

IN THE HIGH COURT OF LESOTHO

In the matter between

R E X

and

LEPOQO SEOEHLA MOLAPO

Accused

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi

On the 12th day of June 1998

The accused and three (3) others namely Matsoso John Bolofo, Lelingoana David Jonathan and Makara Sekautu have appeared before me charged with high treason, alternatively sedition and further in the alternative with contravention of Section 7 of the Internal Security (General) Act No. 24 of 1984 (Internal Security Act). The whole charge which is quite formidable indeed reads as follows:

“Count 1 - High Treason

That the said accused are guilty of High Treason in that:

WHEREAS during the whole period covered by this indictment all the said accused owed allegiance to the Kingdom of Lesotho (hereinafter referred to as the State) upon or about the dates and at or the places hereinafter set out, the said accused, each or the other or all of them, despite such allegiance, did unlawfully and with hostile intent and with the intention of coercing by force or overthrowing the government of the State commit one or more or all of the following hostile acts:-

- A. On or about the 9th day of January, 1996, at Old Europa, in the Maseru Reserve, district of Maseru, the second, third and fourth accused did unlawfully combine and conspire with one another and with other persons to make preparations for the overthrow of the government of the State and did at the meeting they held on or about the 9th January, 1996 aforesaid decide that they were going to announce the overthrow of the government over Radio Lesotho on the 10th January, 1996 and thereafter take control of the government.
- B. Pursuant to and in furtherance of such conspiracy -
- (i) Accused No.2 and accused No.4 were assigned to meet an army officer known to them who would facilitate the accused's contemplated objective of

overthrowing the government.

- (ii) Having failed to get assurance that they (accused No.2, No.3 and No.4) would be provided with secure transport and access to Radio Lesotho premises on the 10th January, 1996, the said 3 accused and their co-conspirators decided to abandon proceeding with their intention to overthrow government on the 10th January, 1996. They decided to defer carrying out their intended objective of overthrowing government to some other day.
- (iii) Accused No.1, No.2 No.3 and No.4 subsequently met at Lithabaneng on or about the 3rd February, 1996 to decide on how to approach the commander of the Lesotho Defence (LDF) with a view to soliciting his support for the accused's intended objective of overthrowing the government. Accused No.1 agreed to approach the commander of LDF with a view to asking him to support them in their intended objective.
- (iv) Accused No.1 some time in February, 1996 (the exact date to the prosecutor unknown) approached the commander of LDF and the director of the

National Security Service (NSS) to ask for their assistance and cooperation so as to ensure that their conspiracy succeeded.

(v) Accused No.1, No.2, No.3, No.4 and other co-conspirators met at Maseru on the 29th February, 1996 to make final preparations concerning the making of the announcement of the overthrow of the government over Radio Lesotho.

C. Pursuant to and in furtherance of the conspiracy, accused No.1 and No.2 together with another conspirator proceeded to the Radio Lesotho premises on the 29th February, 1996, where they gained entry to the studio rooms; held the workers at Radio Lesotho captive by force so as to enable accused No.1 to announce, without hindrance or interference the overthrow of the government.

D. Pursuant to and in furtherance the conspiracy, (sic) while accused No.2 held the workers of Radio Lesotho confined in a room, accused No.1 broadcast over Radio Lesotho that in the name of leaders of political parties, traditional leaders and the Basotho nation he had dissolved government and parliament; that he had suspended the 1993 Constitution of Lesotho; that he was asking for good

cooperation from government departments; and that government departments should await further announcements from time to time.

Alternatively

Count 2 - Sedition

That the accused are guilty of the crime of Sedition.

In that, upon or about the 28th day of February, 1996, and at or near Maseru, in the district of Maseru, the said accused, each or the other or all of them, did unlawfully and with seditious intent participate in a gathering of a number of people which gathering had intent unlawfully to defy and subvert the authority of the Government of the Kingdom of Lesotho and making an unauthorised broadcast over Radio Lesotho that His Majesty's Government, the Government of the Kingdom, had been destabilising the country and undermining peace since the 1993 general elections:-

1. By causing disunity and dissent in the army, the police and prison warders, resulting in deaths of Basotho children, and also humiliating these forces in the National Assembly.

2. By illegally bringing into the country dangerous weapons of war through some of the parliamentarians.
3. By parliamentarians misusing public funds for the benefits of the Basotoland Congress Party (BCP)
4. By inviting foreign armies to come and attack and dissolve the lawfully constituted army of the Kingdom of Lesotho and therefore (the Government) thereby subverting the Constitution (1993 Constitution of Lesotho).
5. By causing disaffection among teachers' organizations and causing disunity among churches and also by not resolving the impasse concerning teachers salaries whereas Government continued to pay parliamentarians who had run away from the country.
6. By embarking on registration of voters for the 1998 general elections without any consultations with political parties.
7. By deliberately and maliciously ignoring constituting a commission of enquiry into the death of His Majesty King Moshoeshoe II.

Pursuant to and in furtherance of a conspiracy to defy and subvert

the authority of the Government of the Kingdom, the accused further announced that as a consequence of of (sic) the aforesaid accusations which they had levelled against the Government of the Kingdom of the Kingdom, (sic) they had dissolved the Government and the Parliament of the Kingdom; they announced further they had suspended the 1993 Constitution of Lesotho; they further asked for cooperation from the armed (security) forces so that their takeover of the Government could proceed smoothly and peacefully; and lastly they announced that they sought cooperation from all Government departments and that such Government departments should await further announcements from time to time.

Alternatively

Count 3 - Contravention of Section 7 of the Internal Security (General) Act, No.24 of 1984 (Internal Security Act).

That the accused are guilty of contravening section 7 of the Internal Security Act

In that, upon or about the 28th or the 29th of February, 1996, and at or near Maseru, the accused, did unlawfully and with subversive intent make an announcement over Radio Lesotho that

was intended:

- (a) to prejudice public order and/or the security of Lesotho;
and/or
- (b) counselling defiance to the law or lawful authority; and/or
- (c) Undermine or overthrow or cause the downfall of the
Government,

by announcing that they had dissolved the Government and the Parliament of Lesotho; announcing that they had suspended the 1993 Constitution of Lesotho; calling upon the security (armed) forces to cooperate with them and support them in their purported takeover of Government other than by constitutional means; and seeking cooperation from all government departments in order to ensure that their proclaimed unlawful and constitutional (sic) takeover of government succeeded.

Alternatively

Court 4 - Kidnapping

That the accused are guilty of Kidnapping

In that, upon or about the 28th or 29th February, 1996, and at or near Maseru in the district of Maseru, the said accused, did unlawfully and intentionally deprive a number of Radio Lesotho employees, all of them adults, of their liberty by holding them

captive by force in a room at Radio Lesotho premises where they remained until they were subsequently freed by the security forces.”

I should mention that after the charge had been read to them the present accused pleaded not guilty while his co-accused pleaded guilty to the crime of sedition. The latter plea was accepted by the Learned Director of Public Prosecutions Mr. Mdhluli hence a separation of trials was ordered.

I turn then to the facts of the case as they relate to the accused in the aforesaid charge of high treason alternatively sedition and further alternatively Contravention of Section 7 of the Internal Security Act 1984.

The Crown called 9 witnesses namely PW1 Masupha Molapo, PW2 Lennox Ntente Sesioaoa, PW3 Francis Ramatona Maseela, PW4 ‘Maliketso Nathalia Masupha, PW5 ‘Mamosili Ntene, PW6 Tefo ‘Musi, PW7 Basia Maraisane, PW8 Thabiso Sephelane and PW9 Private No. 7680 Rasupu.

PW1 Masupha Molapo gave evidence as an accomplice. It was his evidence that he knows the accused. They worked together at Fakhida Cash and Carry in Maseru. The witness was both supervisor and security officer. The accused was also engaged in security work as well as other jobs. He has known the accused for more than twenty (20) years. In fact they are related to one another by birth. Indeed this is common cause. They have been on good terms adding “we never fight.” Once more there is no dispute about this.

PW1 confirmed that he knows the co-accused in the matter adding “I had an association with these men.” He admits that he was involved in politics sometime in 1996 up to February of the same year. He belongs to a political party called the Basotho National Party (BNP). As a member of the BNP he came to know one Makara Sekautu (one of the co-accused). The latter once arrived at the witness’s work place at Fakhida Cash and Carry in 1996. The witness received a report from the accused that Makara Sekautu would like to see them both concerning some “serious news” which he wanted to tell them. He is indeed unchallenged on this version.

According to PW1 this Makara Sekautu belonged to and was a leader of a certain small political party “although he used to attend our BNP rallies.”

It is the evidence of PW1 that he and the accused ultimately met Makara Sekautu at Old Europa at the home of one Khethisa per arrangement. The accused was present and in fact he walked in the company of PW1 to this place.

PW1 and the accused waited at Khethisa’s home until Makara Sekautu arrived alone. He was on foot.

Makara Sekautu then left both PW1 and the accused saying he was going to fetch other people. On his return he was accompanied by PW2 Lennox Ntente Sesioana.

It is PW1's evidence that "Lelingoana (one of the co-accused) arrived at long last." He already knew Lelingoana because they had worked together as soldiers at RLDF (Royal Lesotho Defence Force). Under cross examination PW1 told the Court that he rose to the rank of corporal in the army.

According to PW1 those present at the meeting in question including the accused were all participating in the discussions although he can't recall the exact words expressed by each of them. They however showed that they had problems concerning transport and so they failed to go to Radio Lesotho adding "our desire in going to Radio Lesotho was to go and topple the Government." He was learning about the objective to topple the Government for the first time at this meeting.

PW1 testifies that the whole scheme aborted that day because there was no transport and the person who was to be a crucial link in the scheme had not yet turned up.

PW1 continues that after a couple of days Makara Sekautu came back to the place where the witness and the accused worked.

He wanted to meet them again. They all agreed that they would go and meet at the accused's place at Lithabaneng. The accused was present when this agreement was made. Indeed when the date of the meeting arrived the following people met at the accused's place namely;

- (1) the accused
- (2) Matsoso Bolofo
- (3) Makara Sekautu
- (4) Lelingoana and
- (5) Sesioana (PW2).

PW1 was meeting Matsoso Bolofo for the first time at this meeting. He was introduced to the latter by Makara Sekautu. As he had arrived late at the meeting he was then shown a draft or plan showing that “we should proceed with our mission of toppling the Government.” It also showed the portfolios each would occupy. There would be Councillors who would be above ministers of Government. Other political leaders would be ministers.

According to PW1 the next meeting was scheduled for February 1996. He however, did not attend because “they (the conspirators) had fooled us for quite a long time by not fulfilling their mission.” Nevertheless the accused informed him while they were on duty that the meeting in question was duly conducted “and that they had chosen the 29th February 1996 being the date on which the BNP members would be holding a rally (pitso).” The witness did attend this rally on that day. It is his evidence that they (the conspirators) had agreed that they would start at the rally and from there they would proceed to Radio Lesotho. According to him these people (the conspirators) included the accused and PW2.

PW1 further testifies that he knows PW3 Francis Ramatona Maseela

who was his co-worker. The latter once arrived at a meeting held at Lithabaneng in 1996. Present were the witness himself, the accused, Makara Sekautu, Matsoso Bolofo and Lelingoana. As PW3 heard the discussions going on he warned the participants to stop that “business of toppling the Government.”

As earlier stated PW1 attended the BNP rally on the 29th February 1996. He went to where Matsoso Bolofo’s vehicle was parked. He found the latter with the accused. Makara Sekautu was also present. PW1 inquired why they were not proceeding to the rally itself to which Matsoso Bolofo replied that they were still writing down their discussions. PW1 then proceeded to the rally.

After the rally had dispersed there was a procession leading to the National Assembly. It was here that PW1 found Matsoso Bolofo, PW2, Lelingoana and the accused. They were outside the gate “opposite Radio Lesotho gate.” A certain lady approached them from Radio Lesotho premises. She was met by Matsoso Bolofo and Lelingoana. After a short discussion the two gentlemen went together with the lady inside Radio Lesotho followed by the rest of the party. It is PW1’s evidence that “the accused was present also.” PW1, however remained at the gate where there was a radio playing.

Whilst listening to the radio PW1 realised that “the person reading 1 o’clock news stopped. The national anthem was then sung.” Thereafter Matsoso Bolofo “announced what was written on that document concerning

the toppling of the Government.” After the reading of the “news” PW1 left.

PW1 is adamant that their intention was to go and announce that they had toppled the Government. This was per agreement of the conspirators including the accused. In fact the latter had told him “the decision was that at midday at 1 o’clock our announcement was going to be read over Radio Lesotho - the news over the toppling of the Government and that members from the defence force and the police would arrive to protect us” adding “this is what I got from the accused.”

It is PW1's evidence that after Matsoso Bolofo had read the announcement over Radio Lesotho he (PW1) remarked saying “yes they have succeeded!”

Asked what the attitude of the accused was during the discussions to topple the Government PW1 told the Court that all the people who were there were happy about “the discussion that we were going to topple the Government.”

PW1 was “amazed” by the “simple way of toppling the Government unarmed.” Although they had not decided on who would assume the chairmanship of the Councillors between Matsoso Bolofo and Makara Sekautu he thought that anyone of the two would well be one since he had seen the soldiers do the same job which is not difficult. According to PW1 the accused was going to be one of the Councillors.

It is further the evidence of PW1 that he had been informed by the accused that approaches had been made to the armed forces.

Under cross examination PW1 told the Court that he left the army in 1984. He insisted that Makara Sekautu met the accused first and the latter told him that he (Makara Sekautu) was present outside.

He denied that he and the accused had already planned to go to Khethisa's place whether or not Makara Sekautu came adding "the accused went there because we told Sekautu the nearest place he would find us was at that place." He told the latter how to get there. He agrees it was "a common thing to visit Khethisa's place."

PW1 had not asked Makara Sekautu what the meeting at Khethisa's place was about because he knew that he was a politician. He thought his mission was based on politics. They used to be with him in BNP rallies and he (Makara Sekautu) used to be given a chance to speak.

According to PW1 they did meet at Khethisa's place in the evening. Makara Sekautu arrived with Sesioana (PW2) and Lelingoana. He adds "their statement was that at dawn we are going to Radio Lesotho and announce we had toppled the Government." It is Makara Sekautu who made the statement.

PW1 remembers asking Makara Sekautu how they would get to Radio Lesotho since there was no transport and further how was it he couldn't come

with “one of those who would support us.” Makara Sekautu then left with Lelingoana to go and look for transport “and to come with one of those people who would assist us.”

It is the evidence of PW1 that for the first time he wanted Makara Sekautu to come with one member of the armed forces. His agreement to become part of the conspiracy would have been conditional on such a person being available as well as transport.

Asked whether the accused agreed to the conspiracy PW1 told the Court that he cannot be sure whether he agreed or not because he (PW1) left due to the fact that transport was not available.

Mr. Phoofolo for the accused then put the following questions to PW1:

“Q: Would you agree you didn’t agree (with the conspiracy) because you saw this as a childish plan?

A: I didn’t regard it “as childish” as you say.

Q: Did you regard it as safe?

A: I regarded it as something that can be done if there is transport. We had been told that there would be transport. It was safe if there was transport.”

It was then put to PW1:

“Q: The accused says he disagreed to be a party to that because amongst other things it was childish.

A: I didn’t know how he regarded it.”

PW1 agreed with Mr. Phoofolo for the accused that Sekautu, Lelingoana and Sesioana (PW2) arrived at Khethisa’s place finding both PW1 and the accused already there. He denies the suggestion that the accused did not expect those other people at Khethisa’s place. The accused was expecting Makara Sekautu there since they were going to meet him at that place. He admits that the accused was seeing Sesioana (PW2) for the first time there.

PW1 further agreed with Mr. Phoofolo for the accused that the latter knew Makara Sekautu and Lelingoana. PW1 was then asked the following revealing questions by Mr. Phoofolo:

“Q: And Sekautu opened (the meeting) by saying they had met some political leaders.

A: I can’t recall all what was discussed that day. I have remembered all that I have said today. Perhaps it is what was said at the discussion.

Q: He went further to say he was here in their name - in the name of the leaders of the political parties?

A: I don’t remember him saying that on that day.

Q: The political leaders and himself had decided that this Government be overthrown.

A: In my imagination he never spoke of political leaders except himself concerning the matter of toppling the Government.

Q: And that he was in this regard asking you to play the part of going to the Radio Lesotho with them to make the announcement.

A: Yes he said so.

Q: He (the accused) will tell his Lordship that he formed an impression that there had already been a conspiracy and you were just being coopted.

A: Yes that is so.

Q: He (Makara Sekautu) said he wanted the announcement to be made that night or at dawn.

A: I know at dawn.”

It was then suggested that both PW1 and the accused immediately refused to be part of the conspiracy to which PW1 replied “I remember quite well I refused.” He cannot remember exactly what the accused said because each and everyone was speaking.

The following questions were then put to PW1 by Mr. Phoofolo :

“Q: He (the accused) says he refused to be a party to this thing that he thought was foolish.

A: But he did not tell me.

Q: He says he refused for other reasons that he was fully aware that in the light of democratic dispensation and support of neighbouring countries to Lesotho against overthrowing of governments that will never work.

A: But we ended up going to Radio Lesotho.

Q: He will say he believes in democracy - democratically elected government.

A: But we did go with him to the Radio. I didn't hear him say he believed in democracy."

PW1 testified further under cross examination that he himself believes in democracy. He was then asked the inevitable question:

"Q: If you believe in democracy what was pushing you to attempt overthrowing of the Government?

A: It's because this democratically elected Government belongs to BCP so I belong to BNP. As a member of BNP I did not like BCP Government."

He elaborated further that because he is a member of the BNP party it was easy for him to agree when it was said they must go and topple the BCP Government.

Asked what the accused's reason for toppling the government was PW1 replied that the accused and himself belong to the same party. He however

cannot recall the latter's exact words, adding "but we agreed to those people when they mentioned their mission of toppling the BCP Government." By "we" he meant himself and the accused. One of the reasons mentioned by the accused for toppling the Government "was that he said there was no justice in the ruling Government."

Pressed further to say in what way was there no justice PW1 replied that he did not ask many questions "because I was not against this mission." He didn't regard the mission of toppling the Government as dangerous according to the explanation by Makara Sekautu to the effect that he had assistance from both the armed forces and the police adding "that made me to believe or agree."

At the meeting at accused's place PW1 was shown a written document "that showed our positions when we had succeeded overthrowing the Government." It is Matsoso Bolofo who gave him the paper.

Mr. Phoofolo then significantly put the following question to PW1:

"Q: The accused will say that at the very first meeting at Khethisa's place Makara Sekautu mentioned a Government of National Unity by all parties.

A: I said because this happened a long time ago I cannot recall exactly what was said by Sekautu in this regard.

Q: He will say there was no question of a thing called

Councillors.

A: It was discussed in the second meeting.”

PW1 further testified under cross examination that the accused accepted the position of a Councillor even encouraging the witness himself to accept that position as well. The accused did not raise any query. Significantly PW1 was not challenged on this damning evidence.

After the meeting at Old Europa PW1 and the accused met Makara Sekautu at the former's work at Fakhida Cash and Carry. The three of them agreed to go and meet at the accused's home at Lithabaneng on the following Sunday. Indeed it is not seriously disputed that the parties did meet on the day in question at the accused's home at Lithabaneng.

PW1 categorically denied that at any meetings that were held there was any discussion to approach the Major General for his support in the proposed overthrowing of the Government. The witness recalls about three (3) such meetings. He certainly did not attend the last meeting which according to the defence was the fifth meeting.

PW1 is adamant that the day on which they went to announce the overthrow of the Government over Radio Lesotho had been chosen at the meetings adding “that day was fulfilment day. The plans were already made when we proceeded to Radio Lesotho.” The issue of the overthrow of the Government was discussed in all the meetings. Indeed he is unchallenged on

his version that the agenda at all the meetings held was to go to Radio Lesotho and announce the overthrow of the Government.

It was put to PW1 by Mr. Phoofolo whether he got to know what was discussed at the last meeting which the witness did not attend. This question elicited the following answer:

“Although not all I was informed by accused it was when he told me about the chosen date on which to proceed to Radio Lesotho to announce that we had overthrown the Government.” The date in question was the 29th February 1996.

It is PW1's evidence that he met the accused with Makara Sekautu, PW2 and Matsoso Bolofo at the BNP rally at ‘Manthabiseng on the 29th February 1996. PW1 found them in the latter's motor vehicle. He left them there and went to the rally. They told PW1 he would find them at Radio Lesotho after the rally and the subsequent procession to the National Assembly adding “I would leave the procession and go to Radio Lesotho.”

Mr. Phoofolo then put the following questions to PW1 which clearly suggest that it is not seriously disputed that the accused did get to Radio Lesotho although he alleges it was after the announcement to topple the Government:

“Q: The accused will say he didn't go to Radio Lesotho with

Lelingoana, Bolofo and yourself.

A: I found them in Radio Lesotho.

Q: He will say that he only got to Radio Lesotho after the reading of the announcement by Bolofo over the radio.

A: I found accused at Radio Lesotho before the announcement could be made.”

The meeting at Old Europa was finally conceded by Mr. Phoofolo in the following question he put to PW1:

“Q: Finally the accused will inform his Lordship that he was present at the meeting held at Old Europa.

A: He will be telling the truth.”

The meeting at the accused’s home at Lithabaneng was also conceded by the defence under cross examination.

I pause here to examine the legal principles involved in the evidence of an accomplice. In R v Ncanana 1948 S.A. 399 AD at 405-6 Schreiner JA stated the principle in the following words:

“The cautious Court or jury will often properly 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 the trier of fact should warn himself, or, if the trier

is a jury, that it should be warned, of the 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. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde* that the crime charged was committed by someone; so that satisfaction of the requirements of sec. 285 does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although sec. 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question.”

Indeed Holmes JA expressed himself in the same vein in S v Hlapezula and others 1965 (4) S.A. 439 at 440 when he stated as follows:

“It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely 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. Accordingly, even where sec. 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular *R. V. Ncanana*, 1948 (4) S.A. 399 (A.D.) At pp. 405-6; *R.v. Gumede*, 1949 (3) S.A. 749 (A.D.) at p. 758; *R. V. Nqamtweni and Another*, 1959 (1) S.A. 894 (A.D.) At pp. 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned.”

I am in respectful agreement with the principles as stated by the Learned judges of appeal. I have borne them in mind in dealing with this matter. In particular I consider that the fact that PW1 is related to the accused by birth and that they are obviously on good terms as well as the fact that he was not seriously challenged in material respects go a long way towards reducing the dangers inherent in the evidence of accomplice witness PW1.

The Crown relies upon the evidence of PW2 Lennox Ntente Sesioana as providing corroboration to the evidence of PW1. Since PW2 is himself also an accomplice I shall bear the above mentioned cautionary rule as enunciated by the learned Judges of appeal in approaching his evidence as well.

Mr. Phoofolo relies heavily on the following passage by Schriener JA in Lethola and others v R 1963-66 HCTLR 12 at 16:

“A plurality of accomplices does not in itself constitute corroboration for the purpose of the cautionary rule, since several accomplices are just as likely as one to implicate innocent persons falsely. But such a plurality provides material for checking truthfulness and may in some cases be important.”

While I agree with the principle stated in this passage I do not however understand the passage to mean that there can be no corroborative evidence of an accomplice from another accomplice. The law as I have always perceived it to be is that there is no rule of law that prevents a Court from

finding corroboration in the evidence of another accomplice. In this regard I respectfully agree with the following remarks of Botha JA in S v Avon Bottle Store (Pty) Ltd. And others 1963 (2) S.A. 389 at 393:

“The independent testimony of an accomplice is competent evidence, and I can see no reason why corroboration of one accomplice by another implicating the accused cannot, if the latter is reliable, reduce the risk of false incrimination. Whether or not that risk has been satisfactorily reduced will obviously depend on the circumstances.”

This view was adopted with approval by Holmes JA in S v Hlapezula and others (supra) at 440 in the following words:

“Where corroborative evidence implicating the accused in the commission of the crime is given by another accomplice, the latter’s evidence, if regarded as reliable, may, depending on the circumstances, satisfactorily reduce the risk of a wrong conviction. This was the view of Botha JA giving the judgment of this Court in S v Avon Bottle Store (Pty) Ltd. and others 1963 (2) S.A. 389 A.D. at p. 393 H and I agree with it.”

I should add for completeness that in terms of Section 239 of the Criminal Procedure and Evidence Act 1981 it is perfectly competent for any Court to convict on the single evidence of any accomplice provided the

commission of the offence has been proved by evidence *aliunde*. The Section reads:

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

To the extent that the charge in the instant case relates to high treason it is necessary also to bear in mind the provisions of Section 238 (2) (b) which provides as follows:

“238 (2) No Court shall -

(b) convict any person of treason except upon the evidence of two witnesses where one overt act is charged, upon the evidence of one witness to each such overt act.”

I proceed then to examine the evidence of the other accomplice PW2 Lennox Ntente Sesioana. He is a farmer aged 74 years. He went as far as Matric at Witwatersrand Technical College in 1946. He worked in the CID in the Republic of South Africa for 9 years 9 months leaving the force in 1955.

He then became a businessman from 1956 to 1974 when he took to farming.

I should mention at the outset that this witness gave his evidence in impeccable English. It was a pleasure to listen to him. He maintained his composure even under extreme pressure from cross examination. He always wore a smile. Of course, as earlier stated, I shall bear in mind that he is an accomplice and that the dangers as fully set out above are inherent in the evidence of an accomplice witness. Indeed the composure and smile that PW2 exhibited throughout his evidence do not necessarily lessen the dangers in question.

It is PW2's evidence that he met the accused for the first time on the 9th January 1996 at Old Europa. The accused was introduced to him by Makara Sekautu. He met Matsoso John Bolofo for the first time on the 4th February 1996 at Lithabaneng at the accused's place adding "we were in a meeting." It was on a Sunday. Indeed I observe from the 1996 calendar that the 4th February in 1996 was a Sunday.

He (PW2) knew David Lelingoana from the 9th January 1996 at Old Europa and again on the 4th February 1996 at Lithabaneng at the home of the accused. Makara Sekautu was also present. He has known the latter for a long time. In fact they are from the same village as well as from the same political party.

It is PW2's evidence that on the 29th February 1996 Matsoso Bolofo,

Lelingoana Jonathan, the accused and the witness himself were at Radio Lesotho adding “we were going to claim that we had overthrown the Government.” It is his evidence that he did not like the BCP Government.

According to PW2 they had already met on the 9th January 1996 at a certain place at Old Europa. Those present at the meeting were the witness himself, PW1, Makara Sekautu, Lelingoana Jonathan and the accused. He thus corroborates PW1 in this respect. They met in a flat but he does not know the owner thereof. He was there from 8 p.m. until 6 a.m. They were discussing “serious news.” The witness came to this house in the company of Makara Sekautu. They found the others already in the house.

PW2 then first introduced himself to the others and each stood up and greeted him. Then Makara Sekautu made the following statement:

“My country men, I have brought you Ntate Sesioana the man I talked about often to you. He is to advise us in our mission. I hope you will welcome him.”

Then the meeting started with a prayer adding “Makara led us in prayer.”

It is PW2's evidence that he was chosen because Makara Sekautu knew him very well. After the prayer Makara Sekautu spoke and said the following morning at 4 a.m. “It was the time we were to overthrow the Government.” PW2 testifies that those present all “demanded to know how we are going to

leave Old Europa” adding “they welcomed the suggestion but wanted to know the means of transport. Asked whether the accused welcomed this mission PW2 testified that “it was unanimously welcomed.” He thus corroborated PW1.

PW2 was not armed because according to him they had been assured assistance from members of the armed forces. They had also been promised security from Radio Lesotho to the Government Complex to “get hold of Government offices” after proclaiming the overthrow of Government. But in order to be certain of this the meeting sent Makara Sekautu to meet the soldiers and “make a better arrangement.” Makara Sekautu left at 2 a.m. and returned at 4.30 a.m. on the 10th January 1996. He found his co-conspirators “slumbering.” Makara Sekautu’s report did not satisfy his co-conspirators in as much as it merely said it was “all arranged and we could go to Radio Lesotho on foot safely.” That was unacceptable to PW2 and they all agreed that they must postpone the matter until better arrangements had been made. They dispersed at 6 a.m.

PW2 corroborates PW1 that “the accused was present all this time” adding “he was still normal.”

PW2 left the meeting at Old Europa in the company of Makara Sekautu. On the way the latter told him that there was a certain man by the name of Matsoso Bolofo who could connect them directly with the Major General adding “not this circuitous way of going through the ‘Bashanyana’” meaning

the soldiers.

According to PW2, on or about the 27th January 1996 Makara Sekautu came to him at his home at Mokema and told him that he had met Matsoso Bolofo and that the latter was interested to help and could connect them directly to the Major General. He also informed PW2 that there would be a meeting on Sunday the 4th February 1996 at a place near Lefikeng at Lithabaneng adding "he mentioned that it was at accused's place."

Indeed on the 4th February 1996 PW2 and Makara Sekautu left together from Mokema to Lithabaneng in the morning at 7 a.m. At Lithabaneng they met Matsoso Bolofo along the road. After the latter had introduced himself to PW2 he "apologised that he was going to deliver his wife at home and would come back."

It is PW2's evidence that they saw the accused standing next to the road adding "we went to him. We all waited for Bolofo to come. As he arrived on the road side the accused took us to his home." There were four (4) of them namely PW2 himself, the accused, Matsoso Bolofo and Makara Sekautu. They waited for Lelingoana and PW1 at the accused's place. It was at 11 a.m. They waited "until about 12 o'clock midday when Lelingoana and PW1 arrived." Makara Sekautu introduced Matsoso Bolofo to Lelingoana and PW1 after which he "presented Bolofo to us all as the man who would assist us and would be able to meet the Major General directly."

It is PW2's evidence that Matsoso Bolofo reported to those at the meeting that he had already seen the Major General and that the latter wanted to see the grievances for toppling the Government adding "then we arranged to compile our reasons in a written form and send them to the LDF General." Those grievances were similar to the ones actually read by Matsoso Bolofo over Radio Lesotho on the 29th February 1996. PW2 is adamant they discussed the reasons together adding "the accused was involved in the discussions."

The grievances were handed to Matsoso Bolofo to present to the Major General. PW2 testifies that "during all this time the accused was present." Details concerning the background of Matsoso Bolofo and Lelingoana had been given to PW2. The former was working as a security officer somewhere in the bank. He had previously been a police officer. The latter (Lelingoana) was formerly a defence force man.

PW2 testifies that they proceeded with their discussion "about the approach to overthrow the Government." They were going to do it by peaceful means adding "we decided to march peacefully accompanying political party rally and when we reached Parliament the whole of us, six of us, would go and proceed to Radio Lesotho. We did not care for the constitutional principles of the ballot box. We observed that BCP was not doing democracy anymore."

Asked what they would do if there was resistance PW2 testified that they

would be “helped by the armed forces to rebut that.” He admits that this would entail force and that they actually discussed this.

The discussions were closed “late in the afternoon” when Matsoso Bolofo was instructed by the meeting to go and meet the Major General “and report back during the week.” It is PW2's evidence that he had much confidence in Matsoso Bolofo.

On the 8th February 1996 PW2 was informed by Makara Sekautu that there would be another meeting at the accused's place on the 10th February 1996 at about 2 p.m. Then at about 2 p.m. on the date in question PW2 and Makara Sekautu left Mokema for the meeting at Lithabaneng. They arrived at the accused's place at about 2 p.m. Asked to clarify what time they left Mokema PW2 corrected himself to say it was between 9 a.m. and 10 a.m. They were travelling by bus. It was on Saturday. Once more I observe from the 1996 calender that the 10th February thereof was indeed a Saturday.

It is the evidence of PW2 that Matsoso Bolofo came late while the meeting was already in progress. Lelingoana also arrived. “PW1 was also there” as well as the accused. According to PW2 they had “some discussion before Bolofo arrived” as those present wanted to know what would be their future when they later handed over the Government to political party members. The meeting agreed that after overthrowing the Government they would hand it over to political party leaders.

PW2 testifies that the meeting had “a mind that we must have a chairman.” He was asked by the co-conspirators to help them appoint a cabinet and he agreed to assist them. At the top would be a Council of Rulers comprising of the co-conspirators. Then below this would be a Council of Ministers. It is PW2's evidence that he advised the co-conspirators to have two (2) divisions “so that they could have a role in the Government.” He is adamant that the Council of Rulers would include Matsoso Bolofo, Makara Sekautu, the witness himself (PW2) the accused, PW1 and Lelingoana.

According to PW2 the Council of Ministers would be appointed on the 29th February 1996 “when we had the power.”

Meanwhile Matsoso Bolofo made another report to the effect that the Major General was satisfied with the reasons for toppling the Government. This was on the 10th February 1996. The Major General would however want to meet Matsoso Bolofo and Makara Sekautu. Those at the meeting then instructed the two gentlemen in question to go and see the Major General. It is the evidence of PW2 that “in contributing these advices and hints we all took part - that is all of us.” Asked whether this included the accused PW2 categorically testified that “the accused was there and he contributed.”

According to PW2 the conspirators wanted to “convince the Major General that our course was right.” The meeting was closed at about 7 p.m. having agreed that Matsoso Bolofo and Makara Sekautu must report “immediately” about the meeting with Major General.

On the 24th or 27th February 1996 Makara Sekautu came to PW2 at his place and told him that there would be another meeting on the 28th February 1996 near the Speedy Complex in Maseru near the Traffic Circle not far from the Cathedral. Then on the date in question (the 28th February) PW2 left Mokema in the company of Makara Sekautu. They were travelling by bus. The latter told him that they had appointed a Secretary by the name of Morena Ranthomeng Matete whom PW2 knew as a BNP member. Morena Ranthomeng Matete would be Secretary "for our Council of Rulers."

PW2 and Makara Sekautu arrived at the Speedy Complex where they found Matsoso Bolofo. Later Lelingoana also arrived. The latter told them he had to collect papers to be typed from a certain lady a Miss Masupha (no doubt PW4) at the Speedy Complex. Lelingoana then left but came back later saying the lady had not yet finished typing the papers. At this stage Lelingoana made another report that the typing to some of the papers had not yet been finished by Morena Ranthomeng Matete because he was too busy with chieftainship matters. Those present left the Speedy Complex and went to wait at the Cathedral. They waited there for the papers in question until 4 p.m. when PW2 left for his home at Mokema. The papers were still not ready. It was agreed that the next meeting would be on the 29th February 1996 at about 8 a.m. at 'Manthabiseng Area. It is PW2's evidence that "we would meet there and finalise our plot." Asked what plot he testified that it was the plot of overthrowing the Government.

On the 29th February 1996 PW2 arrived at 'Manthabiseng at about 8

a.m. There he first met the accused who reported to him “that they had a meeting last night where Bolofo was appointed Chairman of Rulers” adding “and he further told me that Makara disputed vehemently about the appointment of Bolofo as Chairman.”

It is further PW2's evidence that the accused told him that Makara said he would spoil everything if Bolofo became Chairman and that the matter of the appointment in question was postponed until the arrival of PW2. PW2 further testifies that the accused told him the appointment in question “would wait for votes.” The accused then left saying he was going to see someone somewhere.

At this stage Matsoso Bolofo arrived and made a report too that the previous night they held a meeting where he was appointed Chairman of the Council of Rulers and that Makara disputed it saying he would spoil everything. Matsoso Bolofo then left saying he was in a hurry to meet the Major General.

According to PW2 Makara Sekautu also reported to him that he disputed the appointment of Matsoso Bolofo as Chairman claiming he was appointed in his absence. PW2 then gave Makara Sekautu “a stern warning” that there was no way back” and that if he was to be followed he must also follow others. Although Makara Sekautu was “very gross” he promised to follow PW2's advice. After sometime all the conspirators came one by one at ‘Manthabiseng Bus Stop namely Matsoso Bolofo, the accused, PW1,

Lelingoana, PW2 himself and Makara Sekautu. It was still on the 29th February 1996. It is the evidence of PW2 that at that time Matsoso Bolofo and the accused had to “shorten the written statement that Bolofo had to announce over the radio.” That is to abbreviate it. According to the evidence of PW2 Matsoso Bolofo was dictating while the accused was writing.

Meanwhile a distance further up the political rally was starting to get ready for a march to Parliament House. PW2 describes the march as a “*toyi toyi*.”

According to PW2 all the conspirators later met except Lelingoana who had already proceeded to the radio station “to examine the position, surveying whether we would be alright.”

The conspirators then joined the rally or “demonstration” down to Parliament House. PW2 reiterates that their “plan” was that when they reached parliament they would break away from the “*toyi toyi*” and go to the Radio Station where they would gain entry and “announce our takeover of Government.” This indeed is not disputed.

When the procession reached the Traffic Circle PW2 felt he could not cope with the “*toyi toyi*” as they were jumping. He broke off and followed Kingsway Road heading for the Radio Station. Those who continued with the procession were PW1, Makara Sekautu and the accused. Matsoso Bolofo drove in his car. PW2 found the latter outside the radio yard in the street

standing with Lelingoana. He joined them. Later the accused arrived followed by PW1. Sekautu didn't appear. It was between 12 o'clock midday and 1 p.m. and the conspirators waited there until a certain lady passed. She was called by Lelingoana and they talked aside after which Lelingoana called the co-conspirators and they all moved inside the yard. According to the evidence of PW2 "we had in mind that now we are ready to proceed with our mission." A statement had by then been prepared and handed over to Matsoso Bolofo to read in the studio.

A few yards from the gate PW2 turned back to go and close the door of Matsoso Bolofo's car as he had left his belongings in there. There were soldiers at the gate but they did not intercept the conspirators. It is PW2's evidence that he was "excited" at this stage adding "the others looked also excited."

As PW2 was delayed while returning to Matsoso Bolofo's car he found the others already inside the studio when he came back. He heard music - the National Anthem playing over the radio and asked a certain lady he met where the room was where the music was playing. The lady pointed the door for him and he entered the studio room where he found Lelingoana and Matsoso Bolofo. The latter was seated next to a microphone. Lelingoana was walking down "near people lying down on the floor." PW2 did not see PW1 and the accused "that time". He was instructed by Lelingoana to watch over those people lying down on the floor. Lelingoana was armed with a small gun - "it was like a pistol." He was holding it in his hand "walking around in there."

He disappeared in the other corner and came back with three more people whom he ordered to lie down. PW2 subsequently heard Lelingoana say “please Seoehla close that door.” It is PW2's evidence that it was then that Seoehla (the accused) emerged from the corner and closed the door.

There were many people lying down - men and women. They were quiet. Asked whether the accused was armed PW2 testified that he was not armed as he saw him. According to PW2 the accused then “went passed towards the door. He never came back.”

At this stage Lelingoana instructed all those people lying down on the floor to “press the knobs.” One man stood up and did as ordered. PW2 then heard Matsoso Bolofo speak on the microphone “and he read the memorandum - the statement adding “he was announcing to the radio station that the Government is being overthrown and people must comply.” The statement had six (6) points why the Government was being toppled.

PW2 then heard footsteps and as he peeped from where he stood he saw two (2) soldiers coming. They were armed. In his own words PW2 testifies “I thought they were our security who would convey us to the (Government) Complex” adding “I later realised that we were arrested when they said “what do you want here hold up your arms.” They complied. In PW2's own words “it was a shock.” They were ordered to lie down against the wall and face the wall and they were searched adding “the accused had vanished.”

The three men namely Matsoso Bolofo, Lelingoana and PW2 himself were then arrested and escorted to a certain room at the gate where they were “interviewed” by many people and photographs taken of them. The paper that Matsoso Bolofo had been reading over the radio was also taken away. PW2 testifies that “we were now ashamed” adding “I was not afraid but embarrassed.” They were locked up in the police cells nearby. Meanwhile “the accused had vanished into thin air.”

It is the evidence of PW2 that he was never taken to prison. They were interrogated adding “I talked the truth.” He told the police all that he knew.

Asked in retrospect about how he feels about the conspiracy PW2 told the Court that he is not ashamed because they were fighting for the right course. They wanted a short cut and they felt it was not necessary to go through elections adding “we intended to ride rough shod over the constitution.”

Under cross examination by Mr. Phoofolo PW2 was taken to task for having earlier said that they were ashamed when they were arrested but his reply was that they were ashamed because “the promises were not fulfilled.” He is not ashamed of “the attitude we took.”

Asked if it occurred to him he could go to prison PW2 replied that “I felt it was rightful if I went to prison. I still feel so even now.” The following question was then put to PW2:

“Q: You are sitting there as a witness because you are hoping for clemency?”

A: No.

Q: You would obtain clemency if you can assist the Crown to obtain conviction against the accused.

A: No. I am just telling the Court the truth of what happened not to convince the Court I need clemency.”

He was then asked:

“Q: You wouldn’t think you were not remanded in custody because there was no case against you?”

A: No. I had already been warned that I would be accused of high treason when I appeared before a Magistrate. When I was released I realised that my truthfulness had helped me not to be accused.

Q: Your truthfulness got you out?

A: My truthfulness had made me what I am.

Q: What are you?

A: An accomplice.”

For my part I should mention at this stage that as I watched the witness (PW2) giving evidence I had no doubt that he was not daunted by the thought of imprisonment. I got the impression that he was spilling the beans and making a clean breast of the true facts of the case regardless of the

consequences.

PW2 further testified under cross examination that he was born on the 15th April, 1923. He joined the South African Police in 1946. He reiterated that he left the police force 9 years 9 months later that is to say in 1955. He left on his own to start a business of a general dealer. He denied Counsel's suggestion that being a conspirator is an achievement. If they had succeeded he would call it a devotion to fight for his rights.

PW2 agreed that the decision to topple the Government was made on the 9th January 1996 at a certain house at Old Europa. This was said by Makara Sekautu when the meeting started. Mr. Phoofolo then put the following significant questions to PW2:

“Q: And what did he say?

A: He said early in the morning of that date it's the day for the overthrowing of the Government.

Q: By whom?

A: By the men I found in the house that night being with the help of the armed forces.

Court: Who were these men?

A: Accused, Lelingoana, PW1, Makara.”

PW2 further testified that he was told by Makara Sekautu that “altogether they had a plan to overthrow the Government.” Asked what he

was to do since the plan had already been hatched PW2's reply was the following and I quote:

“To advise them in certain instances; how they should go on and after. He elaborated that the co-conspirators had a plan to overthrow the Government so they needed advice on how to go about with the plan and after.”

PW2 was then asked to reveal what Makara Sekautu said the plan was. The witness replied as follows and I quote:

“He said they would walk to the Radio Station and announce that the Government had been overthrown. The armed forces would help - they would be escorted to (Government) Complex, he told me that was the plan.”

It was PW2's impression that the conspiracy to overthrow the Government had already been hatched before the 9th January 1996 because at the meeting at Old Europa Makara Sekautu introduced him to the co-conspirators in the following words:

“You gentlemen you remember that in the morning we are going to overthrow the Government. I have brought you an advisor.”

Mr. Phoofolo then put the following revealing question to PW2:

“Q: But according to my instructions I tend to agree with you that this (conspiracy) was hatched a long time before the 9th January 1996.

A: I believe so.

Q: But that it was not hatched by accused and others.

A: I don't know.

Q: We will bring evidence before the Court which will show that Matsoso Bolofo informed the accused that the decision, the plot to overthrow the Government had come from the Government itself.

A: I was not there when Bolofo told Seoehla (the accused) about it.

Court: Mr. Phoofolo, which Government, the BCP Government?

A: Yes my Lord.

Q: He will inform his Lordship that Major General Mosakeng told him the Prime Minister wanted the Government to be overthrown.

A: I don't know.

Q: Because the problem of working hand in hand with his Cabinet had already started.

A: I can't remember that.

Court: Do you know anything about it?

A: I know nothing.”

Corroborating the evidence of PW1 and PW2 Mr. Phoofofo then put to the latter witness that the accused admitted attending the meeting of the 9th January 1996 at Old Europa. He significantly went further to put the following question to PW2 in an attempt to disclose what Makara Sekautu said at the meeting in question:

“Q: And that he Sekautu had come to ask them (the conspirators) to accompany him to Radio Lesotho to announce the overthrow of the Government.

A: I don't remember him saying that adding “ I only heard him saying ‘gentlemen, you know that at 4 a.m. this morning we are going to the Radio Station and overthrow the Government.’””

PW2 is adamant that according to the introduction by Makara Sekautu at the meeting of the 9th January 1996 the co-conspirators already knew that in the morning of the 10th January 1996 the Government would be overthrown. Makara Sekautu was therefore merely reminding them.

It was then put to PW2 that the accused says he never appointed him his advisor. PW2's reply was that the accused “concurred” when he was introduced to the co-conspirators as their advisor. They accepted him.

According to PW2 he advised that the plan to overthrow the Government was not well planned and that it should be postponed “until such

time as when it was well planned.” It had loopholes.

Asked further about the meeting of the 9th January 1996 at Old Europa PW2 testified that the accused was sitting next to him and that the conspirators were “sitting around a table.” He denied that the accused left long before 2 a.m. To the suggestion that the accused did not associate himself with the conspiracy PW2's reply was the following and I quote:

“I don't know how he was not associated yet he was there and discussed together.”

He denies that the accused is the only person who raised the question of security necessary to overthrow the Government. All the co-conspirators raised this issue. Nobody asked about whether the arms were available because “we had people to support us. We had arms” namely the armed forces adding “we were told that they would be behind us.”

It is PW2's evidence that they postponed the meeting of the 9th January 1996 because the arrangements were not satisfactory.

Asked whether security was there on the 29th February 1996 when they went to Radio Lesotho PW2 replied that they had been promised “better security.” They proceeded thereto this time because it was daytime while in January when they refused it was night time. He was then asked by the Court:

“Court: So what difference did it make on he 29th February 1996?

A: We were convinced that security would come at that stage.

Q: What do you mean?

A: I mean when we were broadcasting we were assured security would come.

Q: What convinced you?

A: Because Bolofo told us he had made full arrangements.”

PW2 categorically denied the suggestion put to him under cross examination that on the 9th January 1996 and at the meeting at Old Europa he already knew about the conspiracy to overthrow the Government.

Asked what special qualities he had to warrant being appointed advisor of the conspirators PW2 replied that Makara Sekautu could know the reason as he personally did not know adding however that he is “an experienced man in politics.” Indeed I observe that he was not seriously taken to task on this and I have no reason to doubt his experience in politics - after all it is not disputed that he was a member of “political staff” when attached to the Special Branch of the CID in Johannesburg. It is his evidence that as such he attended political meetings and also took minutes to send to the office.

Explaining his role PW2 further explained that he heard later that his advice was needed for overthrowing the Government, that is to say, how to proceed with the exercise. He adds “they (the co-conspirators) asked me

what they should do if they had overthrown the Government. I said they must make a National Government.”

PW2 further testifies that the co-conspirators asked him advice on what their positions would be in the National Government and he advised that there would be a Senior Council above that of Cabinet Ministers. This latter advice was discussed at the meeting at Lithabaneng at the accused’s home.

Asked about the date of the first meeting at the accused’s place PW2 told the Court that although he did not quite remember the date it was round about the 3rd or 4th February 1996.

Responding to Mr. Phoofolo’s invitation to divulge the contents of the report made by Matsoso Bolofo PW2 told the Court that the latter reported to the conspirators including the accused that he had met the Major General of the Defence Force and the Major General said he wanted to see the conspirators’ complaints for overthrowing the Government adding “we sat down all of us and discussed the grievances which were written by Bolofo.”

PW2 reiterates that at ‘Manthabiseng Bus Stop the accused and Matsoso Bolofo were “shortening statement from the big report regarding the conspirators’ grievances” adding “I saw them writing. They read it after Bolofo read all the minutes that were written by the accused to us all.” He reiterates that Bolofo was dictating while the accused was writing.

Asked further about the procession to Parliament PW2 testified that the conspirators including the accused decided to “mix” with the rally to Parliament house and from there they would all six of them proceed to the Radio Station to do “the work” of overthrowing the Government. According to the evidence of PW2 the six conspirators were Matsoso Bolofo, Makara Sekautu, the accused himself, Lelingoana Jonathan, PW1 and the witness (PW2) himself.

Mr. Phoofolo then put the following suggestion (or was it a protest) to PW2:

“Q: I notice you never stop mixing the accused with meetings.

A: I never said he was there at Speedy Complex.”

Indeed I observe that PW2 is correct on this point. He never sought to place the accused at the Speedy Complex.

Asked further about the statement that was eventually read over Radio Lesotho PW2 testified that “the statement was officially handed to Bolofo by all of us but that statement was written by the accused while Bolofo dictated.”

I pause here to mention that I was impressed with the witness’s consistency in reply to this question which was indeed raised repeatedly. Indeed the witness remained unshaken throughout a long taxing cross examination. I believe that he was telling the truth in the circumstances.

PW2 further repeated his evidence under cross examination that he saw the accused “emerging from a corner when asked by Lelingoana to go and close the door” at the time when the announcement to overthrow the Government was being read by Matsoso Bolofo. That was the last time he saw him.

There is then the evidence of PW3 Francis Ramatona Maseela to the effect that he knows the accused as they worked together at Fahhida Cash and Carry. He has known him for about a year or so. The accused arrived at Fahhida Cash and Carry in between 1994 and 1995 finding the witness already working there. He confirms that the accused was employed as security while the witness was Human Resources Manager and Assistant General Manager - He is a qualified teacher by profession being in possession of PH Certificate.

PW3 also knows PW1 and he confirms that the latter was also employed at Fahhida Cash and Carry as a security officer. He further knows Lelingoana Jonathan, Makara Sekautu and PW2. He also knows Matsoso Bolofo “for quite a short time.”

It is the evidence of PW3 that about a year before 1997 when he gave evidence in this matter that is to say in 1996 he went to Lithabaneng looking for PW1. He got to the home of the accused and found the latter outside his home feeding his dogs. The accused told him PW1 was inside the house. Indeed upon entering the house PW3 found PW1 “present with other people inside the house.” Amongst them were Lelingoana Jonathan and Makara

Sekautu.

PW3 testifies that he then called PW1 outside and gave him an instruction concerning work as he (PW3) would be attending a Workshop at Lesotho Sun the following day. Thereafter they departed.

It became clear to the Court at this stage that the witness was reluctant to come up with the story that the Crown expected him to give. After he was allowed to refresh his memory from the written statement he had made to the police he was prepared to relate “everything that I remember” to the Court.

He then told the Court that in January 1996 he heard that there was a conspiracy and that there were people “attending secret meetings.” He heard that among these people were his co workers PW1 and the accused. To determine the truth of this allegation he called upon both PW1 and the accused and confronted them with the conspiracy allegation. He warned them “to stop forthwith” even though they did not own up to the conspiracy. PW1 however subsequently admitted the meetings in question.

It is the evidence of PW3 that thereafter he got to the home of the accused at Lithabaneng as earlier stated. He reiterates that he found the accused outside and upon entering the house PW3 found PW1, Lelingoana Jonathan and Makara Sekautu inside. He cannot recall if Matsoso Bolofo was there. It is his evidence that the people inside “were seated inside the house. They looked like people who were convening a meeting.” Indeed the witness

was not challenged on this version. Instead the question that was put to him by Mr. Phoofolo appeared to concede the meeting in question. This is the question:

“Q: Accused will say that indeed you went to his house and indeed you found him outside. Masupha (PW1) was in his house. Sekautu was in his house. Sesioana and Lelingoana were also in his house, so was Bolofo. They were not discussing the overthrow of Government.

A: I won't agree that Sesioana was in that house.”

It was clear to the Court however that PW3 was not quite sure whether the person at the meeting was Matsoso Bolofo or PW2 because in his own words he said “there was one person sitting. I thought he was Bolofo.” It is common cause that PW2 was at the meeting.

It is PW3's evidence that he entered the house with the accused. He then heard a discussion led by Makara Sekautu on what was to be done adding “they were discussing steps to be taken about overthrowing the Government. He was talking to the people inside the house.” He is adamant that “as Makara was talking to these people accused was already there.” Once more I observed that the witness was not challenged on this version.

PW3 goes further to testify that before leaving the accused's place he warned all those people in the latter's house including the accused himself that

“it’s better that they stop this conspiracy of theirs.” Nobody responded. Once more he is unchallenged on this version.

I pause here to observe that this was an ideal opportunity for the accused to dissociate himself from the conspiracy, yet the evidence of PW3 points to the contrary. More about this later.

Under cross examination PW3 was asked the following question by Mr. Phoofolo “

”Q: Is it my understanding that there was a conspiracy to overthrow the Government; is that what you heard?

A: That is so.

Q: from whom?

A: By one Makara Sekautu.

Court: Is he one of the co-conspirators?

A: Yes.”

As a parting shot PW3 testified that he had no reason to implicate the accused. Indeed I observe that none was suggested by the defence. On the contrary the accused admitted under cross examination by the Learned Director of Prosecutions Mr. Mdhluli that PW3 was “quite friendly” to him and PW1. In particular I attach due weight to the following question put to the accused and the latter’s reply which clearly says it all:

“Q: And he (PW3) is the type of man who would rather be protective to you rather than expose you?”

A: I don’t believe that he can implicate us.”

As earlier stated PW3 was initially a reluctant witness. The Court must therefore approach his evidence with due caution. I observe however that this reluctance was aimed at protecting the accused. I was however impressed by the witness’s overall evidence. As I watched him give evidence I gained the impression that he was telling the truth. He remained unchallenged in material respects particularly in corroborating the evidence of PW1 and PW2 on the existence of a conspiracy to overthrow the Government and the participation of the accused therein as evidenced by the meeting of the conspirators at the latter’s home at Lithabaneng.

The evidence of PW4 ‘Maliketso Nathalia Masupha is briefly to the effect that she is a secretary whose job entails, amongst other things, making photocopies. She knows the co-accused Lelingoana Jonathan. She has known him for about 2-3 years. She also knows PW1 but does not know PW2 and the accused.

It is the evidence of PW4 that on the 29th February 1996 she heard over the radio that the Government had been toppled. This reminded her that the previous day namely the 28th February 1996 Lelingoana Jonathan came to her office alone and requested her to type certain papers for him. She agreed. Lelingoana Jonathan then left the manuscript with her. Those papers “were

showing that they were going to overthrow the Government.” She handed in the document that she typed as EX “A” which comprises a whole range of complaints against the Government.

It is perhaps appropriate to quote some of the concluding remarks contained in EX “A”:

“.....the Government and BCP Government with its iron hand on the nation is being dissolved and the reconciliation Government will be put in operation. The reconciliation Government is being implemented that comprises of groups of political parties and others.

Other steps besides this will be implemented that is Reconciliation Council to watch over the reconciliation action as well as preparation of elections that will be held in 1998 under Independent Electoral Commission.

Some of the people who were in the ruling Government will be put before courts of law because of the crime they have committed so as to give a chance to these changes to be implemented peacefully.”

It is PW4's evidence further that Lelingoana Jonathan also gave her another document which she also typed. She handed in the typed version as

EX "B". It is headed "The Council of Reconciliation Officers" as well as "Council of Ministers" and "Ministers of State." The document then spells out different portfolios under each heading.

PW4 testified that Lelingoana Jonathan collected the typed documents the same day namely the 28th February 1996 promising to pay for them the following day. He never did. She testifies that Lelingoana "didn't look serious. He said he had brought a mixture of 'triviality.'"

It is significant that the evidence of this witness (PW4) went in completely unchallenged. I have no hesitation therefore in accepting that the evidence is the truth of what transpired on the 28th February 1996 and that both EX "A" and EX "B" emanated from the co-conspirator Lelingoana Jonathan.

The evidence of PW5 'Mamosili Ntene, PW6 Tefo 'Musi, PW7 Basia Maraisane and PW8 Thabiso Sephelane is briefly to the effect that on the 29th February 1996 while they were all at work at Radio Lesotho they and their colleagues were rounded up at gun point by some men who turned out to be Lelingoana Jonathan, Matsoso Bolofo and PW2. PW7 also makes mention of yet another man lurking at the doorway - in corroboration to PW2's evidence that the accused was also present.

Having been rounded up the victims were herded into a certain room, made to lie down and held captive until they were released by the soldiers on

guard at the premises including PW9 Private Rasupu. Three of the attackers, or shall we call them culprits were arrested namely Matsoso Bolofo, Lelingoana Jonathan and PW2.

Mr. Phoofolo for the accused then made the following significant admission namely that on the 29th February 1996 Matsoso Bolofo read a statement over Radio Lesotho being Exhibit "C1" (Sesotho version) or Exhibit "C2" (the English version). He also made a formal admission that the workers of Radio Lesotho were indeed herded into the studio control rooms and held captive there.

It is no doubt convenient and indeed appropriate to reproduce EX "C2" which reads as follows:

"In the name of leaders of political parties, traditional leaders and the Basotho nation, I hereby make the following announcement:-

For the following reasons:

The Government of Lesotho has been destabilising the country and undermining peace since the 1993 general elections-

1. By causing disunity and dissent in the army, the police and prison warders resulting in deaths of Basotho children; and also humiliating these forces in the National

Assembly.

2. By illegally bringing into the country dangerous weapons of war through the (sic) some of the parliamentarians.
3. By parliamentarians misusing public funds for the benefit of the BCP.
4. By inviting foreign armies to come and attack and dissolve the lawfully constituted army of Lesotho and therefore Government subverting the Constitution.
5. By causing disaffection among teachers' organizations and causing disunity among churches and also by not resolving the impasse concerning teacher's salaries whereas Government continued to pay parliamentarians who had run away from the country.
6. By embarking on registration of voters for the 1998 general elections without any consultations with political parties.
7. By deliberately and maliciously ignoring constituting a commission of inquiry into the death of His Majesty King Moshoeshoe II.

For the foregoing reasons and others I announce that I have dissolved the Government and its parliament. I announce that the 1993 Constitution is suspended.

All trips outside the country taken by Government vehicles should cease until a further announcement.

I ask for good cooperation from the armed forces so that all these steps can be achieved with peace. Cooperation is also sought from all Government departments and that they should await further announcements from time to time.

PEACE - RAIN - PROSPERITY.”

I observe that EX “C2” is indeed the shortened version of EX “A”. This in my view corroborates the evidence of PW2 that it was decided to shorten EX “A” as it was too long. That completed the Crown case.

The accused gave evidence as DW1. He is a former member of Royal Lesotho Defence Force (RLDF). He confirms that at the material time he was working at Fakhida Cash & Carry with PW1 and PW3. He confirms that the former is his relative referring to him as his “brother.”

I observe at the outset that the accused was very evasive in his evidence as will become apparent in the course of this judgment. For an example he

was asked by his own attorney Mr. Phoofolo very early in his evidence in chief the following question:

“Q: It is common cause that there was a meeting held at one Khethisa Molapo at Old Europa;

A: Yes I heard that one Sesioana and Sekautu arrived there.”

Yet it transpired that the accused did not dispute his presence at the meeting in question. How then he should claim to have “heard” and not seen the presence of Sesioana and Sekautu at the meeting can only be attributed to evasiveness on his part no doubt initially aimed at trying to dissociate himself from the meeting.

The accused denies that he met Makara Sekautu at Fahhida Cash and Carry prior to the meeting at Old Europa. This despite the fact that PW1 was not challenged on that version.

He confirmed that there was in fact a meeting held at Old Europa on the 9th January 1996 at the home of his “brother” Khethisa Molapo who was away in Leribe. He was in charge of the latter’s house at Old Europa in the latter’s absence.

The accused corroborates the evidence of PW1 and PW2 that the meeting at Old Europa was attended by the accused himself, PW1, PW2, Makara Sekautu and Lelingoana Jonathan. Corroborating PW1 and PW2 it

is the evidence of the accused that “Sekautu told us that he had come to let us know that he and all political leaders in Lesotho and traditional leaders, Lesotho armed forces, Lesotho Police Officers and NSS Security of Lesotho reached a conclusion that at dawn of that day he will be announcing at Radio Lesotho that Lesotho Government had been overthrown and that thereafter the Government of National Unity will be in place. So he had come to invite us to accompany him to Radio Lesotho.”

According to the accused all those at the meeting including himself, PW1 and PW2 then participated in a discussion that followed on issues such as security and the mode of transport. He testifies that the decision was that they were not accompanying Makara Sekautu to Radio Lesotho because he found it “unnecessary to involve myself in such matters.” He denies that he was part of the conspiracy to go to Radio Lesotho adding rather strangely “we saved the Government that day.” Perhaps this is a reference to the fact that the announcement to overthrow the Government was not made on the 10th January 1996 as earlier planned but was actually made on the 29th February 1996.

The accused conceded that the meeting at Old Europa took place for “a long time.” At first he says he left the meeting at 11 p.m. but later contradicts himself to say he left at 12 o’clock midnight. This despite the fact that PW2 was not challenged on his version that the meeting broke off at 6 a.m. on the morning of the 10th January 1996. In any event I find it hard to believe that being in charge of Khethisa’s house as the accused admittedly was that he could leave the house in the occupation of these other conspirators in the

middle of the night. Indeed even his own attorney Mr. Phoofolo was prompted to ask in apparent disbelief:

“Q: I don’t understand - these people you left them there without the owner of the house?

A: That is so.”

It is further the accused’s evidence that at the time of his departure from the meeting at Old Europa he asked Makara Sekautu to go and see him at work “if he has time.” Asked what for, the accused replied that he wanted to persuade Makara Sekautu to “leave that conspiracy, it’s dangerous.” He was then asked the inevitable question by the Court.

“Court: Why didn’t you do so at the meeting?

A: I realised that he would not listen to me.”

The amazing thing is that there is no evidence that the accused ever even tried to persuade Makara Sekautu or indeed anybody including his own relative PW1 at that meeting to drop the conspiracy. Be that as it may the accused told the Court that Makara Sekautu came to him alone on a certain date in February 1996. They however failed to go on with their discussion because the accused was busy and they agreed that Makara Sekautu would “visit” the accused at the latter’s house on Sunday the 4th February 1996. On the Sunday in question the accused met Makara Sekautu at the Bus Stop per agreement. The latter was accompanied by PW2. He left with the latter to his home while

Makara Sekautu waited for Matsoso Bolofo who had just passed by and had promised to come back.

According to the accused Makara Sekautu and Matsoso Bolofo did arrive at his place after a few minutes. Makara Sekautu then told the accused that he was not going to be able to go on with their discussions because the Major General wanted to see them (Sekautu and Bolofo).

PW1 then arrived and it is the evidence of the accused that he was expecting him because the latter had promised to visit him. For my part I should say that I find it extremely hard to believe that the accused could have made an appointment with PW1 to visit him on the same day as Makara Sekautu was due to meet him bearing in mind the accused's claim that he wanted to meet the latter alone to persuade him to drop the conspiracy to overthrow the Government. My impression is that the accused is trying to run away from the fact that there was a meeting held at his place on the 4th February 1996. In this regard the Court has not lost sight of the following question put to PW1 by Mr. Phoofolo:

“Q: He (the accused) will tell his Lordship that the only meeting that he knows of held at his place was that of the 4th February 1996.

A: Although I can't recall the date but I know there was one meeting that I did not attend.”

It is the evidence of the accused that nothing happened until the 10th February 1996 when he reached home from work between 4.30 p.m. and 5 p.m. He was with PW1. They found Makara Sekautu, PW2 and Lelingoana Jonathan at the accused's home. He testifies that Makara Sekautu told him outside that he wanted a meeting to be held at the accused's place and that the latter should excuse him for not having informed him in time. The accused refused to allow the meeting to be held at his place. Makara Sekautu then went inside the house to inform those who were with him.

Asked to explain the presence of PW1 there the accused looked very uncomfortable indeed. He did however say that PW1 had just paid him a visit "as it was his habit." Then Matsoso Bolofo also arrived. The accused has not offered any explanation why the latter would also get to his house unless there was a pre-arranged meeting there.

The accused corroborates PW3 that "as they (the conspirators) were still meeting inside the house" the latter arrived at his place on the 10th February 1996 finding the accused "standing" at his forecourt, PW3 was looking for PW1 who was inside the house. Matsoso Bolofo had also gone inside the house despite the fact that the accused had not allowed the meeting. The accused testifies that he did not attend the meeting himself because he wanted those people inside to leave. He corroborates PW3 that the latter also entered the house while the meeting was on.

The accused was then asked the following question by his attorney Mr.

Phoofolo :

“Q: This was now the second time you people converged at your place.

A: Yes.

Court: When was the first time?

A: 4th February 1996.

Q: The second time?

A: 10th February 1996.

Q: Each time you converged was it the same number of people and the same place?

A: On 4th February 1996 Lelingoana was not present and Mr. Maseela. On 10th February 1996 Sekautu was there, PW2, Lelingoana, PW1 and later PW3.”

The accused testifies further that before entering the house he held a discussion with Matsoso Bolofo in which the latter told him he had a meeting with the Major General who in turn told him the Prime Minister Mr. Ntsu Mokhehle had requested him to assist him in the toppling of the Government because his ministers did not listen to him and he was unable to govern properly. The accused says that according to Matsoso Bolofo the Major General had said he couldn't overthrow the Government because they had signed an agreement with SADCC countries that they would never overthrow governments.

The accused corroborates PW1 and PW2 that he did attend the BNP rally on the 29th February 1996 and that he joined the procession to the parliament building afterwards. He denies being anywhere near Matsoso Bolofo's car with Makara Sekautu. He denies shortening or writing the statement with Matsoso Bolofo. He admits that he saw Makara Sekautu and PW2 at the rally. He was then asked:

“Q: Did you then meet the two you saw?”

A: No we were just together. We didn't talk to each other.”

This is yet another glaring example of how evasive the accused was as a witness. He clearly avoided answering the question whether he did meet Makara Sekautu and PW2.

The accused denies that he got to Radio Lesotho on the 29th February 1996. The nearest he came to Radio Lesotho was about 30 metres that is to say from the Parliament building. He heard the announcement of the overthrow of the Government over the radio while he was already at home.

Under cross examination the accused conceded that he had “several meetings” with the conspirators and that he met them on the 29th February 1996. Indeed he conceded that these people were conspirators. He was then asked :-

“Q: Can we move from a common premise that the three people

(Matsoso Bolofo, Lelingoana Jonathan and PW2) were conspirators bent on toppling the Government?

A: Yes they agreed.

Q: On how many occasions did you meet these people either at your place or somewhere else?

A: I met some of them three times and some went to my place twice.”

In typical evasive fashion the accused answered as follows to a question put to him under cross examination:-

“Q: And you as BNP you were not well disposed towards the Government of BCP.

A: No, that is not so - the Government was not BCP but Government of the Basotho Nation.

Q: Then the governing party?

A: BCP.”

Asked why the conspirators should choose to hold such dangerous meetings at his house the accused could not offer any reason except to say it “surprised” him. He finally conceded under the pressure of cross examination that his house found favour with the conspirators because “it’s a very quiet place.” He conceded that Makara Sekautu also “loved” him.

The accused claims to be a democrat and as such he wouldn’t agree with

the conspiracy to overthrow the Government by unconstitutional means. As a result he refused to go to Radio Lesotho and he even discouraged Makara Sekautu. Yet as I recall the evidence he never had an opportunity to meet the latter alone in order to discourage him as alleged.

Amazingly the accused later testified under cross examination that he wouldn't be saving the country by "going away" from Makara Sekautu. He was then asked:

"Q: After the 9th January 1996 why didn't you keep your distance from this man?

A: It's not wise when one has heard about the mission to topple the Government to distance oneself because they are going to kill you."

He reiterates that he met the conspirators on the 4th February 1996 and 10th February 1996.

The accused further testified under cross examination that he is a soldier by profession having joined the Lesotho army in 1980.

Asked why Makara Sekautu would keep coming back to him even after he had discouraged him from the conspiracy to overthrow the Government the accused could offer no reply.

Confirming that he did not discourage the conspirators from the idea of toppling the Government the accused answered as follows to a question put to him in cross examination:

“Q: Even at that time you were not inclined to tell these people you were going to the authorities if they did not desist from the unlawful acts.

A: Ntate you can't say that to people who want to topple the Government. They can kill you.”

The accused conceded however that Matsoso Bolofo is “old” and that he is not afraid of him. According to him Makara Sekautu is dangerous because “he is familiar with dangerous people in the army.” PW1 is also dangerous because he was once a soldier. Yet in the same breath he testifies that the relations between PW1 and himself were friendly. In fact they were relatives. I cannot then see that a friendly warning to PW1 would have done any harm. My impression is that the accused was not being candid with the Court.

Regarding EX “A” the accused does not dispute that it was prepared by the conspirators and that a lot of work went into the preparation of this document which embodies similar sentiments to those which were expressed at the BNP rally on the 29th February 1996. Almost in the same breath the accused immediately contradicts himself to say that the sentiments so expressed are not the same at all. While the accused admits writing EX “D”

which is a document entitled "One day" he denies that the shortened statement EX "C" which was read over Radio Lesotho on the 29th February 1996 was written by him. He was then asked to compare the handwritings on the two documents. His evidence was that they were different but he was unable to show any differences. Nor could his own attorney Mr. Phoofolo point any to the Court.

For my part I should state that I observed that the handwriting on the two documents in question is so similar or indeed so identical to the naked eye that I do not even need expert evidence in the matter. In doing so I bear in mind of course the danger of relying on one's own observations in matters such as this. That having been said I should state however that a Court of law is not precluded from making its own observations in the absence of expert evidence. It depends on the circumstances of each case. EX "D" and "C1" are peculiarly similar and identical not only in every letter thereof but also in the fact that all the letters in both exhibits peculiarly tilt towards the left. I have also attached due weight to the fact that this was not a case of conflicting evidence as such on the handwritings on the two documents. As earlier stated the accused could not point to any differences. I have no doubt therefore that EX "C1" was written by the accused as PW2 testified. *

Finally the accused admitted that the co-conspirators came to his own house and invited him to join them in their mission of overthrowing the Government. He conceded that they would approach someone they had confidence in. He corroborates PW1 and PW2 that the purpose of going to

Radio Lesotho was to announce the overthrow of the Government over the radio. He confirms that he knew about the conspiracy to overthrow the Government on the 9th January 1996.

Having seen and heard the accused give evidence before me I can say with confidence that he was not only evasive but he was clearly a lying witness.

In a nutshell the accused's explanation is that he dissociated himself from the conspiracy to overthrow the Government.

Now the law as I have always perceived it to be is not whether the accused's explanation is true but whether it may possibly reasonably be true. That is the real test. Conversely the test is not whether the Court subjectively disbelieves the accused. Indeed the Court does not even have to reject the case for the Crown in order to acquit the accused. That remains so even where the case for the Crown is overwhelming against the accused. The court must still determine whether the defence case is so demonstrably false or inherently so improbable as to be rejected as false. It is also pertinent to bear in mind that in embarking upon this exercise it is a wrong approach to reject the accused's explanation merely because the Court is satisfied as to the reliability of the witnesses for the Crown. It is only after the merits and the demerits of the two sides have been analysed and weighed together with the probabilities of the case that a Court would be justified in reaching a conclusion one way or the other regarding the question whether the Crown has proved its case beyond

reasonable doubt. Authorities in this regard are indeed legion.

See for example *S v Singh 1975 (1) S.A. 227 AT 228 per Leon J* (now Judge of our Court of Appeal)

S v Kubeka 1982 (1) S.A. 534 at 537

S v Jaffer 1988 (2) S.A. 84

S v Munyai 1986 (4) S.A. 712 at 714

Indeed in *R v Difford 1937 AD 370 at 373* Watermeyer AJA succinctly stated the law in the following words:

“It is equally clear that no *onus* rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false.”

Davies AJA reaffirmed the legal position in *R v M 1946 AD 1023 at 1027* in the following words:

“....the Court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.”

It is on the basis of the above mentioned principles that I approach the accused's explanation in the matter. But before doing so it is necessary to examine the evidence of his witness DW2 Matsoso Bolofo as it was tendered to bolster this explanation.

It will be recalled that Matsoso Bolofo is one of the leading co-conspirators in the matter. He is the very person who actually made the announcement over Radio Lesotho on the 29th February 1996 to the effect that the Government of Lesotho had been overthrown. As earlier stated he subsequently pleaded guilty to the crime of sedition and was sentenced to four (4) years imprisonment half of which was suspended conditionally. He is thus a convicted criminal and a co-conspirator whose evidence must be approached with due caution as stated above. The danger is that DW2 may well be giving favourable evidence to the accused simply in an attempt to shield him from the consequences of the case he is facing.

It is the evidence of DW2 that he is aged 60 years old. He lives at Lower Seoli in Maseru. In February 1996 he was employed as security officer at Lesotho Bank. Otherwise he is a retired police officer having retired in 1987 as a Major. He had joined the police force in 1961.

He confirms that he is serving a term of imprisonment for sedition. He is serving together with Makara Sekautu and Lelingoana Jonathan.

It is the evidence of DW2 that he knows PW2 whom he first met on the

The 4th February 1996 at Lithabaneng at the home of the accused. He does not know PW1 but qualifies this by stating “I don’t know whether he (PW1) was the very same person that I found there on the 10th February 1996.”

DW2 testifies further that he first saw the accused at the latter’s place at Lithabaneng on the The 4th February 1996. He says that as he passed at a place called Lefikeng Makara Sekautu stopped him. He told the latter to wait for him as he was going to drop his wife at home. On his return he found Makara still waiting for him there at the bus stop. He delivered a message to the latter that the Major General wanted to meet him. DW2 had promised Makara Sekautu that he would assist the latter to meet the Major General about the instability in the country “caused by the Government.”

DW2 and the accused then proceeded to the latter’s home after he (DW2) had told the accused that he was travelling with someone who was at accused’s home. Asked what he was going to do at accused’s home DW2 testified that Makara Sekautu had asked a lift from him.

At the accused’ house DW2 found the accused with PW2. He saw Makara Sekautu discussing with the accused inside the house. Indeed I observe that he contradicts the accused who says that the discussion took place outside.

After the discussion in question Makara Sekautu approached DW2 and told him they “may now leave.”

Asked whether Makara Sekautu talked with the accused in the witness's presence DW2 immediately contradicted himself and testified as follows "I did not see him discuss in my presence" He was then asked:

"Court: You said Makara Sekautu discussed with the accused; how long did that take?

A: I didn't say he discussed with the accused I said with Ntente."

Well the record will show that DW2 was plain lying on this aspect.

DW2 further testifies that on the 7th February 1996 Makara Sekautu and himself met the Major General who after having been given grievances against the Government by the former told them that those grievances do not involve the armed forces and that the permits could be obtained from the police. The Major General refused to have anything to do with the matter even when Makara Sekautu reminded him that he was a member of the State Council and was also the custodian of the Constitution. In fact the Major General chased away the two gentlemen the following day.

According to DW2 he got to the accused's house again on the 10th February 1996 looking for Makara Sekautu. He found the accused standing outside holding a dog so that it should not attack him and told him Makara Sekautu was inside the house. As he entered the house he found the latter with Lelingoana Jonathan "and one other gentleman whom I saw for the first

time.” According to DW2 the accused did not enter the house until they left.

DW2 testifies that after entering the accused’s house on the 10th February 1996 he heard Makara Sekautu reporting to “those other men one Lelingoana and one gentleman I did not know” that the owner of the house had not given them permission to hold a meeting in his house. DW2 had not gone there for a meeting. It is his evidence that PW2 was not present at this meeting.

Asked by Mr. Phoofolo for the accused to confirm or deny whether on his arrival he reported that the Major General had agreed to the toppling of the Government DW2 once more became evasive and replied that “I had not gone to that place to deliver that statement my Lord.”

On the 29th February 1996 DW2 went to the BNP rally at ‘Manthabiseng Bus Stop where he met Makara Sekautu. He confirms that he was travelling in his motor vehicle. He also met PW2. He did not see the accused at all that day “up until we were arrested.” He denies that the conspirators met at ‘Manthabiseng. He further denies that he ever dictated a statement to the accused to write. According to DW2 “there was no such thing. The statement that I was going to read at Radio Lesotho was typed the previous day. So nothing was written that day.”

Well for my part I should say that I am not impressed with this statement and I think once more DW2 is plain lying because the statement

actually read over Radio Lesotho was EX "C1" which is clearly a shortened Sesotho version of the typed statement EX "A". EX "C1" is handwritten for that matter which would seem to corroborate PW2 that it was handwritten at the last moment before the conspirators joined the procession to Parliament building.

DW2 concedes that he went to Radio Lesotho with PW2 in his car. He did not see the accused at that place. Whereas there is unchallenged evidence which I accept that the conspirators followed a certain lady into Radio Lesotho DW2 says they "followed nobody." Once more DW2 was being plain untruthful. In any event DW2 immediately retracts from this stance and concedes that they followed the lady in question into the studio rooms.

Amazingly DW2 denies the conspiracy to overthrow the Government at any time. He does not explain the effect of the series of meetings the conspirators had and the fact that they ultimately went to Radio Lesotho where he personally announced the overthrow of the Government. My impression was that DW2 was a terrible liar.

Asked by Mr. Phoofolo to comment on the allegation that he was detailed by the accused, Makara Sekautu and Lelingoana Jonathan DW2 evaded the question in the following words:

"I said we went to General Mosakeng twice only and not with the others."

The question was inevitably repeated and produced exactly the same results - evasiveness:

“Q: The allegation is that they detailed you;

A: I have mentioned that I went to Major General Mosakeng following Sekautu’s request that he wanted to meet the Major General.”

Nor was that the end of DW2's bouts of evasiveness as he was then asked:

“Q: It is again alleged that you met on the 29th February 1996 to overthrow the Government.

A: I have shown the person I met at the gathering at Lithabaneng.”

Under cross examination DW2 fared even worse. He was mercilessly exposed for what he is - an unrepentant liar. For example he was asked:

“Q: When you retired from the force you were then attached to NSS (National Security Service).

A: No.

Q: Were you at any stage a member attached to NSS?

A: While still at work.

Q: When was that?

A: I started in 1964.

Q: Till when?

A: Until 1987.

Q: So why did you deny that when you retired you were in NSS?

A: That is correct I was still attached to NSS.”

He evaded this question because he had been exposed as a liar.

I should also mention that I was not impressed by the demeanor of DW2 who at times would simply refuse to answer questions put to him despite the Court’s warning that he must answer them.

DW2 corroborates the evidence of PW1 and PW2 that he read over Radio Lesotho on the 29th February 1996 that “I am taking over the government and hereby announce that the Government has been discharged. And I have suspended the Constitution.” Asked under what powers he did so DW2 arrogantly retorted “my own powers.”

DW2 was at pains to say whether he read from the long typed statement EX “A” when announcing the overthrow of the Government. He only admitted to having read from EX “A” after a long hesitation and dilly dallying - once more I have no doubt that he was being untruthful on this point. I accept that he read from EX “C1” being the shortened statement. It was then inevitably and correctly put to him:

“Q: This statement (EX “C1”) was admitted in evidence as the statement you read over Radio Lesotho on the 29th February 1996.

A: It’s not true.”

It is incredibly the evidence of DW2 that “the intention was not to overthrow the Government” but to mobilise the people yet in his own words as shown above he had announced that he was taking over the Government and announced that the Government had been dissolved. The Constitution had also been suspended. I think the truth means nothing to DW2.

DW2 subsequently testified under cross examination that it is Makara Sekautu who dictated and EX “C1” was written by one Matete. Yet this was never put to the Crown witnesses particularly PW2. Because this aspect of the evidence was given in hardly audible voice (in undertones as if DW2 was indeed ashamed of himself) the Court warned the witness to speak aloud. DW2 assured the Court “ I don’t have any problem” but immediately contradicted himself to say “I feel I am not in a position to give evidence.” Asked whether this was due to the pressure of cross examination he replied “No my Lord I am still suffering from heart attack.” That indeed precipitated a long postponement until the witness was able to continue with his evidence.

At the resumed hearing DW2 once more contradicted himself and now conceded that they did not intend to read from the long statement EX “A”. He now corroborated PW2 that the shorter statement EX “C1” was read over

Radio Lesotho on the 29th February 1996. He maintained that it was prepared by him at 'Manthabiseng. He claimed the handwriting to be his yet it will be recalled that he had earlier attributed the handwriting to one Matete. My impression was that DW2 never stopped lying unashamedly.

DW2 further testified that their intention of going to Radio Lesotho was to "mobilise" the people to "oust the Government if they so wished." According to him the date on which to go to Radio Lesotho was chosen by Makara Sekautu and the co-conspirators including himself did not agree with it. He was then asked:

Q: And you just went along with that?

A: Yes.

Q: How comes you read the statement?

A: Because he (Makara Sekautu) said he was going to join the rally of the National Party."

I do not think that the conspirators including DW2 would "just go along" with such a sensitive thing as toppling the Government. My impression is that DW2 was simply a lying witness who did not want to take the Court into his own confidence.

As is obvious from the evidence of DW2 he did not assist the accused on the allegation of the events of the 9th January 1996 at Old Europa.

I return then to evaluate the accused's explanation that he dissociated himself from the conspiracy to overthrow the Government. At the outset I observe that the following factors militate against this explanation.

- (1) It is common cause that the accused attended the meeting of the co-conspirators at Old Europa at the home of Khethisa Molapo on the 9th January 1996.
- (2) It is further common cause that the accused was in charge of the house in which the meeting was held in the absence of Khethisa Molapo who was conveniently away in Leribe.
- (3) It is common cause further that at the said meeting of the 9th January 1996 the discussion centred around the toppling of the Government which would be effected by an announcement over Radio Lesotho at "dawn" on the morning of the 10th January 1996.
- (4) The evidence of PW1 and PW2 is not challenged to the effect that ultimately the accused and the co-conspirators discussed the question of security and transport to get to Radio Lesotho. That being the case I find that the conspiracy was accepted in principle by the participants at the meeting. In my view this is the only reasonable inference to be thrown in the circumstances of the case (see

R v Blom 1939 A.D. 188 at 202-203.

- (5) PW1 was not challenged in his evidence that all the participants of the meeting in question including the accused were “happy” over the discussion to topple the Government.” This is inconsistent with the conduct of someone who dissociated himself from the conspiracy.

- (6) It is common cause that the meeting at Old Europa took place for a very long time starting from the evening of the 9th January 1996. While the accused claims he left the meeting either at 11 p.m. or 12 o’clock midnight I accept the unchallenged evidence of PW2 that the meeting broke off at 6 a.m. on the morning of the 10th January 1996. I further reject the accused’s evidence that he left the co-conspirators still engaged in the meeting bearing in mind that he was in charge of the house in the absence of its owner and also bearing in mind that there was admittedly no transport to take him from Old Europa to his house at Lithabaneng in the middle of the night. On accused’s own version they had walked on foot to the meeting in question. I accept the evidence that if he left he did so after the meeting was closed at 6 a.m. when it was no longer dangerous for that matter to leave the house unguarded. That being the case I consider that the accused had ample

time to walk out and dissociate himself from the meeting if he did not associate himself with the conspiracy to overthrow the Government. Yet the accused participated right through to the end.

- (7) There is no credible evidence that the accused ever discouraged the co-conspirators including his own relative PW1 from the conspiracy to overthrow the Government at this meeting or indeed any other meetings. This is incompatible with a man who allegedly dissociated himself from the conspiracy.
- (8) It is not disputed that the conspirators even went to the extent of detailing Makara Sekautu and Lelingoana Jonathan during the course of the meeting at Old Europa to go and bring one of the security men from the army. They admittedly left at 2 a.m. and returned at about 4.30 a.m. (See the unchallenged evidence of PW2). Now the fact that the accused would also await this exercise for such a long time is also glaringly incompatible with a man who dissociated himself from the conspiracy.
- (9) It is not seriously disputed that the conspirators failed to go to Radio Lesotho on the 9th January 1996 merely because they had not secured transport as well as security and not

because there was no agreement on the conspiracy itself. Hence the question of going to Radio Lesotho was deferred to another day. Indeed I accept this version.

(10) There is no evidence that the accused reported to the authorities about the conspiracy. Once more this is incompatible with the conduct of a man who has dissociated himself from the conspiracy.

(11) The accused concedes that he attended a “series of meetings.” In my view this is again incompatible with the actions of someone who had dissociated himself from the conspiracy.

(12) The evidence that some of these meetings were actually held at the accused’s home at Lithabaneng was not seriously disputed. As earlier stated I have attached due weight to the following questions put to PW2 by Mr. Phoofolo:

“Q: He (the accused) will tell his Lordship that the only meeting that he knows of held at his place was that of the 4th February 1996

A: Although I can’t recall the date but I know there was one meeting that I did not attend.”

I accept the evidence that some of the meetings were in fact held at the home of the accused at Lithabaneng. I find it too much of a coincidence that the first meeting held at Old Europa on the 9th January 1996 was actually held at a deserted house (under the care of the accused himself) whose owner was conveniently away in Leribe and the fact that the meetings of the 4th February 1996 and 10th February 1996 were held at the accused's home which is admittedly secure and convenient for sensitive meetings of that nature. I think probabilities are that the venues for the meetings were carefully chosen. The point is why must these meetings be held at houses over which the accused is responsible unless he is part and parcel of the conspiracy? At any rate I have no doubt in my mind that the accused would not have allowed the meetings to take place at these houses if he had dissociated himself from the conspiracy.

- (13) I accept the unchallenged evidence of PW3 to the effect that he warned the conspirators including the accused to stop the conspiracy and that "nobody responded" including the accused. I consider that this was an ideal opportunity for the accused to dissociate himself from the conspiracy yet he did not. His conduct therefore is inconsistent with that of a man who had dissociated himself from the conspiracy.

- (14) There is undisputed evidence which I believe and accept (see the evidence of PW1) that the accused agreed to be one of the Councillors in the proposed government that was to be set up by the conspirators after the overthrow of the lawful Government. This again is incompatible with the conduct of a man who had dissociated himself from the conspiracy.

In all the circumstances of the case and taking the cumulative effect of the above mentioned factors into account I have come to the conclusion that the accused's explanation cannot reasonably possibly be true and I find that it is false beyond reasonable doubt. Accordingly I reject it.

Moreover in my view the merits and demerits of PW1 and PW2 as corroborated by PW3 are clearly far superior to the merits and demerits of the accused and his witness DW2.

I have considered that the fact that PW1 is related to the accused and that they are admittedly on good terms as well as being co-workers reduces the danger for false incrimination. In the circumstances of the case I believe the evidence of the Crown witnesses PW1, PW2 and PW3. These witnesses were not shaken in cross examination. Moreover PW3 was not interested in the case. He was a neutral witness and no reason was suggested why he should implicate the accused.

To the extent that PW1, PW2 and PW3 may be single witnesses to some of the issues involved in the case I have of course warned myself of the dangers of relying on single evidence. These witnesses have however not been challenged or shaken in their evidence and I find that their evidence was so clear and satisfactory in material respects that I accept it. I am satisfied that they have told the truth.

This is perhaps an appropriate stage then to refer to the law regarding the offence of high treason. This crime has been defined by P.M.A. Hunt in South African Criminal Law and Procedure Vol. II (Revised Second Edition by JRL Melton) in the following words:

“High treason consists in any overt act unlawfully committed by a person owing allegiance to a State possessing majestas who intends to impair that majestas by overthrowing or coercing the Government of that State.”

The essential elements of the crime of high treason are therefore the following:

- (a) an overt act;
- (b) unlawfully committed;
- © by a person owing allegiance to the State;
- (d) which possesses majestas and
- (e) with hostile intent otherwise known as *animus hostilis*.

I should mention at the outset that the defence makes no challenge to essentials (c) and (d) above. Mr. Phoofolo has confirmed this position in his Heads of Argument. Accordingly the Court accepts that the accused indeed owes allegiance to the State which in turn possesses majestas. It is essentials (a) (b) and (e) above which are put in issue in this case.

The definition of an overt act was reaffirmed by Watermeyer CJ in *R v Leibbrandt and Others 1944 AD 253 at 284* in the following words:

“An overt act has been defined by Lord Tenterden in *Rex v Thistlewood* (33 S.E. Tr 684) as “any act manifesting the criminal intention and tending towards the accomplishment of the criminal object” and it must be clearly distinguished from the state of mind or intention which accompanies it.”

It is pertinent to note that this definition was adopted by this Court in *R v Mofelehetsi Moerane and Others 1974-75 LLR 212* where Mapetla CJ stated that “a conspiracy to commit an overt act of high treason is itself an overt act of high treason.” I respectfully agree with this principle which is indeed reaffirmed by Friedman J in *S v Banda and Others 1990 (3) S.A. 466 AT 474* to the effect that not only an attempt, but also incitement and conspiracy to commit high treason are acts of high treason in themselves. Indeed I respectfully wish to adopt the following remarks of the learned judge on page 473 J - 474 B of the judgment:

“Any act therefore, if viewed objectively, which is seemingly and apparently to all appearances innocent, may establish treason if it is performed with a hostile intent. This aspect has received judicial pronouncement in cases where it was stated - ‘an act, apparently innocent in itself, may clearly be an overt act of treason if proved to have been done with hostile intent to the injury of the State or the supreme government’. R v Viljoen 1923 AD 90 AT 92; R v Wenzel 1940 WLD 269 at 275; R v Adams and Others 1959 (1) SA 646 (Spec Crim Ct) at 666; S v Hogan 1983 (2) SA 46 (W) at 57C; R v Christian 1924 AD 101; R v Mardon 1947 (2) SA 768 (Spec Crim Ct); R v Stauss 1948 (1) SA 834 (A).”

It was precisely for this reason that Mapetla CJ in R v Mofelehetsi Moerane and Others (supra) at p 219 correctly stated, in my respectful view, that “even what may in itself appear to be a perfectly innocent act, if it can be proved that that act was done with a hostile intent, will amount to an overt act of high treason.” The learned Chief Justice arrived at this conclusion after referring to the following passage by Ramsbottom J in R v Wenzel 1940 W.L.D. at 275:

“Now, gentlemen, an overt act and deed, manifesting an intention to commit any of these species of treason, need not necessarily be an act of treason in itself; for example, suppose that there is an undoubted scheme proved or admitted to raise an insurrection or

to levy war against the King for a general purpose, there can be nothing more innocent in itself in the world than the ringing of a bell, or firing of a skyrocket, the beating of a drum, or anything of that sort; but if it be proved at the same time that any of these were to be the signals of the insurrection, then these acts, perfectly innocent in themselves, if done by a person who was aware of the object of them, is an overt act of treason; that is to say, it is an overt act, intimating the treasonable purpose the man has in view.....”

What then is hostile intent? It is pertinent to bear in mind that this hostile intent or *animus hostilis* is the definitive element of high treason itself. The most authoritative and all embracing definition of hostile intent is that given by *Snyman: Criminal Law (Second Edition) at page 314* which is to the following effect:

“Hostile intent may be defined as follows: and intention unlawfully to overthrow the Government, coerce, impair or endanger the existence, independence or security of the Government.....”.

As was succinctly stated by Watermeyer CJ in *R v Liebbrandt and others* (supra) at 284 intention is clearly something subjective that is to say a state of mind incapable of direct proof by witnesses. Proof of hostile intent therefore can only be proved by inference from the acts and expressions of the

accused and from those of their proved co-conspirators as well as from surrounding circumstances bearing in mind the two cardinal rules of logic as set out by Watermeyer JA in *R v Blom* (supra) at 202-3 namely that:-

- “(1) the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn;
- (2) the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

Now the evidence adduced in this case has shown beyond reasonable doubt that there was a conspiracy to overthrow the Government as at the 9th January 1996. I accept that the conspiracy was probably hatched before that date. On accused's own version Makara Sekautu announced to the participants of the meeting at Old Europa on the 9th January 1996 that he had come to let them know that he himself and “all political leaders in Lesotho and traditional leaders and Lesotho armed forces and Lesotho police officers and NSS security of Lesotho reached a conclusion that at dawn of that day he will be announcing at Radio Lesotho that Lesotho Government had been overthrown and that therefore the Government of National Unity will be in place. So he had come to invite us to accompany him to Radio Lesotho.”

The question then is whether the accused associated himself with this conspiracy. He does not dispute the fact that he participated in the meeting of the 9th January 1996 for a very long time. Nor does he dispute that eventually the discussion centred on whether transport and security would be available for the carrying out of the conspiracy early on the morning of the 10th January 1996. To show their determination and resolve in the matter the parties even went to the extent of sending out two of the conspirators Makara Sekautu and Lelingoana Jonathan to go and fetch a security man from the armed forces.

In my view this is a clear indication that the conspiracy was accepted in principle. Logic dictates that an agreement (expressly or by conduct) would indeed precede such niceties and modalities as security and transport. For reasons fully stated above I reject the accused's explanation that he dissociated himself from the conspiracy and I believe the evidence of PW1 and PW2 regarding the accused's association with the conspiracy to overthrow the Government on the 9th January 1996. That being the case I find that the accused is guilty of a treasonable act.

Again as earlier stated the accused does not seriously dispute that he attended "a series of meetings" after the 9th January 1996. I accept the evidence of PW1, PW2 and PW3 that those meetings were in furtherance of the conspiracy to overthrow the Government. I have already rejected the accused's explanation that he dissociated himself from the conspiracy. By attending meetings in furtherance of a conspiracy to overthrow the Government I find that the accused is guilty of high treason.

Mr. Phoofolo has relied heavily on the case of *R v Labuschagne and others 1941 TPD 271* for the proposition that even though the accused took part in the meetings in question he did not specifically agree to the conspiracy. In that case however there was clearly no decision taken and there was no evidence disclosing a conspiracy. There was no “incitement” by any person and more importantly there was evidence that the conduct of the accused was one of “discouragement.” Quite clearly therefore that case is distinguishable from the instant case where there is evidence which I believe that the accused actually associated himself with the conspiracy to the extent that he even accepted a position as a Councillor in the proposed government of National Unity after the lawful Government had been overthrown. I consider that this is a treasonable act in the circumstances of this case.

Regarding the element of hostile intent I am satisfied that the Crown has proved this beyond reasonable doubt from the whole conduct of the conspirators culminating in some of them actually holding the staff of Radio Lesotho hostage and announcing the overthrow of Government over the radio. Indeed PW2 is unchallenged in his evidence that “we were serious; we were sober.”

Mr. Phoofolo has argued that since the Crown did not allege in the indictment that the accused was one of the conspirators who went to Radio Lesotho then it cannot tender evidence that in fact he did get there. He relies on section 256 of the Criminal Procedure and Evidence Act 1981 which is to the effect that in a treason trial evidence shall not be admitted of any overt act

not alleged in the charge “unless relevant to prove some other overt act alleged therein.” In my view this proviso is decisive in the instant case where Count I A makes it perfectly clear that the conspiracy was to overthrow the Government by announcing same over Radio Lesotho on 9/1/96 and that in terms of Count I B, the objective was then deferred to some other day. The main thing here is that the announcement of the overthrow of the Government was going to be made over the Radio whatever the date.

I consider therefore that the evidence that the accused was actually seen at Radio Lesotho was necessary and relevant as being in furtherance of the conspiracy to go and announce the overthrow of the Government over the radio.

In any event even if I am wrong in the view that I take of the matter I am satisfied that in a matter such as this the executive acts of the co-conspirators at Radio Lesotho are the acts of the accused. That these acts amount to treason admits of no doubt.

Lastly, as earlier stated there is no evidence that the accused reported the conspiracy to overthrow the Government to the authorities. Taxed as to why he failed to report to the authorities the accused could offer no explanation which could reasonably possibly be true. He started saying totally outrageous things such as that the police, the army and members of the National Security Service were all involved in the conspiracy to overthrow the Government and that therefore he could not report to them as they might kill him. As I

understand his evidence he never even tried. In any event I reject this explanation as being unfounded and totally false. This is so because on his own version the accused was told by Matsoso Bolofo that “Major General Mosakeng said he cannot overthrow the Government because they have signed an agreement with SADCC countries that they will never overthrow Governments.” It must have been clear to the accused therefore that Major General Mosakeng was opposed to the overthrow of the Government. That being the case I consider that the accused could have reported to him if he was so minded and if he did not have treasonable intentions.

Nor does this Court believe the accused’s explanation that he did not report to his own chief because the latter was “likewise” involved in the conspiracy to overthrow the Government. There was absolutely no evidence that the chief was so involved and this was clearly said as an afterthought. I have no doubt that the accused was plain lying on this point. The truth of the matter is that he never reported to any authority. He did say however out of desperation that he reported to one Lekhooana Jonathan who is secretary of the BNP party. But then there is no evidence that the said Lekhooana Jonathan is a man in authority. In any event he is admittedly not accused’s own chief.

It is appropriate at this stage then to refer to *Snyman: Criminal Law* (supra) page 312. This is what the learned author states on acts of high treason:-

“Even an omission to act which is accompanied by the requisite hostile intent constitutes high treason. Every person who owes allegiance to the State and who hears or otherwise becomes aware of the fact that high treason is being committed or that there is a plan to commit it has a duty to communicate this fact to the authorities as soon as possible. Failure to do so constitutes treason.”

I respectfully agree with the principle stated by the learned author. Indeed Greenberg JP in *R v Labushagne* (supra) at 275 acknowledged this principle in the following words: It can be assumed that failure to report past conduct which is treasonable is also treason.”

I am satisfied, from the totality of the evidence before me, that the accused’s failure to report the conspiracy and the co-conspirators themselves to the authorities was in furtherance of the conspiracy and was accompanied by hostile intent. This omission is in itself an act of high treason in the circumstances of the case.

Taking into account the totality of the evidence as a whole therefore I have come to the conclusion that the Crown has proved its case beyond reasonable doubt on the charge of high treason.

Accordingly the accused is found guilty of high treason as charged in Count I. He is discharged on the other Counts.

My Assessors agree.



M.M. Ramodibedi

JUDGE

12th June 1998

For the Crown : Mr. Mdhluli (the DPP)

For the Accused : Mr. Phoofolo

SENTENCE

It is now the task of this Court to impose a sentence which is appropriate in the circumstances of the case. In doing so the Court must balance the mitigating factors including personal circumstances of the accused as against the requirements of reasonable punishment designed to ensure not only maintenance of law and order but also deterrence. It is on the basis of this principle that I approach the matter.

At the outset I should like to say that I have received full submissions from both counsel in the matter in so far as sentence is concerned. I have accordingly taken into account all that has been said including personal circumstances of the accused in their entirety. In particular I have attached due weight to the fact that the accused is a first offender who may well be a fallen angel. He is married with three minor children. He is the sole bread winner. I have also taken into account the fact that the accused has been in custody since his arrest in March 1996. There is no doubt that he has suffered not only from the long incarceration and its attendant consequences but also from the agony of having the case hanging over his head during all this time.

As against personal circumstances of the accused this Court considers that the offence of high treason is very serious indeed. It must be punished accordingly in order to make a lasting impression on the accused and other like minded persons and thus deter them from similar acts in future. Indeed the seriousness of the offence can be gauged from the fact that in terms of

section 297 (1) (b) of the Criminal Procedure and Evidence Act 1981 the High Court has a discretion whether or not to pass a sentence of death upon an accused convicted of high treason. To that extent therefore the offence is literally a matter of life and death. I have accordingly had to consider seriously whether or not to spare the accused's life for the treasonable act he has committed. I have taken into account in favour of the accused the fact that the amount of violence involved was relatively minimal being confined to the rounding up of Radio Lesotho staff at gun point. That however must have been a traumatic experience to the poor people.

As I had occasion to observe in sentencing the accused's co-accused on the 12th March 1997 in these days of democracy in Lesotho political dissensions can easily be addressed through the ballot box. I said then and wish to repeat now that there is absolutely no need to resort to the unlawful acts such as high treason.

What is of particular concern to this Court is the fact that it is common cause that it has now become fashionable in this country for people to resort to unconstitutional toppling of Government by force. It is no wonder the accused and his co-conspirators were so confident of success in their traitorous and treasonable acts that they obviously genuinely believed that the mere announcement of the overthrow of the Government over the radio would do the trick and the Government was up for grabs! It is hoped that the sentence that this Court is about to pass will go a long way towards stamping out the culture of coups that has besetted this country for so long. Indeed the

Court is determined that democracy as is enshrined in the Constitution shall prevail. Such is the object of this sentence.

Yet on the other hand this Court subscribes to the principle eloquently enunciated by Mofokeng J, as he then was in *Sekonyela and ors. V Rex 1981 LLR 41* to the effect that justice must be tampered with mercy. This is what he said at page 45 of the judgment:-

“It is characteristic of courts of law to be merciful in their dealings with individuals who appear before them despite horrible crimes they have been found to have committed.”

I shall therefore extend a hand of mercy to the accused and give him an opportunity to rehabilitate rather than be broken completely. I consider that at the age of 41 years he is not too old to reform.

In all the circumstances of the case therefore I consider that justice will be done if the sentence imposed upon the accused is one of ten (10) imprisonment three (3) of which is suspended for three (3) years on condition that the accused is not found guilty of an offence involving high treason or sedition committed during the period of such suspension and I so order.

My Assessors agree.

M.M. Ramodibedi

JUDGE

12th June 1998

For the Crown : Mr. Mdhluli
For the Accused : Mr. Phoofolo

ORDER:

I have considered the evidence of the accomplice witnesses PW1 Masupha Molapo and PW2 Lennox Ntente Sesioana and I am satisfied that they fully answered to the satisfaction of the Court all such lawful questions as were put to them. Accordingly they are both discharged from all liability to prosecution for the offence concerned in terms of Section 236 (2) of the Criminal Procedure and Evidence Act 1981.



M.M. Ramodibedi

JUDGE

12th June 1998