C OF A (CRI) No 4 OF 96

**IN THE LESOTHO COURT OF APPEAL**

In the matter between:

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| **SAMUEL MONONTSI MALIEHE** | **1st Appellant** |
| **MICHAEL TEBOHO CHAKA** | **2nd Appellant** |
| **REMAKETSE SEHLABAKA** | **3rd Appellant** |

and

| | |
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| **REX** | **Respondent** |

**HELD AT : MASERU**

**CORAM:**

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| **STEYN** | **P** |
| **Browde** | **JA** |
| **Van den Heever** | **JA** |

J U D G M E N T

**BROWDE JA:**

The three Appellants were charged in the High Court of Lesotho on the following counts:

1. "In that upon or about the 10th day of September 1991 and at or near Sekamaneng in the district of Maseru, the said accused, one or the other or all of them did unlawfully and intentionally kill one Toloko Constantinus Kimane".

2. "In contravention of section 183(2) of the Criminal Procedure and Evidence Act No.7 of

1981 'during the period August to September 1991 (the exact date to the Prosecutor unknown), and at or near Maseru in the district of Maseru, the said accused, one or the other or all of them did unlawfully and intentionally conspire with Momake Mathibela and others, to aid or procure the Commission of 'or' to 'commit the offence of unlawfully and intentionally killing one Sam Rahlao, an employee of Standard Bank Chartered, Maseru'.

3. "In that upon or about the 10th day of September 1991 and at or near Sekamaneng in the district of Maseru, the three accused, one or the other or all of them, did unlawfully and intentionally steal a motor vehicle being a Toyota 2.4 station wagon, the property or in the lawful possession of the deceased Toloko Constantinus Kimane."

The Appellants all pleaded not guilty and after a lengtny trial they were all found guilty on the first two counts but on the third count namely the theft charge the third appellant was acquitted but the other two were convicted. All three appellants were sentenced to death as a result of the conviction on count 1 while on count 2 they were each sentenced to six years imprisonment. In regard to count 3 the first and second appellants were each sentenced to imprisonment for three years and the sentences on this count were ordered to run concurrently with those on count 2. The appeal of all three appellants has been brought against both the convictions and the sentences. (For the sake of convenience I will hereinafter refer to the first, second and third appellants as accused No.1, accused No.2 and accused No.3 respectively).

On 11 September 1991 the deceased who held a fairly senior management position in Barclays Bank was found dead at Sekamaneng

some 10 or so kilometres from the Maseru city centre. His body which appeared to have been dumped off the road where it was found had 8 bullet wounds in it. According to the witness Major Telukhunoana who is an expert in the field of firearms, three of the shots appeared to have been fired from behind the accused, the bullets entering his back and exiting from his chest, judging by the wounds. A further bullet had entered his chest in the vicinity of the right nipple and left near the left.

The record of the evidence in this case together with the judgment runs into almost 2000 pages. While making due allowance for the fact that there were some 30 witnesses who were called to testify it seems to me, with all due respect to the learned presiding judge, that at times the cross-examination was allowed to become unduly extended. There are many instances (for the purposes of this judgment I do not think it will be of any assistance to detail them) where cross-examination was directed at completely irrelevant matter and in the circumstances of the case could have been of no assistance to the Court. It is generally accepted that it is undesirable for the trial judge to interfere more than is absolutely necessary with counsel's cross-examination since the disallowance of proper questions sought to be put to a witness by cross-examining counsel may amount to an irregularity See **S. v. Cele** 1965 (1) SA 82 at 90 and the case there cited. As Williamson JA said in that case:

> "The difficulties which sometimes arise in a trial in regard to a limitation of the right of cross-examination, relate more usually to attempts by counsel to cross-examine a witness on matters merely

> collateral to the issues being tried, the purpose being to undermine his credit as a witness. Particularly when the attack is directed to a witness's credibility can the ambit of such an examination tend to become unduly extensive unless properly controlled." (my emphasis)

It is the control which I am particularly referring to in this case. It seems to me that much of the cross-examination was purposeless and that the learned judge would have been fully justified in suggesting to counsel that the right of cross-examination was being abused because it was not productive of anything which could assist the Court in its eventual decision on credibility relating to relevant issues. As only one out of a number of examples, I fail to see whether a witness was right or wrong as to whether a blazer was black or navy could have the remotest bearing on the outcome of the case where the colour itself was irrelevant and no-one put it to the witness that his powers of observation in regard to relevant matters were faulty. Nor do I think it would be out of place if I point out, with respect, that counsel should not be permitted to bully a witness. It is not proper to put to a witness that he has contradicted previous evidence unless it is a certain fact that he has done so. There are instances in the record before us in which this was done without justification and it need hardly be said that this is unfair to the witness concerned.

An example of wrongly putting the evidence to a witness is to be found at page 750 and 501. At the former page the following is the record of the passage between cross-examining counsel and the witness:

"You said A1 elbowed me and said that I should shoot the driver of the vehicle?

- I believe that I said indicating that I should shoot.

No you did not you believe wrongly, you said 'and said that I should shoot the driver of the vehicle'?

That was made by a sign there was no talk made.

So now you are changing it, you are saying you didn't say with his mouth but he made a sign? -

That is what I am saying.

So when you are cornered you version not so (meaning I assume, "you change your version").

That is not so.

Well it is apparent from what you said to us.

- I did not put it in that way."

The Record at page 501 shows that the evidence of the witness originally was "We went up to the place where there are shops. After we had gone past that A1 elbowed me and indicated to me that I should shoot the driver of the vehicle the deceased."

The attack on the witness was therefore completely without substance and was unfair to him.

Nor is it within counsel's province to say to a witness "you are a liar". That is for the Court to decide. All that counsel may properly do, having established a foundation for it, is to point out that a particular answer is vulnerable to criticism as being either self-contradictory or in conflict with other prima facie acceptable evidence. While cross-examination may

legiftimately be firm and even aggressive, counsel should never stoop to being insulting or trespassing on the terrain of the Bench.

**Hearsay Evidence.**

During the course of the trial many objections were raised against evidence alleged to be inadmissible as being hearsay. It appears to me that many of such objections arise from a misunderstanding of the law relating to the inadmissibility of evidence as to what a witness heard another say. Not every statement made by a person not called as a witness is necessarily inadmissible hearsay. Speaking in general terms a statement by a person not called as a witness is inadmissible if it is tendered in order to prove the truth of what was said. I can do no better in this regard than to quote from the judgment of Watermeyer JA (as he then was) in **R v. Miller** 1939 AD 106 at 119 where the learned Judge of Appeal said:

> "Statements made by non-witnesses are not always hearsay. Whether or not they are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (i.e. as evidence of the truth of what they assert), they are hearsay and are excluded because their truth depends upon the credit of the asserter which can be tested only by his appearance in the witness box. If, on the other hand, they are tendered for their circumstantial value to prove something other than the truth of what is asserted, then they are admissible if what they intended to prove is relevant to the inquiry."

Often that "something other" is to explain why an accused

might have acted in a particular way.

**The evidence of accomplices**

Because the Crown relies so heavily on the evidence of the accomplice Mosia (PW14) it is not surprising that Counsel for the first and second accused (Mosia's evidence did not affect seriously accused No.3) submitted that the Court **a quo** was wrong in accepting his evidence and that it erred in not apply the so-called "cautionary rule" relating to the evidence of accomplices. Although there are many reported cases dealing with the subject perhaps it would be helpful if this Court looked again at the reasons for the general proposition that accomplice evidence should be treated with caution, in order to consider which, if any, apply in this case.

It appears to be generally accepted that the following are such reasons:-

1. The accomplice is a self-confessed criminal

2. He may have a motive to implicate the accused falsely because

   (a) he wishes to shield the real culprit or

   (b) he hopes for clemency from the Crown if he assists in obtaining

the conviction it seeks or

(c) he has some grudge against the accused.

(this is not necessarily an exhaustive list)

3. Inside knowledge of the crime and how it was committed makes him a witness peculiarly equipped to convince the unwary that his lies are the truth. He has a deceptive facility for convincing description - his only fiction being the substitution of the accused for the real culprit.

These reasons were dealt with by van den Heever JA in her unreported judgement in the case of **Ntusi vs The State** which was delivered in the Appellate Division of South Africa on 29 November 1993. It was said there

> "The first reason may or may not carry weight, depending on the circumstances; but the weight should at least not be overestimated. In 1844 already Chief Baron Joy, EVIDENCE OF ACCOMPLICES (quoted in Wigmore 3rd ed Vol 7 para 2057 p 323) pointed out the illogicality of requiring the evidence of a witness with a long string of previous convictions - unbeknown, of course, to the court - to be dealt with differently from that of the co-perpetrator of some minor offence, on this ground.
>
> > "Moral guilt, then, can never afford any rational foundation for a rule which applies indiscriminately to the highest and to the lowest degrees of that guilt - but an accomplice, we are told, comes forward to save himself, and his credit is affected by the temptation which this holds out to forswear himself. But who is it that establishes his guilt? He himself - he is

> his own accuser; and the proof, and often the only proof which can be had, of his guilt, comes from his own lips. He is generally admitted as a witness from the necessity of the thing, and from the impossibility without him of bringing any of the offenders to justice. If this be the foundation of the rule, it rests on a shifting sand. The temptation to commit perjury which influences his credit must be proportionate to the punishment annexed to the crime of which the witness confesses himself guilty."

The reasons listed under paragraph 2 must also vary in the weight attached to them, depending upon the circumstances of each case; save that 2(c) should be discounted as being a valid reason for suspicion in the case of an accomplice as such. It becomes a valid ground for suspicion against any witness once some foundation for such suspicion is laid in the facts presented to the court.

The reason given in paragraph 3 is the important one, in my view, not by itself but read with 2(a) and (b). Inside knowledge makes an accomplice a dangerous witness because it arms him too well with all the accoutrements needed to sell a lie: that the detail is so good may lead to the false inference that the identification of the perpetrator must be good too. But this reason is hardly appropriate to a situation such as we have here, where the detail is to all intents and purposes common cause, since the murder and robbery were committed in broad daylight and the complainant told the court almost everything that happened before the two accomplices testified."

The similarity between that case and the present one is obvious. Mosia's version of the events leading to the deceased's death are largely common cause and a danger of the substitution of the accused for the real culprit being of no application on the facts of this case. It is not in dispute that Accused No.1, Mothobi and Mosia were in the deceased's car and that the deceased, who was sitting in front with Accused No.1 while the latter was driving, was shot in the back and also in the right

side of his chest. Mosia admits firing the first and probably the lethal shot and it cannot be seriously suggested that he is using inside knowledge to falsely transfer his own guilt to someone else. His evidence that Accused No.1 fired the shot which was obviously fired from the deceased's right is not tainted therefore by any need for Mosia to try to escape culpability by passing it on to the accused. The only suggestion of a motive to misrepresent is that of Counsel for Accused No.2 who submitted that Mosia might have been cajoled by the police into implicating the accused because they "were keen to land a big fish". Quite apart from the fact that there is no evidence supporting such speculation there is, so it seems to me , no justification for the suggestion that Accused No.2 was a big fish. The mere fact that Mosia re-wrote his statement several times before the police were satisfied does not mean that they were satisfied only when Mosia implicated the accused. There does not appear to be any valid reason for disbelieving Mosia when he said that he told the whole story only when he realised that the game was up because the others (Mothobi and Accused No.1) had already implicated him in the murder.

In any event the evidence was that Mosia and Accused No.1 were close friends, the former having been the latter's commander when they were both in exile undergoing military training outside this country. The evidence certainly does not support a suggestion that Mosia bore Accused No.1 a grudge. As far as he might, in giving his evidence, have been hoping for clemency Mosia was well aware that to be given an indemnity from

prosecution he had to satisfy the Court that he was telling the truth. That being so he would have been particularly stupid had he lied about the role played by Accused No.1 and No.2 in the preparation for and commission of the murder when either or both of them may have been able to show that his evidence was unreliable. He must have known that for him that would have been a quick route to the gallows, since his evidence was a confession to having himself murdered the deceased.

I am therefore of the opinion that there was and is no reason for approaching Mosia's evidence with suspicion merely on the ground that he was an accomplice. My reading of his evidence has led me to the conclusion that Mosia was as honest as a cold blooded killer without a conscience can be. In **R v. Kristusamy** 1945 AD 549 at 556 it was said by the Court that "if one had to wait for an accomplice who turned out to be a witness of that kind" (i.e. one wholly consistent or wholly reliable, or even wholly truthful in all that he says)" - or indeed anything like it - one would, I think, have to wait for a very long time."

**The Evidence**

I do not propose to analyse the evidence in any great detail since this was done at great length by Lehohla J. in the court **a quo**. Suffice it to say that the evidence points overwhelmingly to the guilt of Accused No.1. According to Mosia and PW8 (Walk Tall) Accused No.1 was involved in talks with them as well as with Mothobi about what should be done about those

people who had not joined the strike. Several trips to Maseru preceded that on the fateful night when Accused No.1, who was well-known to the deceased, persuaded the latter to give him, Mosia and Mothobi a lift. It was after the deceased had handed over the wheel to Accused No.1 that the fatal shots were fired. Accused No.1 would have us believe that he had no prior knowledge of the plan to kill the deceased and that, as far as he was concerned, Mosia fired because of an aberration or else for a motive known only to himself. This suggestion can only be described as fanciful since it is common cause that Mosia had no interest in the strike and, apart from the mercenary aspect, no possible reason for killing the deceased. It is, therefore, quite beyond belief that he would have gone on a frolic of his own and for no reason shot the deceased in the presence of two witnesses who were in no way associated with the shooting and who could bear testimony against him.

As I have said, according to accused No.1 the shooting of the deceased happened without any prior warning as far as he was concerned and came as a complete surprise to him. He did not stop however but continued driving. Credulity is strained beyond breaking point at the thought that the innocent driver whose passenger is shot in the confines of his car, should not only placidly drive on, but - as he admits - at no time attempt to find out from the killer, who happens to be a good friend of his, why the shooting took place at all.

In my judgment the Court **a quo** was completely justified in

finding that accused No.1 was clearly not only an active participant in the scheme to lure the deceased away from the hotel and into the trap but an active participant in the violence. He fired the shot which ultimately lodged in the deceased's blazer unless one is prepared to believe, which I am not and which the Court **a quo** was perfectly justified in also not doing, that someone on the back seat was a contortionist and shot the deceased from the side where appellant No.1 was sitting after the fatal shots in the back of the deceased had already been fired.

Mr. Seggie who appeared for Accused No.1 in this Court did so at the court's request when virtually at the eleventh hour it was discovered that accused No.1 had no counsel. Mr. Seggie obviously put in many hours of work since he mastered the formidable record and argued the case most ably, and the court is indebted to him for his assistance. He submitted that the Crown's case was dependent on proof of a conspiracy and that the evidence of such conspiracy was very vague - this both in relation to the existence of the conspiracy and also its terms. He asked the court to find that it was reasonably possibly true that Accused No.1 accompanied Mosia and Mothobi on his various trips to Maseru merely for companionship and that he in no way participated in any plan to assist the strikers or to intimidate those who wished to end the strike. This version is, on the evidence before the Court, quite unacceptable. It is common cause that Mosia, Mothobi and PW8 (Walk Tall) were all well-known to Accused No.1, and the latter, on his version was a friend of

Accused No.2. Mothobi was himself on strike and led discussions about the strike with Accused No.2 while Accused No.1 was in the car. The further evidence regarding the pointing out of Rahlao's vehicles and the house where Rahlao spent time was deposed to by Mosia and was corroborated by Rahlao himself to the extent that he admitted owning the vehicle described and that he frequented the house pointed out. If one then looks at all the evidence of the meetings in Maseru together with what happened when the deceased met his death while giving a lift to the three friends in the car, the only conclusion one can come to is that beyond reasonable doubt Accused No.1 was not only a party to the conspiracy to kill Rahlao and the deceased but that he participated in the murder of the deceased and indeed fired one of the shots into his body. Accused No.1's appeal against his conviction on counts 1 and 2 must therefore fail.

Having killed the deceased, Mothobi, and accused No.1 appropriated his car for their own purposes: to leave the scene, dump the corpse elsewhere where it was ultimately found, and themselves get away from there; abandoning it only after and because they had caused it considerable damage.

No valid argument has been addressed to us why we should interfere with the learned judge's finding that Accused No.1 participated in the theft of the vehicle. I would therefore dismiss also his appeal against this conviction.

The evidence implicating Accused No.2 is primarily that of

Mosia. I have already pointed out that he was a good witness and correctly found to be so by the trial court, moreover who admitted to being himself a hired killer.

Mosia was a bosom friend of Mothobi's. Mothobi saw Mosia cleaning a firearm and asked him to help deal with the management of the Bank who were thwarting the strikers; and was to introduce Mosia to the chairman of the committee - presumably of the Lesotho Union of Bank Employees ("LUBE"). Instead he was introduced to the vice-chairman, accused No.2, initially under a nom-de-plume. No.2 was to take care of the necessary infrastructure of the proposed venture. The precise nature that it was to take was not yet formulated.

Mosia testified to a further meeting set up by Mothobi with accused no.2. During this, which took place in accused no.2's car, No.2 pointed out the cars belonging to people opposing the strike; there was discussion as to where people who were to be attacked lived; and accused no.2 took them to a particular building. There he pointed out where a particular individual visited and described the vehicle with which he would arrive. That man had to be killed "so that Bank Management would hear the request of the employees"

Then Mosia gives details of what was discussed at the Lancer's Inn. It is unnecessary to go into detail. According to him accused No.2 was part of those discussions, which dealt i.a. with the fact that the vehicle of accused no.2 was not fast

enough for their venture and no.2 pointed out a potential victim about whom Mosia had a reservation: he would not kill if he found at closer range that the prey was a relative of his.

This direct evidence implicating no.2 is corroborated in a number of respects.

"Walktall" was an accomplice who was found by the trial court to have been an unreliable witness. He implicates himself in the conspiracy, and adds little to the testimony against accused no.2, save the seemingly irrelevant titbit that when he met no.2 at a meeting set up by Mosia which took place in the car of no.2, "both Mothobi and No.2 had come empty-handed. I expected them to bring firearms and money"

Rahlao testified that he had vehicles which compllied with the description given to Mosia by accused no.2, according to Mosia; and that he himself saw accused no.2 pointing out his, Rahlao's, girl friend's house from where no.2 was standing on the back of a vehicle. Counsel who appeared for no.2 did not challenge this evidence.

Accused no.2 admitted that on two occasions he had meetings with the people, when they came to Maseru, who were present when Kimane died. He knew they were "military people" who had no personal interest in the strike. Mothobi nevertheless offered them as people who could make some contribution to putting an end to the strike. There were discussions under circumstances that

can only be described as clandestine, in strange places. He gives no acceptable explanation, relies at one stage on a lapse of memory: he cannot remember what had been discussed with people who on his version sought him out, not vice versa.

The very improbability of both his versions, provides corroboration that Mosia is correct as to the purpose and content of those meetings: the meeting with non-Union members were to tell him of matters in which they had no interest and which he already knew: that strikers were suffering, unable to pay their rent, and so on; or that discussions took place but he could not remember what they were about.

I agree with the submission of the Director of Public Prosecutions that if it was properly accepted (which I firmly believe it was) that Mothobi came to Maseru to pursue the objectives of the conspiracy hatched at Hlotse to either threaten, harass or kill those who were perceived to be obstructing the strike by refusing to participate or encouraging workers to return to work it follows as a necessary inference that Mothobi would have discussed his intentions with accused No.2.

It follows from what I have said - and I have by no means covered all the evidence - that accused No.2 was a co-conspirator in the plot to kill the deceased and Rahlao and that being so he was, in my judgment, correctly convicted by the Court **a quo**.

While it is highly likely that Accused No.2 knew that it was intended to take the deceased's car after he was killed I do not believe that this has been proved beyond reasonable doubt. It may have been a decision taken by the other conspirators after Accused No.2 had left and consequently his complicity in the theft of the car is open to some degree of doubt. Therefore his conviction on the theft charge should be set aside.

With regard to Accused No.3 the Crown case depends largely on inference. Mabasia Phomane (PW7) was a Bank employee who stated in evidence that Accused No.3 was in favour of the continuance of the strike and was a party to if not the author of a letter to two Banks asking them to tell the Banks' management not to tamper with the members on strike. Then there is evidence that accused Nos. 2 and 3 were obviously very close to one another and No.2 reported to No.3 after his meeting with Mothobi et al. It is a fair inference that he told No.3 what had gone on in the conspiracy but I doubt whether the requirements set out in **R v. Blom** 1939 AD 188 were met.

Though on the evidence accused No.2 himself was aware that the use of firearms was contemplated, the word killing expressly uttered, finally the first victim identified, the content of the conspiracy took shape as time passed and opportunity presented itself or could be created. Originally deeds and words were limited to threats and intimidation. The inference that when accused No.2 met with and reported to No.3, he told him that more than that had been decided upon: that the deceased or Rahlao were

to be killed, is not the only inference consonant with all the proven facts. There is a gap in the chain.

The learned Judge **a quo** found it very sinister that Accused No.3 gave PW7 the instructions to give Mothobi M15 without disclosing to PW7 the reason for the payment. I cannot find this so significant as to warrant the observation from the learned Judge that this incident, coupled with his not giving evidence in Court, were circumstances from which an inference of guilt was inescapable. The learned Judge also found "astonishing" and apparently one of the facts from which guilt could be inferred that Accused No.3, after the murder, did not publicly dissociate LUBE from the killing. I cannot agree that that is a fact that is significant in the assessment of the case against Accused NO.3. There was no clear evidence that LUBE was publicly perceived as having been associated with the murder. In any event the witness Mosohli testified that Accused No.3 was opposed to violence and the fact that he may not have publicly expressed condemnation of the deed does not mean that he approved of it.

In my judgment therefore there was not sufficient cogent evidence to justify the finding that Accused No.3's guilt was proved beyond reasonable doubt. His appeal should succeed and his conviction and sentence should be set aside.

I have already referred to the fact that the accused were sentenced to death. The learned Judge imposed the sentence because he found that the accused had not discharged the onus of proving the existence of extenuating circumstances. I doubt

whether the learned judge was right in finding that there was an onus on the accused but it is not necessary to decide that since before us the Director of Public Prosecutions "not without reluctance" conceded that extenuating circumstances existed in the case of Accused Nos. 2 and 3. In my view the concession was a proper one. The evidence concerning the strike given by the witnesses Phomane (PW7) and Mosohli (PW21) points to great frustration amongst the employees of the Banks unaccustomed to the proper utilisation of new legislation dealing with labour relations - indeed the latter witness relates how it was suggested that those people who were against the strike "should be taken out and whipped" and that it was the intervention of Accused No.3 which helped prevent violence. I need hardly point out that while this in no way excuses the brutal killing of the deceased it to some small extent diminishes the moral blameworthiness of Accused No.2 . It would also in my view be unconscionable were accused No.2 to be sentenced to death where the prime mover, Mothobi, is not before court and the actual killer, already described as cold blooded and without conscience, go scott free. There is, in short, substance in the submission of Mr. Wessels who appeared for Accused No.2 that the fact that the latter was a socius criminis and not the principal offender should be taken into account in his favour. In **S v. X** 1974 (1) SA 344 (R.AD) Beadle C.J. said (p.348 DE):

> "The fact that the accused is a socius and not a principal offender is always an important factor to be taken into account in assessing his moral blameworthiness....."

The learned Judge then went on to say that of course it depended on the extent to which the socius participated in the commission of the crime. While Accused No2 was an important participant the leading role in the crime was played by Mothobi. In my view extenuating circumstances exist in the case of Accused No.2.

In regard to Accused No.1 the Director of Public Prosecutions conceded that it would be perpetrating an injustice if having found extenuating circumstances in the case of the other accused, Accused No.1 were to be treated differently. We are told, and it appears to be common cause, that Accused No.1 gave the impression of being a person of low intelligence who followed the others because of his weakness and pliability. In fact Mr Mdhluli went so far as to say that he believed that Accused No.1 fired the shot from the .38" revolver because he wished to participate from a sense of bravado to impress Mosia who we know had been an officer in exile whereas No.1 had been a humble trooper, a driver. This too appears to reduce his moral blameworthiness. In his case too, therefore, I find extenuating circumstances to have been present.

I turn now to consider what sentence would be appropriate in the place of the death sentence imposed on Accused No's 1 and 2. It cannot be too strongly stressed that no court will treat with any semblance of leniency the resort to violence in disputes arising from the relationship between management and employees. Throughout the civilised world governments of late have attempted through legislation to bring about the resolution of labour

disputes by peaceful means. Violence in this field can lead only to instability of society if not chaos and anarchy. The Kingdom of Lesotho is no exception and the courts must, therefore, treat cases of the kind before us with sufficient severity to emphasize its abhorrence of the use of violence - here, extreme violence - to compel surrender by the other party instead of attempting the peaceful settlement of disputes; the more so since the mechanisms for negotiation and settlement have been put in place. In my opinion an appropriate sentence for both Accused No's 1 and 2 is 20 years imprisonment. In view of the fact that the accused have been in gaol since their arrest in 1991, I think it would be just if that were taken into account and I would therefore sentence them each to 16 years imprisonment.

I am aware that Accused No.2 was allowed out on bail for a period of some months but in the overall picture I think that should not affect his sentence.

There is, in my opinion, no reason to interfere with the sentences imposed by the Court **a quo** in relation to Counts II and III save to say that they should run concurrently with the sentence of imprisonment now imposed upon accused Nos 1 and 2.

In the result I make the following order:

FIRST APPELLANT

(i) The appeal against his conviction on Counts I, II and III is dismissed save that in

respect of Count 1 the Appellant's conviction is altered to "guilty of murder with extenuating circumstances."

(ii) The Appeal against the sentence on Count I is upheld. The sentence of the Court **a quo** is set aside and the following sentence is substituted therefor:-
16 years imprisonment.

(iii) The Appeal against the sentences imposed by the Court **a quo** in respect of Counts II and III is dismissed save that such sentences are to run concurrently with the sentence on Count 1.

SECOND APPELLANT

(i) The Appeal against his convictions on Count I and II is dismissed save that in respect of Count I the Appellant's conviction is altered to read "guilty of murder with extenuating circumstances."

(ii) The Appeal against his conviction and sentence on Count III is upheld. The finding of the Court **a quo** in relation to this count is deleted and the following is substituted therefor:-

Accused No.2 is found not guilty on Count III.

(iii) The Appeal against the sentence on Count I is upheld. The sentence of the Court **a quo** is set aside and the following substituted therefor:-

16 years imprisonment.

(iv) The appeal against the sentence imposed by the Court **a quo** in respect of Count II is dismissed save that it will run concurrently with the sentence on Count 1.

THIRD APPELLANT

The appeal against his convictions and sentences on all counts is upheld and his convictions and sentences are set aside.

**J. BROWDE**
**JUDGE OF APPEAL**

J. H. STEYN
PRESIDENT

VAN DEN HEEVER
JUDGE OF APPEAL

Delivered at Maseru on the ...5th day February, 1997