to the Court that

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he does not press for conviction against accused 3. Mr. *Phoko* applied for his acquittal. The Court found accused number 3 not guilty and he was discharged.

The Crown closed its case.

Accused 1 gave evidence in his own defence and took an oath like all the other witnesses.

On the 26th January, 1990. Accused 1 said he went to Mohale's Hoek to go and see his girl friend. He went by public transport. They met during the lunch break. Accused 1 was then drinking with Accused 3 and 2 who are his friends. Accused 2 told Accused 1 that he had brought Accused 3 to meet Mojalefa. Mojalefa arrived at 4 p.m. and Accused 2 and Accused 3 discussed their matter. They were talking about diamonds. Accused 1 and the other accused returned to Maseru around sunset that day.

Cross examined by Mr. *Qhomane* for the Crown, Accused 1 said Mojalefa joined them while he was drinking with Accused 2 and 3. He did not see if Mojalefa was in the company of anybody. Mojalefa was in fact alone. Accused 1 said he has known Accused 2 and 3 for a long time. He built a house for Accused 2 and a house for the

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father of the wife of accused 3 in Leribe. Accused 1 said he did not see Lesenyeho P.W.5.

Mojalefa came between 3 and 4 p.m. he and the other accused went back to Maseru in the evening. Accused 1 denied he was deliberately removing Lesenyeho P.W.5 from the scene. P.W.5 in the opinion of Accused 1 had been taught what to say. P.W.5 was never with Mojalefa. Accused 1 said he got to Mohale's Hoek around 11 a.m. He denied he got there after 2.30 p.m. Accused 1 said he does not know where his counsel got the idea that he got to Mohale's Hoek at 2.30 p.m. and proceed to put it to P.W.5. Accused 1 said they left for Maseru around 6 p.m., the sun was still shining.

Accused 1 says he never saw P.W.5 the accomplice at all that day. He denies plotting deceased's robbery, or theft with P.W.5. He could not have killed deceased because he had already left Mohale's Hoek. Accused 1 denies he slept at Setjoetleng as P.W.5 suggests. Accused 1 says he never talked about a van with Lesenyeho. Accused 1 says he was introduced to Mojalefa through Mafa. Accused 1 says he told P.W.6 his girl friend to meet him at the hotel. He first said he went to see P.W.6 later Accused 1 says he phoned her. Accused 1

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denies killing deceased.

Accused 2 gave evidence in his own defence. He denied killing deceased. On the 26th January, 1990, he had gone to Mohale's Hoek with Jimmy Nhlapho Accused 3. They got to Mohale's Hoek around 10 or 11 a.m. They were travelling to Mohale's Hoek Hotel where Accused 3 had an appointment with Mojalefa. When they got there they joined Accused 1 who was already there. At about 1 p.m. the girl friend of Accused 1 joined them for less than 30 minutes and she left.

Accused 2 says at about 4 to 5 p.m. Mojalefa came alone and they talked with Jimmy about selling each other diamonds. After that Mojalefa drank a can or two of beer and left. Between 6 and 7 p.m. before sunset all the accused left for Maseru.

Accused 2 denies the entire evidence of P.W.5 which shows they plotted to steal money, selected deceased as a target and then visited deceased. Accused 2 denies killing deceased. Accused 2 denies meeting Lesenyeho P.W.5 at all on the 26th January, 1990.

Cross-examined by Mr. Qhomane for the Crown Accused

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2 said he only heard deceased had been killed when the case began. That was in February 1990. Before he was arrested he was in Lesotho armed forces attached to the task force. Accused 2 came to know Accused 3 while he was in the South African Police and they became friends.

Accused 2 was surprised that it had been put to P.W.5 that he was never in Mohale's Hoek. What was correct was that he was never on a mission in Mohale's Hoek involving P.W.5. They had waited for Mojalefa from 1 up to 4 p.m.

By coincidence Accused 1 was there when diamond buying was discussed with Mojalefa. When Accused 2 and others went home, they did not go via the girl friend of Accused 1.

When Accused 2 was arrested, he had visited his grandmother. Accused 2 denied killing deceased or sleeping at Setjoetleng. Accused 2 states he first saw P.W.5 before the Court before that they had not met.

Accused 2 called Mojalefa Lehula D.W.3 as a witness.

D.W.3 Mojalefa told the Court that he had known Accused 3 in his taxi at the time he had gone to Sebokeng. Mojalefa had an appointment with Accused 3 which he was only able to keep at 5 p.m., because he had gone to

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Zastron. When Mojalefa kept this appointment with Accused 3, he was alone.

Mojalefa states that Accused 3 was in the bar with other people. Accused 1 and 2 and P.W.5 were among the people in the bar. The three accused were sitting together while P.W.5 was on another table but still in the same room. Mojalefa says he talked with Accused 3 for about 20 minutes. He then said good-bye and left. He left the hotel, he did not see the accused leave. Mojalefa says he did not talk to P.W.5. He also never saw the accused from that day.

Cross examined by Crown Counsel D.W.3 Mojalefa, who is semi-literate, says he cannot remember the exact date Mojalefa says they had agreed to meet with accused 3 at Makhala's but they met at the hotel. Accused 3 had come to buy old currency, not coins but bank notes. They discussed old currency. As Accused 3 had not provided him with transport, Mojalefa was without the old currency notes because Accused 3 had not provided him with transport to enable him to obtain it. Accused 1 and 2 must have heard what was being said, although they were drunk.

Accused 3 asked him if he could find him stones and added diamonds. Mojalefa said to Accused 3 he knew nothing

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about diamonds. Mojalefa said he had to be reminded about diamonds by cross examination because he had forgotten, not because he was telling lies.

Mojalefa said he had known the other two accused for some time. Accused 2 had been a soldier, he knew him at the time he was impounding stolen vehicles. He knew Accused 1 because he was fond of football and had met him in taxis when he was going for football matches.

Asked about P.W.5 Lesenyeho, Mojalefa said he had known him for 10 years. They were just acquaintances but certainly not enemies. Lesenyeho P.W.5 often goes to the hotel. He saw him on the 26th January, 1990 but did not talk to him that day. Mojalefa denied he and P.W.5 ever got into the vehicle of Accused 3 that day.

Mojalefa denied he introduced P.W.5 Lesenyeho to the accused or talked to P.W.5 that day. Mojalefa said P.W.5 had not told the truth in his evidence. P.W.5 was also not telling the truth when he said the police met at Setjoetleng with the accused that day. Two days later he heard that deceased had been shot but Mojalefa does not have a good memory about those events. Mojalefa denied he was ever involved in the plot to take money from

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deceased.

Mojalefa denied he ever made any statement before the police. He said he only signed a paper after being tortured for 3 days. Mojalefa says he was shown Mafa who was chained and after unchaining Mafa the police chained him. The police did not ask him anything concerning the case, they asked him where the gun was. Mojalefa says he was tortured by members of the army and the CID about deceased's death. The police statement signed by Mojalefa was handed in by the Crown to discredit Mojalefa. It was in English.

The Defence closed its case.

One of the problems I was faced with in this case was that both the Defence and Crown counsel in cross-examination often mixed up what was suggested to witnesses for purposes of testing the credibility of a witness and what was put as the case of either side. What was suggested in cross-examination is intended solely to test credibility. On the other hand what is put to a witness is intended to test credibility and also to give notice to the other side of the evidence that will be brought. The particular witness is given an opportunity to comment on

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that evidence. If evidence is later suddenly brought by the other side on matters the witness in the box had knowledge, but was never given the opportunity to comment on that evidence that is unfair. Such evidence is treated with suspicion, but it is not automatically rejected. Mr. Qhomane for the Crown took questions as evidence. They are not evidence. The fact that the accused elects not to give evidence that he promised to give or lies cannot be regard as corroboration of witnesses of the Crown. Lord MacDermont in *Tumahole Bereng & Others v The King* 1926-53 HCTLR 123 at page 138 BC put the position as follows:

"But the accused admits nothing by exercising his trial right which the law gives him of electing to deny the charge on oath. Silence of that kind...—affords no corroboration to satisfy the rule of practice under consideration. Nor does an accused corroborate an accomplice merely by giving evidence which is not accepted and must therefore be regarded as false."

A great deal depends on the circumstances of the particular case before the Court.

It was put by the Defence to P.W.5 that Paseka Mokemane, during interrogation, confessed to this very crime. This was not evidence and it was not suggested

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that P.W.5 was aware of this fact. The Crown and the police were being challenged to deny or admit this fact.

The Crown did not deal with this matter. It was a serious allegation that the police put pressure on suspects during interrogation with the result that Mokemane implicated himself with a crime he did not commit. D.W.3 Mojalefa said he and Mafa were tortured. The Crown does not have to respond to everything, but I do not think where it was put to an accomplice that someone else has confessed to the same crime that should be ignored.

In the case of *R v A. Mphanya & Others* CRI/T/5/72 (unreported) an accomplice witness confessed to a ritual murder he did not commit (and which did not in fact exist). He did this as a result of the nature of the interrogation that the police embarked upon. Evans J in that case was obliged to say:-

"Never in my experience at the Bar and on the Bench have I listened to the unfolding of a Crown case without a shred of evidence to support a fantastic and incredible story devoid of substance and yet persisted in to the bitter end. The evidence revealed in cross-examination indicated Police intimidation, brutality and an attempt to paint a false and malicious picture to the court..."

It is therefore wise not to ignore allegations that

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someone else has confessed to the crime, more especially if that person is mentioned by name. While the Defence is obliged to prove what it asserts, the Crown cannot let allegations that interrogation was improper and has led people to falsely implicate themselves go unchallenged or unexplained. This is particularly so because in this case the Defence would not have found it easy to bring Paseka Mokemane before Court after his alleged ordeal.

What emerged from the evidence of P.W.6 was that Accused 1, 2 and 3 had had some business in Mohale's Hoek in January 1990. Among the people who were sometimes with them was Mafa, who was later interrogated by the police. Accused 3 and his vehicle was often seen in Mohale's Hoek at that time.

Accused One's Counsel had, through cross examination, given the impression that he would come and say he met Mojalefa and P.W.5 Lesenyeho towards sunset. Before 2.30 p.m. Accused 1 (it seemed from what his Counsel put P.W.5) had not yet got to Mohale's Hoek. His sworn evidence was different from what the Court had been led to expect. Accused 2 gave the impression that he was not in Mohale's Hoek on the 26th January, 1990 although this could be interpreted to mean also that he did not have dealings

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with P.W.S Lesenyeho.

From the way the accused gave evidence and answered questions, it was often clear they had a lot to hide. Indeed Accused 1 and 2 volunteered information that Accused 3 in their presence discussed illicit diamond buying with Mojalefa. Accused 2 actually said his mission with Accused 3 when they went to Mohale's Hoek was that of diamond buying. The accused were generally untruthful and clearly dubious characters who probably are involved in crime one way or the other.

The two accused did what many accused people often do—, that is distancing themselves away from the crime in time and place. Their evidence on this aspect was suspect and at places even down right untruthful. Whether they were in Mohale's Hoek after sunset on the 26th January, 1990, cannot be certain. Even if they were that does not necessarily mean they killed and attempted to rob deceased.

The fact that I cannot trust the evidence of the accused on this point, taken with other evidence of a credible nature, might give me an assurance that they committed the crime charged. Consequently I have to

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examine the other evidence before me in order to see if it is of a quality from which conviction in my mind that the accused are guilty can follow.

P.W.5 Lesenyeho is the main witness. P.W.5 stated repeatedly that he did not know all the accused. Towards the end of his evidence-in-chief he said he was afraid of Accused 2 because he knew Accused 2 was a former soldier.

There are two people who are suspected of killing deceased from what P.W.3 and P.W.4 told the Court the deceased said. It makes P.W.5 a possible robber of the deceased with the help of someone else. If he has not disclosed everything, then innocent people are likely to be hurt.

The demeanour of P.W.5 was far from impressive. P.W.5 said that was because he was scared of the lawyers in Court. See the cross-examination of P.W.5 by Counsel for Accused 3. It is not unusual for witnesses to be uneasy or outwardly unsatisfactory even when they are telling the truth. Nevertheless once a witness is uneasy as P.W.5 was, this ought to put the Court on guard lest there be more to this behaviour than meets the eye. The need for caution becomes even greater because P.W.5 told the Court a demonstrably false story when he said he did

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not know Accused 2 before the day they decided to go to deceased's place. P.W.5 accidentally revealed the truth when he revealed he took the threats of Accused 2 seriously because he knew Accused 2 was a former soldier. Even the idea that he was threatened rang hollow because he still maintained he did everything willingly.

The deceased's place was just next door from the home of P.W.5. The suggestion that complete strangers such as the accused could just repose their trust in P.W.5 brings up a few doubts to my mind. Even so, the most improbable things happen. P.W.5 says he went most willingly to go and take off money from deceased, so much so that he did not even think whether they might find the money or not.

Mojalefa, according to P.W.5, went to the home of P.W.5 to fetch him for the accused. At the car of Accused 3 near Frasers even before they got to the hotel P.W.5 introduced himself to the accused. Mojalefa did not introduce P.W.5 to the accused, he only brought them together if we properly understand what P.W.5 really meant. The big question is for what purpose? If it was to select a business premise to steal from Mojalefa could do this just as well. There are too many imponderables for us to relax when dealing with the evidence of P.W.5.

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The onus of proof is on the Crown. Mr. Qhomane for the Crown in urging the Court to convict largely because the accused are liars overlooked this point. Lord MacDermont in *Tumahole Bereng & Others v The King* 1926-53 HCTLR 123 at page 138D put the legal position as follows:

"The giving of false evidence - may bear against the accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent it cannot be used as a make-weight. To hold otherwise would be to undermine the presumption of innocence..."

In order for the Crown to be found to have proved its case beyond doubt, we have to find sufficient credible evidence to make this possible. In other words rejecting the evidence of the accused as false does not put an end to the problems of the Crown.

"The burden on proof always lies on him who takes action. If one person claims something of another in a court of law then he has to satisfy the court he is entitled to it." *Pillay v Khrishna* 1946 AD 946 at 951.

In a criminal case proof must be beyond a reasonable doubt not just on a balance of probabilities.

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P.W.5 Lesenyeho is an accomplice witness. There is no doubt that the evidence of an accomplice is admissible not only in terms of our Common Law but also according to Section 239 of the *Criminal Procedure and Evidence Act* of 1981 which provides:

"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 actually been committed."

Walker on the *Law of Evidence of Scotland* page 387 says of an accomplice:-

"His evidence, however, is received with suspicion, and a jury must be specifically directed to apply to it a special scrutiny over and above the general examination which a jury has to apply to all the material evidence."

In our law conviction on the evidence of single witness is permissible while in Scotland there has to be corroboration. Nevertheless after recognising that a court is empowered to convict on the evidence of a single witness, Schreiner JA in *Rex v Ncanana* 1948(4) SA 399 at page 405 said:-

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"The cautious court or jury will often acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that a trier of fact should warn himself, or, if the trier is a jury it should be warned, of a special danger of convicting on the evidence of an accomplice; for 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."

Holmes JA in *S v Hlapezulu* 1955(4) SA 439 at page 440E takes the matter further and emphasises the need for "the safeguard of some factor reducing the risk of a wrong conviction", such as corroboration implicating the accused in the commission of the offence. The reason being that:-

"various considerations may lead the accomplice to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description- his only fiction being the substitution of the accused for the culprit."

In *Lethola v Regina* 1963-66 HCTLR 12 at page 16A Schreiner JA dealing with accomplice evidence said in evaluating the quality of an accomplice's evidence,

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"it is not a mere question of demeanour... Possible motives to implicate the accused falsely-additional to those normally associated with accomplice evidence-may lessen the weight given to the accomplice evidence..."

It is to be expected that an accomplice's demeanour and sometimes even the quality of his evidence may seem superior to that of the accused. This is precisely because the accomplice has the inside knowledge of the crime. It is for this reason that corroborative evidence implicating the accused is generally sought. Holmes JA in *S v Hlapezulu & Others* 1965(4) SA 439 at 440 GH has crisply put the position as follows:

"Satisfaction of the cautionary rule does not necessarily warrant conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of safeguards aforementioned."

It is clear from the facts of this case that for the conspiracy to rob the deceased and the identity of those involved, this Court has to rely on P.W.5 Lesenyeho.

P.W.4 Jonase has told the Court that he interviewed the deceased who told him he saw the person who shot him.

It was a young man who is light in complexion. There

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was light in the room from the evidence given. There is no suggestion from the evidence obtained from the deceased that the person who shot him had a hat on or was disguised in any way.

Yet P.W.5 Lesenyeho says the accused put on overalls and hats when they went towards the deceased. Accused 1 had a balaclava hat that covered his head and showed only the eyes and the mouth. Accused 2 wore a skull-cap that had been brought down to cover the forehead up to the ears. Of the two accused, Accused 1 is the one whose complexion is relatively light though still on the brownish side. Accused Number 2 is definitely dark, in complexion. Yet P.W.5 says Accused 1 said it was Accused 2 who shot deceased.

Mr. *Qhomane* says the Court should accept the evidence of P.W.5 on this point because deceased made a mistake, because he must have been in pain. If that was so P.W.4 Jonase ought to have said so. It would seem to use Holmes JA's words in *R v Hlapezulu*, P.W.5, the accomplice may have either "substituted the accused for the culprit" or simply made a mistake. This is one of the problem I have in this case. If the evidence of P.W.5 coincided with what the deceased on the question of possible ident-

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ity this might be a "safeguard of some factor reducing the risk of a wrong conviction"—*R v Hlapezulu*.

There is also the fact that P.W.5 (quite apart from being an accomplice) is a single witness. In some countries such as Scotland, it is a rule of law that courts cannot convict on the evidence of a single witness, without some corroboration. In Lesotho the law is similar to English law where the court by law can convict on the evidence of a single credible witness. To put the matter beyond doubt Section 238 of the *Criminal Procedure and Evidence Act* of 1981 specifically provides that,

"any court may convict any person of any offence alleged against him in the charge on the single evidence of any competent and credible witness."

In *R v Bellingham* 1955(2) SA 566 it was correctly observed that if there are two or more witnesses there is a safeguard that their versions can be checked against each other. But where there is only one witness this safeguard is not there. It is on this basis that in *R v Mokoena* 1956 (3) SA 81 (AD) the South African Court of appeal reiterated what was said in *R v Mokoena* 1932 OPD 79 to the effect that a trial court should always warn itself and be alive to the dangers of convicting an accused

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person on the evidence of a single witness.

In the case before me, I have already observed that the evidence of P.W.5 on the appearance of the deceased's assailants does not quite coincide with what P.W.4 gave as the deceased's description of his assailant. Mr. Qhomane, the Crown Counsel used the written statement the police caused D.W.3 Mojalefa to sign to discredit D.W.3 as a defence witness. That implied that I should reject the evidence of D.W.3 Mojalefa as a whole. Mojalefa turned out to be most untrustworthy. Although the Crown wanted me to use some portions of his statement to corroborate P.W.5, that could not work. Perhaps Crown Counsel would have been better advised to ask me to reject the evidence of D.W.3 in *toto* together with the police statement that D.W.3 signed. This would have been the proper and normal thing to ask for.

There also remains the possibility that deceased was visited by the people who had a grudge against him to which his wife P.W.2 testified about. If they shot the deceased and did not deliberately take his money, that too is a possibility. That was what deceased's wife feared and suspected when she took deceased to Bloemfontein.

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The police do not seem to have made a proper investigation. They did not handle this case with expedition. The reason being that even the results of the firearms examiners microscopic examination were not obtained until after 7 months. They do not seem to have put any pressure that the examination be made earlier. Mojalefa says torture was used on him and Mafa. This is what Mr. *Qhomane* the Crown Counsel also confirms he said. We do not have evidence aliunde that can be believed about this. We do not know how P.W.5 came to give his statement. Whether P.W.5 is one of the people who attacked deceased or not, we will never know. Whether his evidence is true at all we cannot be sure.

My Assessor and I have come to the conclusion that it would be unsafe to convict on the single evidence of P.W.5 Lesenyeho, who is also an accomplice. We have also come to the conclusion that the merits of his evidence are not high. The demerits are quite substantial. We have therefore given the accused the benefit of the doubt.

The two accused are therefore found not guilty and are accordingly discharged.

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W.C M. MAQUTU
JUDGE

For the Crown : Mr. N. *Qhomane*
For the 2nd Defendant: Mr. A.T. *Monyako*
For the 3rd Defendant: Mr. L. *Pheko*