CRI/T/4/98

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX

vs

THABO MICHAEL MALIMABE

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 30th day July, 1998

The accused Thabo Michael Malimabe appears before this Court indicted on two counts - one of murder it being alleged that upon or about the 21st day of December 1991 and at or near the Hospital Area in the Mafeteng Town in the district of Mafeteng, the said accused did unlawfully and intentionally kill one David Potsane Khomari. To this count the accused pleaded not guilty. On the second count, the accused stands charged with the crime of Housebreaking with intent to steal and theft - it being alleged that upon or about the 20th day of December 1991 and at or near Hospital Area in the Mafeteng Town in the district of Mafeteng, the accused did unlawfully and intentionally and with intent to steal, break and enter the house there situate of David Potsane Khomari, or in his lawful possession and did steal therefrom the following goods, to wit:-

1. two blankets,
2. a two piece blue overall suit,
3. a basin,

4. two cooking pots,
5. a pair of training shoes,
6. a floor mat,

the property or in the lawful possession of David Potsane Khomari,

There was a third count which the Crown withdrew before the accused pleaded involving a television set and the television was added to the items listed in count two. Accused pleaded not guilty to this count.

Mr Putsoane who appeared for the accused made the following admissions in terms of Section 273 of the Criminal Procedure and Evidence Act of 1981.

(a) The depositions of Posholi Posholi and of Makhetha Mphutlane made at the preparatory examination. The Court was informed by the Crown that these witnesses had since died. Their depositions were read into the record by the Crown Counsel

(b) The Post mortem examination report made by one Dr Schmeidl as to the cause of death. The report was also read verbatim into the record by the crown counsel.

Also dead was another witness Ntsiuoa Khuele but whose deposition was not admitted by Mr Putsoane. I will deal with this matter later in this judgment.

At the trial it was common cause that the dead body of the deceased David Potsane Khomari was discovered on the 24th December 1991 by his elder brother Chabeli Khomari (P.W.1). P.W.1 being anxious about the whereabouts of the deceased, visited the house of the deceased during the afternoon of the 24th December 1991. P.W.1 told the court that he had last seen the deceased on the 20th December 1991. Upon arrival and in the company of his nephew Thulo Matsau he found that the Government quarters occupied by the deceased were locked. It was common cause that the deceased was a civil servant employed under the Forestry Woodlot Department of the Ministry of Agriculture. He was currently occupying this house alone since his wife was working and staying in Mohale's Hoek as an accountant.

P.W.1 says he knocked at the door and even shouted - but received no reply. The front and back doors were locked. He then went to the bathroom window and using his hand managed to open this window, which had an old hole. He climbed into the bathroom and immediately proceeded to the bedroom. Upon entering the bedroom he noticed that there was nothing on the mattresses on the bed. He suddenly saw the deceased who was his younger brother, lying prostrate in a pool of dried blood. He observed that he was dead. He saw several open wounds on the chest and waist. He called out to his nephew to come in through the open bathroom window. He noticed that the headboard of the bed was damaged, wardrobe doors were open and the clothes were scattered on the floor. There were no blankets on the bed. The deceased was dressed only in an underwear and a T-shirt. P.W.1 told the court that he observed some shoe impressions on the dried blood next to the deceased.

He and his nephew, then went out through the same bathroom window and made a report to the police. The time was about 4 pm when they made a report to a passing police patrol near Frasers. With the police, they drove back to the scene and he then went to his parents' house where he got spare keys. He says he did not break the news of death to his mother then. The house of the deceased was then unlocked and everyone there entered and after inspection, the police then conveyed the deceased to the Mafeteng mortuary. After this, P.W.1 then went back to his mother to break the news of his son's death.

P.W.1 goes on to say that on the 13th January 1992 he was called to the Mafeteng Police Station and at the C.I..D. Offices he was asked to identify some property and he recognised the following items of property as belonging to the deceased-

(a) a black TV set (national)
(b) training shoes
(c) blue trousers of an overall
(d) 2 grey blankets
(e) a floor mat

The items were identified in Court by the witnesses as follows:-

(a) a TV set - Ex "1"
(b) a pair of white training shoes - Ex "2"
(c) a blue pair of trousers - Ex "3"
(d) 2 grey blankets - Ex "4"
(e) a brownish floor mat - Ex "5".

When he was cross examined by Mr Putsoane, P.W.1 admitted that at the preparatory examination he did not state any identifying marks which made him to recognise these goods as belonging to the deceased. He was not asked by the prosecutor, he explained. He said he identified the TV set as being that of the deceased because it was a "national" and black and had dirt on the dial. He could not say when he had bought it. It was put to P.W.1 that the accused would say that all the goods - along with the television set belonged to one Tsele Motseta.

The Crown next called Lithakong Sechele (P.W.2) who also identified the two grey blankets exhibited in courts as those which he once used when he was accommodated for three nights at the quarters occupied by the deceased. This was in June or July 1991 when he was on a temporary duty at Mafeteng. His posting was in the district of Mohale's Hoek. On being cross-examined by Mr Putsoane he agreed that similar brands of blankets were on sale in many stores but he was certain that the blankets before court were the property of the Forestry Department lawfully borrowed by the deceased at the time of his sojourn. P.W.2 also recognised the training shoes as belonging to the deceased.

The wife of the deceased Masebolelo Khomari (P.W.3) was also called to testify. She told the court that her late husband, the deceased used to work at Mafeteng Forestry Division and that because of marital friction between them during December 1991 she was staying at Mohale's hoek where she worked as an accountant in the Government sub-accountancy offices. She told the court that in December, 1991 she went to Peka for her Christmas vacation and came back to Mohale's Hoek early in January 1992, and that one day the news of the death of her husband were broken to her by some friends.

On being shown the items of property in court she recognised all (except one pair of trousers) as the property which the deceased owned at Mafeteng; these were the black National television set (which she said they bought at Wepener), a two - piece overall, a pair of training shoes (which she declared she had personally bought for her deceased husband), two grey blankets which she said belonged to the Forestry Department and had once been used by P.W.2 when he stayed at their house; a brown mat, 2 cooking pots, an empty sta-soft plastic bottle, khaki trousers, a greenish basin.

During her cross-examination, P.W.3 was even more positive about the TV set and even recited its serial number - CN 51643439 - because, she explained, the deceased once opened the set and showed her the numbers in order that when it was sent for repairs, it could be easily identified (later the court ordered that the set be opened and the same serial numbers CN 51643439 were found at the back of the set).

P.W.3 told the court that on the 13th January, 1992 whilst she herself was also in police custody, the accused took them to his room at Motlere's stand. He was bleeding from the nose and had bruises on the face. The accused then took out all the properties exhibited before court from his room at Motlere's stand. All these properties belonged to the deceased, she said. She also agreed that during the three days she spent at the Mafeteng police station she was even assaulted because police said they suspected her to be privy to the killing of her husband.

Tokiso Posholi (P.W.4) also a colleague of the deceased, was called by the Crown. He told the court that he had had a long standing relationship with the deceased since school days - he even assisted him when he eloped his wife! On the 20th December 1991, the deceased, himself and other Forestry employees had a Christmas party for Quthing, Mohale's Hoek and Mafeteng divisions. The party was held in Mafeteng. He told the court that after their celebrations which ended at about 8 pm he parted ways with the deceased at a shebeen. He did not meet or see the deceased on the 21st December 1991 and on the 24th did not report for duty. It was on the evening of the 24th December 1991 when one of his neighbours told him that David Potsane Khomari was late. He told the court that he was later called to the Mafeteng Police Station and there he

recognised the two grey blankets, a blue two piece overall as being the property of the deceased. During cross - examination he admitted that such blankets are common in Lesotho and that there were no special distinguishing marks on the blankets or overall. I can interpolate here to mention that Mr Putsoane during his cross examination was always stressing to the witnesses that the accused was not claiming the goods as his property but that they belonged to Tsele Moketa.

Another witness called by the Crown was Nthabiseng Khomari (P.W.9), deceased's sister. She told the court that on the 21st December 1991 she found the deceased at a stockfel at the house of Mocholi Matlosa at about 4 pm. It was a Saturday. She says the deceased later left at about 5 pm without telling her where he was going to. That was the last he saw him alive. On the 26th December 1991 she learned about the deceased's death. She had left for Quthing on the 24th December and spent her Christmas there; she returned on the 26th December 1991. After new year she was called to the Mafeteng Police Station where she was shown items of property to wit: a TV set, a pair of white training shoes; she said these looked like the deceased's property.

The deposition of David Mokhele Motsepa made at the preparatory examination was also admitted by the defence and was accordingly read into the record. The court however called him to explain how the TV set came to be in his possession. He told the court that the TV set (identified as of the deceased) was brought to him for repair by one Nono on the 4th January 1992 and it was only on the 12th January 1992 that police arrived at his house and that the accused was called in and asked to point out a TV and the accused pointed out the TV set now before court from amongst the 4 sets in the room.

The defence also admitted the deposition of Makhetha Mphutlane and this was read into the record and hence forms part of the crown evidence in this case. The court was also informed by the crown that Makhetha Mphutlane had since died. The importance of his evidence is to effect that as early as the 23rd December 1991 - some two days after the death of the deceased - the accused in the company of Tsele and Nono was seen by the witness trying to sell the TV set before court and claiming it as his own property which he was selling because he had nothing to offer his children at Christmas. This was the same TV set later brought by Nono to David Mokhele Motsepa for repair on the 4th January 1992. The fact that the accused led the police on

the 12th January 1992 to David's house- the day on which he was arrested - shows that he must have known from Nono where the TV set was; moreso Makhetha Mphutlane stated that he, the accused, claimed the TV set as his property.

Also admitted was the formal deposition of Posholi Posholi who identified the corpse on the 27th December 1991 as being that of David Potsane Khomari. He says it had about eleven open wounds (the autopsy doctor however observed 8 stab wounds). The latter observation is corroborated by Detective Trooper Ralentsoe whose P.E. deposition was also admitted by the defence. He was one of the police team that first attended the scene on the 24.12.91. He states that he discovered the dead body lying prostrate in a pool of dry blood and saw "a print of a tender shoe." He then undressed the body and noted its injuries after which he transported the corpse to the Mafeteng mortuary. He states that the corpse did not sustain any other injuries on the way to the mortuary.

On the investigation side, the crown called Detective Trooper Mpholo who told the court that on the 12th January 1992 acting upon information received he and other police officers proceeded to Matlapaneng in the Mafeteng township and found the accused and having identified himself he arrested him for the murder of the deceased and took him to the charge office where he was questioned; after this, the accused took them to the home of David Mokhele Matsepa where the accused pointed out the TV set from among four TV sets in the room of David Matsepa. The TV set was then seized by him.

Trooper Molelle (P.W.5) was then called and he testified to the effect that on the 13th January 1998 he took the accused - who was already in custody - to his room at Motlere's stand and there - in the presence of the wife of the deceased the accused produced the following items of property: a mat, 2 cooking pots, a greenish basin, a blue 2 piece overall, 2 pairs of trousers, 2 grey blankets, an empty sta-soft plastic bottle and a brown okapi knife. A certain lady Ntsiuoa Khuele (a concubine of the accused) was also present when he pointed out these items. It should be pointed out that on the 12th January 1991 when he was arrested the accused was found wearing the pair of training shoes which were recognised in court as belonging to the deceased. Trooper Molelle was later ordered on the 2nd November 1992 to take the said pair of training shoes to the Forensic Laboratory in Maseru along with two cobex sheets.

During cross examination Trooper Molelle denied that on the 13th January 1992 the accused was bleeding from his nose when he pointed out and produced the items of property. Next called was L/Sgt Ramokepa P.W.7. He told the court that he first met the accused on the 12th January 1992 when the accused was already in custody. He says he seized from the accused the pair of training shoes he was wearing then; and on the 14th January 1992 he proceeded to the house of the deceased at Hospital Area in the Mafeteng Township. He told the court that he is a Scene of Crime Officer. He then took some photographs of the shoe prints shown to him, measured them and then placed on the said prints a special tape to uplift them. He then placed the tape on the cobex sheet. He later gave the sheets and shoes to Trooper Molelle to take to the Police forensic laboratory at Makoanyane. He fetched these items from Makoanyane on the 11th May 1993 and filed the sheets in the docket to be handed in later as exhibits at the trial.

Major Khomo-Haka P.W.8 was then called by the crown. He informed the court that he was trained in Forensic Science in Scotland, United Kingdom and considered himself a prints expert. He then told the Court that on the 2nd November 1992 Trooper Molelle of Mafeteng Police brought to him a pair of white training shoes and 2 plastic cobex sheets. On examination he observed on cobex sheet (1) an impression of a heel (sheet 2 impression was indistinct). He then compared the impression on sheet (1) and print of the left shoe and found that the impression on sheet No.1 was made by the left training shoe. He examined the visual pattern and measurements and found that the details of the pattern on the cobex sheet (1) and on the left training shoe were similar. He found that the width of the impression on the cobex sheet (1) was 6.8cm and that of the heel of the left training shoe was 7cm. He explained the difference of .2cm by the fact that a worn off shoe does not usually make a full impression like a new shoe.

Before closing its case, the Crown then made an application for the admission of the deposition of two witnesses Ntsiuoa Khuele (since deceased) and Thabo Nono Mokhisa (whose whereabouts were unknown) who both had given evidence at the preparatory examination. The application was being made under section 227 of the Criminal Procedure and Evidence Act of 1981 which reads as follows:-

"(1) The deposition of any witness taken upon oath before any magistrate at a preparatory examination in the manner required by section 70 in the presence of any person who has been brought before the magistrate on a charge of having committed an offence, or the deposition of a witness taken in circumstances described in section 95, shall be admissible in evidence on the trial of the person for any offence charged by the Director of Public Prosecutions in pursuance of the preparatory examination at which the deposition was taken or on that person's trial before a subordinate court or on the remittal of the person's case by the Director of Public Prosecutions after considering the preparatory examination except that-

(a) it is proved on oath to the satisfaction of the court that -

(i) the deponent is dead;
(ii) the deponent is incapable of giving evidence;
(iii) the deponent is too ill to attend; or
(iv) the deponent is kept away from trial by the means and contrivance of the accused, or is outside the jurisdiction and his attendance cannot be procured without considerable amount of delay or expense and the deposition offered in evidence is the same which was sworn before the magistrate without alteration; and

(b) it appears on record or is proved to the satisfaction of the court that the accused, by himself, his counsel, attorney or law agent, had a full opportunity of cross-examining the witness.

(2) The evidence of a witness given at a former criminal trial shall, under like circumstances, be admissible on any subsequent trial of the same person upon the same charge.

(3) Subject to the conditions mentioned in this section where the witness cannot be found after diligent search or cannot be compelled to attend, the court may allow his deposition to read as evidence at the trial." (Underlining my own)

The case of Rex v Mathapelo Moeti (1) 1994-75 LLR 6 is authoritative in such enquiry. In that case was held that where the magistrate who took the accused's confession was abroad, his evidence at the preparatory examination could be admitted in the discretion of the court which had a duty to guard against any prejudice which might result from its admission. However the mere fact that the evidence sought to be adduced is vital to the prosecution case was not per se sufficient to give rise to prejudice; the deposition of the magistrate was admitted.

In the present case Ntsiuoa Khuele gave evidence at the preparatory examination which implicated the accused vitally in that she says the accused admitted having killed a person. The Crown called evidence of Teboho Khuele on oath to prove that Ntsiuoa Khuele died on the 17th November 1996. It was also necessary under section 227 above that it should appear on the record or is proved to the satisfaction of the court that the accused had full opportunity of cross-examining the witness. In this case the record of the preparatory examination does not show any entry after this witness had given evidence which indicates that the accused was afforded the opportunity to cross-examine but reserved the same. The P.E. record reads-

> "P.E. procedure is explained to accused and he understands and elects to reserve his cross-examination."

At the preparatory examination Ntsiuoa Khuele was called and sworn before giving her evidence in which she says accused admitted having killed a person. At the end of her testimony there is no clear indication on the record that the accused was offered an opportunity to cross-examine this witness. I am of the view that the correct practice is that after each crown witness has given his or her evidence on oath there should be an entry on the record: "XXD (cross examination) by Accused: No questions" or "I reserve my questions." There is doubt that full opportunity existed. It was on this ground alone that I ruled the deposition of Ntsiuoa Khuele not to be admitted. In this case Ntsiuoa Khuele has died - as have many important witnesses in the case. Her evidence is very vital to the Crown case. It can also be noted here that the Resident Magistrate Makoa who took the preparatory examination has unfortunately also passed away since. I also had some grave reservations regarding the evidence of Ntsiuoa Khuele. There is an

irresistible impression to be gained from the evidence of her grandfather Teboho Khuele (P.W. 10) who also gave evidence before this court that Ntsiuoa Khuele was not a woman of good character and that she changed lovers now and then. She was a common mistress. The value and credibility of her evidence - if admitted - would depend largely upon the impression which this court would form of her. That, however does not necessarily mean that she was an untruthful person but her credibility as a witness is of great importance if a conviction were to rely upon her testimony. It is important to see and hear her and to see whether she is reliable or not-but alas she is dead. - R v Malan, 1948 (2) SA327; R v Dladla and others - 1961 (3) SA 921 R v Stoltz 1925 WLD 38, R v Rasool 1927 TPD 73. Her evidence seems to me to be of great importance and here I capture the cautious words of Greenberg J. in R v Rasool (supra)

> "I cannot say what will happen to this witness if she were properly cross-examined, as I have no doubt she would have been if she were here, but I am very doubtful whether injustice might not be done to the accused by allowing this witness's evidence to be read and once there is that doubt in my mind I do not think I should subject the accused to the risk that he may be prejudiced."

The other witness who gave evidence at the preparatory examination but whose whereabouts are presently unknown is Thabo Mokhisa - also known as Nono. The crown also applied that his evidence be admitted under section 227 (3) which reads -

> "Subject to the conditions mentioned in this section, where the witness cannot be found after diligent search or cannot be compelled to attend, the court may allow his deposition to be read as evidence at the trial."

The crown called Mokoena Moholi (P.W.11) the headman of Matsaneng - who knew the missing Thabo Mokhisa and his parents. He informed the court that since 1995 they have disappeared from his village; I am not however satisfied sufficient attempts to effect a diligent search were made to trace this witness, and in the exercise of my discretion I disallowed the deposition because I am not able to satisfy myself that prejudice will not result to the accused by the

admission of such evidence as it is my duty to guard against such prejudice - S v Ngubane - 1961 (4) SA 377; R v Andrews 1920 A.D. 290. For avoidance of doubt, it should be stated that section 227 (1) properly interpreted does not confer any discretion at all once the requirements under (a) and (b) are fulfilled because the subsection uses the words "shall be admissible in evidence"; discretion only comes under subsection (3).

The Crown then closed its case and the accused elected to give evidence on oath.

The accused told the court that his home is at Taung Ha Mokoroane and in December 1991 he was living at Ha Motlere in the Mafeteng township. He said he had a friend one Tsele Moketa who had a room in the same stand of Motlere; he did not know the whereabouts of Tsele Moketa at present.

He says one day in December this Tsele Moketa and one Thabo Nono Mokhisa brought to him all the items of property before court to wit: 2 grey blankets, a mat, a blue 2 piece overall, a pair of training shoes, a khaki trousers, 2 cooking pots, a green basin, a sta-soft bottle; Tsele Moketa asked him to keep these goods in his room since his room was locked his concubine being absent. Tsele Moketa also explained that it was his property which had been seized by his landlord in Maseru for his rent arrears. The accused says he even asked Tsele Moketa to borrow him the blue two piece overall and the white pair of training shoes. The television set was not among the property Tsele Moketa brought to him on that day but Tsele had said a TV set had been left behind in Maseru.

The accused says these goods were brought to him by Tsele Moketa after Christmas but before the New Year. He continues to say that later the police found him at Nyokopete's place where he was drinking beer with friends. The police then ordered him to take them to his room and show them the goods brought to him by Tsele Moketa. It should be noted that this Tsele Moketa has never been in police custody. He says he then took out all the property which Tsele Moketa had brought to him. At the time he says he was wearing the white training shoes he had borrowed from Tsele Moketa. He says the police then told him that Tsele had killed a person and stolen the said goods. He says the police assaulted him to force him to admit complicity in the killing. Later the police took him to the home of David Mokhele Matsepa, where he pointed out a television set after David Matsipa had pointed it out and explained it was brought by one Nono. He denied having killed the deceased.

Under cross-examination, the accused agreed that Tsele Moketa was his friend and that the latter had brought these properties for safekeeping; and he admits that the okapi knife was amongst the goods in question. Of interest is the fact that the evidence of Makhetha Mphutlane (now deceased) was admitted by the defence but when giving evidence, the accused now denied even knowing this Makhetha Mphutlane. The importance of the deposition of Makhetha Mphutlane is that the accused on or about the 23rd December 1991, was going about with the television set exhibited in court and was offering it for sale explaining that he had nothing to offer his children at Christmas. The evidence of Makhetha Mphutlane therefore shows that as early as the 23rd December 1991 the accused had this television set in his possession and was seeking to dispose of it. This evidence must be distinguished from the evidence of pointing out by the accused at the house of David Mokhele Matsipa. I am of the view that when he pointed out the television set on the 13th January 1992 the accused was in police custody and on the previous day when he took out other items at his own room, the accused was seen to be bleeding from the nose. This bleeding was observed by the wife of the deceased. I am in doubt therefore that when he pointed out the television set, the accused did so freely and voluntarily - see Mabope vs Rex 1993 - 94 LLR (Legal Bulletin) 154 where Ackerman J.A. in considering the evidence of pointing out under section 229 (2) of the Criminal Procedure and Evidence Act held that since the pointing out had been preceded by assaults and threats -

> ".... any such pointing out would be inadmissible unless freely and voluntarily made. The onus was on the Crown to prove that, notwithstanding the fact that accused had shortly been tortured in order to make statements favourable to the prosecution, the effect of such improper inducement had ceased to operate."

Whilst therefore I reject the evidence of pointing out the television set on the 13th January 1992, I see no reason to reject the evidence of Mphutlane to the effect that the accused was seeking to find a buyer for the television set on the 23rd December 1991. This evidence was in fact admitted by the defence. The fact that the accused when giving evidence in the box now refutes it, does nothing but to reflect negatively on his credibility. As regards other items pointed out by the accused, he explains they were in his room for safekeeping. An objective fact in this case is that the television set and other items of property were positively identified as belonging to the deceased and must have been stolen simultaneously, and the possession of the items is not as innocent as the accused wishes this court to accept.

There is no direct evidence implicating the accused on the counts of murder and of house breaking. The crown's case rests on circumstantial evidence and the burden of proving the guilt of the accused person remains on the prosecution throughout the case. In Hlatsoane Mofolo v Rex C of A (cri) No.5 of 1973 Maisels P had this to say

> "The fact that stolen goods are found in the possession of an accused person does not shift the onus of proving his innocence. The true position is that if it is proved in a case that the goods found in the possession of the accused were stolen, that the goods in question were recently stolen and that the accused has failed to give a satisfactory explanation of his possession of those goods, the Court may, not must, infer that he stole the goods which were found in his possession."

In this case it has been positively proved that the goods found in the possession of the accused were stolen and that the television set which the accused was seeking to sell on the 23rd December 1991 was recently stolen. The accused denies ever dealing with Mphutlane at all. He admits his evidence but denies what it says. This is not satisfactory. The television set and other items of property cannot and should not be separated. In the absence of satisfactory explanation by the accused as to how he came to be dealing with the television set on the 23rd December 1991, the only inference which this court can reach is that the accused acquired possession of the television set and other items knowing that it had recently been stolen.

The other crown evidence which tends to link the accused with the scene of crime is that of shoe impressions found in the dried blood stains in the bedroom of the deceased. The accused on being arrested on the 12th January 1992 was found to be wearing the white training shoes. The prints of these shoes were found to be similar to the shoe impressions on the blood stained floor. Can we conclusively say that the person who was found wearing these training shoes on the 12th January 1992 was the person who committed the murder on the 21st December 1991? In my view if these were finger prints of the accused for. the matter would rest conclusively against the accused. The training shoes could have been worn the Tsele Moketa after killing the deceased;

the lapse of time between the killing and the 12th January, 1992 and the explanation by the accused that he borrowed the said training shoes from Tsele Moketa throws some doubt on the crown case and I cannot say that complicity of the accused has been proven beyond reasonable doubt in the offences charged.

This is a most unfortunate case in which witnesses important to the case have either died or cannot be found; most importantly Tsele Moketa has not been found. He is probably lying low some where - but murder never prescribes.

The fact that the accused was found wearing training shoes that had prints similar to the impressions found on the dried blood next to the bed cannot by itself be conclusive proof that he murdered the deceased. It is one of the factors that have to be taken into account in the consideration because it tends to show that he is the person likely to have caused this gruesome killing (R. v Tefo Temi - CRI/T/80/91). Another factor is the one already alluded to, that is, the fact that on the 23rd December 1991 the accused was seen by Mphutlane trying to sell the television set later identified as belonging to the deceased; on the 13th several items of property were produced by the accused and these were positively identified by several witnesses as those which belonged to the accused.

The test that has to be applied in cases circumstantial as the present was laid down by Schreiner J.A. in R. v Mtembu 1950 (1) SA 670 A.D.

> "I am not satisfied that a trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. If the conclusion of guilt can only be reached if certain evidence is accepted or if certain evidence is rejected, then a verdict of guilty means that such evidence must have been accepted or rejected, as the case may be, beyond reasonable doubt. Otherwise the verdict could not properly be arrived at. But that does not necessarily mean every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied. I am not satisfied that the possibilities as to the existence of facts from which inferences may be

> is 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. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

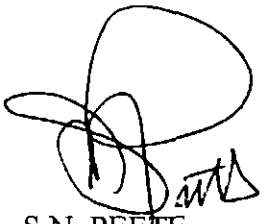
In the case of Veddie Sello Nkosi vs Crown 1993-94 LLR 39, the circumstantial evidence was so overwhelming and the defence case so untenable that the court held the state had successfully proved its case beyond reasonable doubt.

In case before us to-day the circumstantial evidence, though creating a strong suspicion that the accused could have participated in the killing, does not prove this beyond reasonable doubt that the accused killed the deceased and/or broke into the premises and stole the mentioned properties. Finger-prints of the accused, if found at the scene or a shoe impression made by a shoe belonging to the accused could have made the crown's case stronger. I have already alluded to the guiding principle laid down by Maisels P. in Mofolo vs Rex (supra) regarding the inferences that may be drawn from the fact that the accused of recently stolen goods. The court may, where there is failure on the part of the accused to give a satisfactory explanation of those goods, infer that he stole these same goods and (as in this case) even killed the deceased - R v Du Plessis 1924 TPD 103. Such inferences must be the only reasonable inferences - S. v. Parrow 1973 (1) SA 603; the court must take into account not only the explanation which the accused gives in evidence at the trial but also what he is proved by defence or prosecution witnesses to have said outside the court - R. v. Kumalo 1930 A.D. 193. Whilst suspicion may be strong that accused and perhaps with another person or other persons not before court committed these grisly crimes, I come to a sad conclusion that the crown has not proven its case beyond reasonable doubt in both counts. The matter however does not rest there. I am of the view that the evidence led proves however that the accused received into his possession goods proved to have been stolen without having reasonable cause for believing at the time of the acquisition or receipt thereof that the goods were the property of the person from whom he received them; the explanation of the accused as to how he came to be dealing with a stolen television set on the 23rd December 1991 is far from satisfactory - he denies ever possessing the television set, when, through his own lawyer, he admitted the deposition of Mphutlane; the rest of the stolen items were also found in his possession although severals days later on the 13th January, 1992.

The accused is therefore found guilty of contravening section 344 of the Criminal Procedure and Evidence Act of 1981 - being a competent verdict under a charge of theft (S. 192 thereof).

Sentence:- Six years. Two years suspended for three years on condition that the accused is not convicted of an offence involving dishonesty.

All exhibits to be returned to the wife of the deceased. Knife to be forfeited to the Crown.



S.N. PEETE

JUDGE

For the Crown : Ms Mofilikoane

For the Defence : Mr Putsoane