

IN THE HIGH COURT OF LESOTHO

In the matter of:

REX

VS

TUMELO RAMOKHESENG

LEBUSA SHABE

JUDGMENT

Delivered by the Honourable Mr. Justice B.K. Molai on

1st day of December, 2000

The two accused persons appear before me charged with two counts of murder and assault with intent to do grievous bodily harm. The body of the charge sheet is couched in the following terms:

Count I: “In that upon or about the 25th day of May 1995 and at or near Pela-Tšoeu in the district of Leribe the said accused, one or the other, or all of them did unlawfully and intentionally kill Thabiso Mphalane”

Count II: “In that upon or about the 25th day of May 1995 and at or near Pela-Tšoeu in the district of Leribe the said accused, one or the other, or all of them did unlawfully assault ‘Masetoke Molopi by hitting her with sticks on her body and head with the intention of causing her grievous bodily harm.”

It may, perhaps, be convenient to mention, at this juncture, that when they were arrested in connection with the offences against which they stand charged, number 1 and number 2 accused were with another person by the name of Mohau Mohau. When the proceedings of the preparatory examination commenced Mohau Mohau and number 2 accused had absconded and were still at large. Only number 1 accused was before the Court. However, during the course of the preparatory examination proceedings, number 2 accused was traced, re-arrested and joined with number 1 accused as co-accused. The evidence which had been adduced in court before he was joined in as co-accused was, in accordance with the provisions of Sec. 63 (3) of the **Criminal Procedure and Evidence Act, 1981**, duly read over to number 2

accused.

When the charges were put to them the two accused pleaded not guilty on both counts. The plea of not guilty was accordingly entered on both counts, in respect of the two accused persons.

It may be mentioned from the start that **Mr. Putsoane**, who represents the two accused in this trial, told the court that the defence was admitting the depositions of 'Meselane Mphalane, Qhoaeli Mphalane, Motsotso Mphasane, Seeiso Majara, D/Tpr Ramataboe and Francis Mashongoane Ranyali who had testified as P.W.1, P.W.3, P.W.5, P.W.7, P.W.8 and P.W.9, respectively, at the proceedings of the preparatory examination. **Miss Dlangamandla**, counsel for the crown, told the court that the crown was accepting the admissions made by the defence counsel. The depositions of 'Meselane Mphalane, Qhoaeli Mphalane, Motsotso Mphasane, Seeiso Majara, D/Tpr. Ramataboe and Francis Mashongoane Ranyali were, therefore, admitted in evidence, in this trial. By agreement of the parties, the medical report, compiled in respect of 'Masetoke Molopi, the complainant in Count II, and the post mortem report compiled in respect of Thabiso Mphalane, the deceased in Count I, were handed in, from the bar, as exh. "A" and exh "B", respectively, in this trial.

It is significant to mention, at this juncture, that at the close of the crown case an application for the discharge of the accused persons was made on the ground that the crown evidence had failed to prove beyond a reasonable doubt that the accused persons had committed the offences against which they stood charged.

As far as I am aware there is no law compelling a court of law to deal with the question of credibility of evidence at this stage, unless it can be said that, on the face of it, the crown evidence is so hopeless that to refuse the application for their discharge and require the accused persons to answer the charges against which they stand charged will amount to asking them to help build the charges which the crown itself has failed to establish.

The test to be applied at this stage is whether, on the face of it, the crown evidence has established a **prima facie** case against the accused persons. If the reply is in the affirmative, the court is entitled to refuse the application and reserve the question of credibility to the end when the defence will have closed its case. However, this does not mean that where, at the close of the crown case, the application for the discharge of the accused persons is refused, the defence is obliged to call them into the witness box or lead any evidence at all. The defence is perfectly

entitled to close its case without calling upon the accused persons to give evidence in their defence. It is only then that the court will be bound to deal with the question of credibility of evidence and apply the more stringent test of proof beyond a reasonable doubt to determine whether or not the offences against which they stand charged, in this trial, have been committed by the accused persons.

When the application for the discharge of the accused persons was made, in the present case, I applied the less stringent test of whether or not, on the face of it, the crown evidence had established a **prima facie** case for the accused persons to answer. I found that there was evidence indicating that the two accused were amongst the people who had unlawfully assaulted and inflicted injuries on the deceased, in count I, and the complainant, in count II. I reserved the question of credibility of that evidence to the end, when the defence would have closed its case, and came to the conclusion that, on the face of it, the crown evidence had established a **prima facie** case for the accused persons to answer. As it was perfectly entitled, the defence told the court that, in that eventuality, it was closing its case.

I shall now proceed to deal with the question of credibility of evidence and apply the more stringent test of proof beyond a reasonable

doubt to determine whether the offences against which they stand charged, in this trial, have been committed by the accused persons.

The evidence of D/Tpr Ramataboe was to the effect that he was a member of the Lesotho Mounted Police Service, stationed here in Maseru. However, in 1995 he was stationed at Hlotse Police Station, in the district of Leribe. On 28th May, 1995 he was still on duty at Hlotse Police Station when he received a certain information following which he proceeded to the mortuary at the Leribe government hospital where he found a dead body of a male African adult. The body was identified to him by one 'Meselane Mphalane, as that of the deceased, Thabiso Mphalane.

According to him, D/Tpr. Ramataboe examined the body for injuries and found that the deceased had sustained four (4) open wounds on the head, bruises all over the body and also some burned pieces of cloth had stuck on his legs.

D/Tpr. Ramataboe further testified that on the following day, 29th May 1995, he proceeded to a village called Pela-Tšoeu, still in the district of Leribe. He introduced himself to Seeiso Majara, the headman of the village. With the assistance of the headman he was able to meet

the two accused persons now before court. Mohau Mohau could not be found in the village.

According to D/Tpr Ramatoboe, the headman handed to him three (3) panties. He took possession of the panties and returned with them to Hlotse Police Station, together with the two accused person. On arrival at the Police Station, he found Mohau Mohau already there. After they had given him explanations the Police officer cautioned arrested and charged the three (3) accused persons as aforesaid. He took the three (3) panties to the office of the clerk of the court, presumably in accordance with the provisions of the **Criminal procedure and Evidence Act,1981** of which subsection (1) of section 55 reads:

“55 (1) If criminal proceedings are instituted in connection with any article referred to in section 52 (c) and such article is required at the trial for purposes of evidence or for the purposes of an order of Court, the police official concerned shall, subject to the provisions of sub-section (2) deliver such article to the clerk of the court where such criminal proceedings are instituted or to the Registrar of the High Court as the case may be.”

The evidence of Francis Mashongoane Ranyali was to the effect that he was, at the material time, the court interpreter at the Leribe Magistrate Court. Due to shortage of staff at the Magistrate Court, he

normally dealt with articles of exhibits brought to the office of the clerk of the court by the police. He confirmed the evidence of D/Tpr. Ramataboe that the latter brought the three (3) panties to the office of the clerk of the court at the Leribe Magistrate Court. That was on 8th June, 1995. He authorised the police officer to retain the panties in the police custody, presumably in accordance with the provisions of the **Criminal Procedure and Evidence Act, 1981** of which sub-section (2) of section 55 reads:

“55 (2). If it is by reason of the nature, bulk or value of the article in question impracticable or undesirable that the article should be delivered to the clerk of the court in terms of sub-section (1), the clerk of the court may require the police official concerned to retain the article in police custody or in such other custody as may be determined in terms of section 52 (c)”

It is significant to observe that section 55 (2) of the **Criminal procedure and Evidence Act, supra**, empowers the clerk of the court, and not a court interpreter, to authorise police officers to retain, in police custody, articles which will be used as exhibits in criminal trials. In authorising D/Tpr. Ramataboe to retain the three (3) panties in police custody, as he did, Frances Mashongoane Ranyali, who was admittedly a court interpreter and **not** the clerk of the court, clearly acted ultra vires and, therefore, unlawfully.

Be that as it may, in his testimony D/Tpr. Ramataboe alleged that after they had been handed in as exhibits at the proceedings of the preparatory examination, the panties were returned to the police exhibit room where they had since been destroyed by the rats. They could not, therefore, be made available, as exhibits, in this trial. Likewise the weapons which were allegedly used to inflict the injuries on the deceased in Count I, and the complainant, in Count II, could not be found and handed in as exhibits, in this trial, due to the fact that, at the time of investigating this case, there was an on-going strike in the police service.

As it has been pointed out, earlier in this judgment, the post mortem report of the deceased, in Count I, and the medical report compiled in respect of the complainant, in Count II, were handed in, from the bar, as exh. "B" and exh "A", respectively. According to exh. "B", on 7th June 1995 and at Leribe government hospital mortuary, a medical doctor performed an autopsy on the body of a male African adult. The body was identified before the medical doctor as that of the deceased, Thabiso Mphalane, by 'Meselane Mphalane and Qhoaeli Mphalane. That was confirmed by both 'Meselane Mphalane and Qhoaeli Mphalane according to whom the deceased was their own brother and had, therefore, no difficulty in identifying his dead body

before the medical doctor.

According to exh. "B", the examination of the body revealed that the deceased had sustained abrasions on both his legs, a small wound on the left temporal region, three deep wounds/lacerations on the right temporal region and both the head and the face were severely swollen. In the opinion of the medical doctor, the deceased had died as a result of cerebral bleeding caused by the injuries inflicted on his head. I can think of no good reasons why the opinion of the medical doctor should be doubted in this regard.

Exh. "A" was to the effect that the complainant, in Count II, was medically examined by Dr. Kimanuka on 30th August 1995. i.e a little over three (3) months after the alleged assault on her had taken place. The findings of Dr. Kimanuka, the medical officer at the Leribe government hospital, were that the complainant had sustained bruises on her left eye, both her thighs and buttocks. A hard object could have been used, with a mild degree of force, to inflict the injuries which were not dangerous to life and caused her no degree of disability at all. She was treated as an out patient.

Although there was an inordinate delay in the medical examination

of the complainant, in Count II, presumably because there was, as D/Tpr Ramataboe had testified, a strike in the police service, I am prepared to accept the evidence disclosed by exh. "A" that the complainant, in Count II, had sustained injuries as a result of the assault that had been perpetrated on her.

The salient questions that now arise for the determination of the court are whether or not the two accused, before court, are the persons who assaulted the complainant, in Count II, with intent to cause her grievous bodily harm and inflicted the fatal injuries on the deceased, in Count I, and, therefore, brought about his death.

In this regard the court heard the evidence of P.W.2, Antony Ntsenki, who told the court that he lived at the village of Pela-Tšoeu under Chief Seeiso Majara. He knew the two accused before court. They lived in the neighbouring village of ha Tjotji, still under chief Seeiso Majara. He knew 'Masetoke Molopi who also lived in the village of ha Tjotji. The deceased was a child of his paternal uncle.

P.W.2 testified that at about 7:30 p.m. on 25th May 1995 he was on his way to a night virgil in the village of St. Danis. As he passed next to the chief's place he heard a voice of a person shouting: "He has

stolen panties". There was a noise of many people from the direction of the chief's place. As a result of that noise P.W.2 decided to go via the chief's place to investigate what was taking place there. On arrival at the chief's place he found that the deceased was tied up with a rope on both his hands and was lying on the ground. There were also many people gathered at the chief's place. When P.W.2 inquired what the deceased had done number 2 accused replied that the deceased had stolen panties. According to P.W.2 as he layed on the ground with his hands tied up with a rope the deceased was wearing only a T-shirt and a piece of a torn overall which covered only the top part of his body. He was half-naked. P.W.2 remarked that even when he was arrested, a person should not be treated like that. He asked where the deceased's clothes were. Number 2 accused then pointed out at the deceased's clothes which were placed in a pile, some distance away from him. According to him, P.W.2 went there and took deceased's underpants, short pants and a truck suit. He assisted the deceased to put on the underpants, short pants and the truck suit. As he assisted to dress him, P.W.2 tried to talk to the deceased who was, however, unable to speak. P.W.2 told the court that after he had assisted him to put on his clothes, the deceased tried to come to him but number 2 accused violently pulled him back by the rope with which both his hands were tied up. He (accused 2) then pressed down the deceased's head with his boot and

said to P.W.2: “At ha Tjotji you release thieves. Here we kill them”. It is worth noting that of all the witnesses who testified in this trial, P.W.2 was the only one who told the court that number 2 accused stumped his booted foot on the head of the deceased and uttered the words: “At ha Tjotji you release thieves. Here we kill them.”

P.W.2 told the court that, when he came to the chief's place, he could not identify many of the people who had gathered there because it was dark. The illumination, which was provided by some grass fire was on and off and so poor that he could not positively identify all the people he had found gathered there. However, he did identify, by their voices, those people he had the occasion to speak to. He identified number 2 accused because he found him standing close to the deceased and he actually heard him talking. He also identified number 1 accused because he actually spoke to him as he was leaning against the wall of a house some 8 paces (indicated) from where the deceased was lying on the ground. He also identified Mohau Mohau because he actually snatched away his sjambok saying he was going to fetch ‘Masetoke Molopi. When he snatched away his sjambok Mohau Mohau threw down his stick next to P.W.2 who admittedly took possession thereof.

P.W.2 told the court that, when number 2 accused told him “at ha

Tjotji you release thieves. Here we kill them”, he decided to leave that place. He followed the direction taken by Mohau Mohau so that he could give him back his stick and take his sjambok. According to him, when he came to ‘Masetoke Molopi’s home he found Mohau Mohau whipping her with the sjambok in the house. He told Mohau Mohau to stop whipping that woman with the sjambok. Mohau Mohau did oblige. P.W.2 then asked ‘Masetoke Molopi whether she had stolen the panties. She denied it. She even opened her wardrobes and asked Mohau Mohau to look inside and satisfy himself that the panties he was looking for were not there. Mohau Mohau did look in the wardrobes but could not find the panties he claimed ‘Masetoke Molopi had stolen.

P.W.2, Mohau Mohau and ‘Masetoke Molopi then proceeded to the chief’s place. Before this court, P.W.2 denied that on the way to the chief’s place Mohau Mohau was assaulting ‘Masetoke Molopi in any way. Nor was ‘Masetoke Molopi or the deceased assaulted by anybody on arrival at the chief’s place. However, at the proceedings of the preparatory examination, P.W.2 told the Magistrate that Mohau Mohau did assault ‘Masetoke Molopi on the way to the Chief’s place. In my view, P.W.2 was not testifying to the truth either before this court or before the Magistrate at the proceedings of the preparatory examination. However, as it will be seen, later in this judgment, P.W.2 corroborated

the evidence of 'Masetoke Molopi that on arrival at the chief's place she was tied together with the deceased with a rope. According to P.W.2 it was only Mohau Mohau who did so. He denied, therefore, the evidence of 'Masetoke Molopi that number 1 accused and number 2 accused also took part in fastening her to the deceased. He further denied the evidence that after 'Masetoke Molopi and the deceased had been tied together they were assaulted in any way.

In his evidence, P.W.2 told the court that shortly after Mohau Mohau had fastened 'Masetoke Molopi to the deceased, Thabo Sek'asana arrived at the chief's place and ordered that 'Masetoke Molopi be unfastened and released to go home. He supported Sek'asana in that regard, particularly so because 'Masetoke Molopi was clearly pregnant, at the time. After 'Masetoke Molopi had been released to go home, P.W.2 took his sjambok, presumably from Mohau Mohau, and continued on his way to the night virgil at St. Danis where he found chief Seeiso Majara. He reported to the chief what was happening at the chief's place. In the morning, P.W.2 left the place where the night virgil was held and returned home. I shall return to his evidence in a moment.

Thabo Sek'asana gave evidence as P.W.3 in this trial and told the

court that he lived at Pela-Tšoeu in the district of Leribe. He knew the deceased in his life time. He also knew the two accused persons before court. Both the deceased and the accused persons lived in the same area as he did. According to P.W.3, he was the right-hand-man of the chief in his area. On the night of 25th May 1995 the two accused person before court and Mohau Mohau came to his house and reported that they had arrested a thief. As the chief was not in, at the time, they were asking for his assistance. P.W.3 told the court that he then got out of bed and proceeded to the chief's place in the company of the two accused persons and Mohau Mohau.

On arrival at the chief's place, P.W.3 found that a large number of people had already gathered there. He noticed the deceased and 'Masetoke Molopi tied together with a rope, a short distance away from the people who had gathered at the chief's place. He assured the court that as they were fastened together with a rope at the chief's place, the deceased and 'Masetoke Molopi were not being assaulted, in any way.

According to P.W.3, when he asked the people who had gathered at the chief's place as to who had fastened the deceased and 'Masetoke Molopi together, Mohau Mohau replied: "we did". He, however, did not ask Mohau Mohau whom he meant by "we". He merely proceeded

to unfasten 'Masetoke Molopi and the deceased before ordering the former to go home and return to the chief's place in the morning of the following day. Thereafter he inquired what the deceased had done and, again, Mohau Mohau replied that the deceased had stolen panties. The deceased himself tried to say something which P.W.3 could not follow because he was unable to speak clearly. P.W.3 then detailed messengers to go and report to the relatives of the deceased. He and the people who had gathered at the chief's place remained with the deceased, the two accused and Mohau Mohau for the whole night. In the morning, the chief himself arrived. He was followed by 'Masetoke Molopi and the relatives of the deceased. P.W.3 then reported to the chief that, in his absence, he received the report that the deceased had been arrested and brought to the chief's place on the allegation that he had stolen panties. The deceased had, in fact, been arrested together with 'Masetoke Molopi. The two accused and Mohau Mohau, who were present when he reported to the chief, did not gainsay what P.W.3 told the chief.

According to P.W.3, whilst the matter was being discussed before the chief, the deceased passed away. P.W.3 testified that he had observed that the deceased had a swollen face. When the two accused and Mohau Mohau were questioned about it the latter said the deceased had fallen whilst he was being chased after. The two accused did not

say anything.

Now, returning to his evidence P.W.2 testified that when he arrived home from the night virgil, he told his mother that he was going to see the deceased at the chief's place. On arrival at the chief's place he, however, learned that the deceased had passed away.

The evidence of Motsotso Mphasane was to the effect that sometime in May, 1995 he passed next to the chief's place where he noticed that many people had gathered there. He decided to go to the chief's place, presumably to investigate what was taking place. On arrival at the chief's place, he noticed the deceased who was clearly injured as he was lying down with a swollen face. In the observation of Motsotso Mphasane, the deceased was still alive. He heard one Shabe Shabe, in a loud voice telling the people, who had gathered at the chief's place, that the deceased had stolen panties and money. According to him, Motsotso Mphasane then left the place. He did not know when the deceased died because, when he left the chief's place, he was still alive.

It is worth observing that the evidence of Motsotso Mphasane does not disclose on what day, in May 1995, he went to the chief's place

where he found many people already gathered there. One can only assume that it must have been in the morning of the following day, 26th May 1995 because he was able to see that the deceased had a swollen face.

The evidence of Seeiso Majara was to the effect that he was the chief of Pela-Tšoeu. The two accused person, 'Masetoke Molopi, P.W.2 and the deceased were all his subjects.

At about between 7:00p.m and 8:00p.m on 25th May, 1995 he went to a night virgil from where he returned home at about between 5:00a.m and 6:00a.m on the following day. On arrival at his home he received a report following which he summoned to him and questioned P.W.3 about the incident which had allegedly taken place on the previous night. After P.W.3 had given him a report, the chief proceeded to the former's home where he found the dead body of the deceased. Chief Seeiso Majara denied, therefore, the suggestion of 'Masetoke Molopi and P.W.3 that the deceased had passed away while his matter was being discussed before the chief, at the chief's place.

According to chief Seeiso Majara, when he found it, at the home of P.W.3, the corpse of the deceased was covered with a grey blanket.

He uncovered the body and merely looked at it. He did not actually examine it for injuries. Thereafter, he detailed messengers to go and summon the deceased's relatives to him. On their arrival, he told the relatives of the deceased what P.W.3 had reported to him. That was in the presence of the two accused persons before court, Mohau Mohau and many other people who had gathered at the chief's place.

In the evidence of chief Seeiso Majara, he was never shown the rope by which the deceased and 'Masetoke Molopi were allegedly fastened together. He did not, therefore, take possession of the rope. However, Mohau Mohau did show him the panties which he alleged had been stolen by the deceased. When he questioned her about them 'Masetoke Molopi denied knowledge of those panties.

Chief Seeiso Majara further testified that when the relatives of the deceased conveyed the corpse to the police station he ordered number 1 accused and Mohau Mohau to go with them. They did not do so. Subsequently, the police came to the village looking for the accused persons. He ordered them to go with the police and they obliged.

Forty-two (42) years old 'Masetoke Molopi testified as P.W.1 and, in a nutshell, told the court that she lived at a place called Pela-Tšoeu,

in the district of Leribe, under Chief Seeiso Majara. The two accused, before court, were her co-villagers. She knew the deceased in his life time. The deceased was her secret lover. She assured the court that she had no love affair with either the two accused or Mohau Mohau.

P.W.1 told the court that on 25th May 1995 one of the relatives of Mohau Mohau held a “**Pitiki**” (birthday party for a baby) feast in the village. She and the deceased, her secret lover, attended the feast. The two accused persons were also amongst the many people who had attended the feast. P.W.1, the deceased and a few other people, including the two accused, were amongst the people who were being served or entertained at the house of Mohau Mohau.

At about 7 p.m. P.W.1 left the place of the feast for her home. She was in the company of the deceased. It was already dark in the evening. On the way, the two accused and Mohau Mohau caught up with them. Without uttering a word, the two accused and Mohau Mohau started assaulting her and the deceased. As a result of her screams, many other people came to the scene. However, instead of coming to their rescue, those people joined their assailants in assaulting P.W.1 and the deceased. Although in her evidence in-chief, P.W.1 told the court that their assailants used sticks to assault her and the deceased,

under cross-examination she said she was not positive about it because the attack on them came as a surprise and it was dark.

In her evidence, P.W.1 further told the court that when they were thus suddenly attacked by their assailants, she and the deceased ran away, in different directions. She ran towards her own house whilst the deceased ran in the direction towards his parental home, in the village.

Asked how she could have positively identified the two accused and Mohau Mohau as some of the people who attacked and assaulted her and the deceased on the way since, in her own words, it was dark and their assailants never uttered a word during the attack on them, P.W.1 merely contented herself with telling the court that the assailants were her co-villagers and she had, therefore, no difficulty in identifying them.

Be that as it may, P.W.1 testified that shortly after she had come to her house, Mohau Mohau arrived. He was armed with a sjambok with which he whipped her saying she should produce the panties which the deceased had stolen for her. According to her, P.W.1 denied knowledge of the panties and opened her wardrobes so that Mohau Mohau could search and satisfy himself that there were no such panties

in her house. He could not find the panties in her house. However, Mohau Mohau continued whipping P.W.1 with the sjambok and ordered her to proceed to the chief's place, in the village. Mohau Mohau continued sjambokking her on the way to the chief's place.

According to her, on arrival at the chief's place, P.W.1 was attacked by many other people who joined Mohau Mohau in assaulting her before she was tied together with the deceased with a rope by number 1 accused and number 2 accused. However, under cross-examination P.W.1 said A2 and Mohau Mohau were the only people who actually tied her to the deceased with a rope. Of the people she found gathered at the chief's place, P.W.1 remembered Maqalika Makese who hit the deceased a blow on the head with a stick, Napo Shabe who put some burning grass on the deceased, number 1 accused who hit the deceased a blow on the body with a stick, number 2 accused who hit the deceased on the head with something she could not clearly identify and a certain Checha Checha.

P.W.1 told the court that eventually a certain Thabo Sek'asana came to the chief's place and unfastened her saying a woman could not be treated in the manner she was been treated. He ordered her to go home and return to the chief's place in the morning of the following day.

According to her, P.W.1 did go home as ordered. In the morning of the following day, she returned to the chief's place where she found the two accused persons, Mohau Mohau, a large number of villagers and the deceased already gathered there. She observed that the deceased had sustained injuries on the eye and head. She was questioned as to what had happened to her and the deceased. Whilst P.W.1 was explaining to the people who had gathered at the chief's place, what she had already told the court, the deceased passed away.

After he had passed away the deceased was transported by his relatives, first to Hlotse Police Station and then to the mortuary at the Leribe government hospital. P.W.1 accompanied the body of the deceased as it was being transported from Pela-Tšoeu to Hlotse Police Station where they found the police on strike and, therefore, not working. She confirmed that on a later day she returned to the police station. She was given a medical form and referred to a medical doctor who examined her. She had since returned that medical form to the police, at Hlotse Police Station.

According to her, P.W.1 was, at the time of the assault which was perpetuated on her, pregnant with a child. She subsequently got a miscarriage as a result of the assault on her.

I must say I am not convinced that P.W.1 positively identified the two accused and Mohau Mohau as some of the people who assaulted her and the deceased on the way from the place of the feast, regard being had to the fact that it was dark at night and the assailants attacked them by surprise and without uttering a word before and during the attack.

In her evidence, P.W.1 conceded that visibility was poor at the chief's place because it was provided by the illumination of some grass fire which was on and off. That being so, I find it incredible that P.W.1 could have positively identified the people she alleged had assaulted the deceased in the manner she described to the court, more particularly so as she herself was being assaulted and, therefore, obviously frightened. I am not prepared to accept the evidence of P.W.1 unless it is corroborated by a more reliable evidence. I am unable to find any such corroboration on this point.

It has been stated, earlier in this judgment, that of all the witnesses who testified before this court, P.W.2 was the only one who told the court that he saw number 2 accused stumping his booted foot on the head of the deceased. Although the court is entitled to convict the accused person on the evidence of a single witness, such witness must be found to be a credible witness. See sub-section (1) of S. 238 of the

Criminal Procedure and Evidence Act, 1981 which provides:

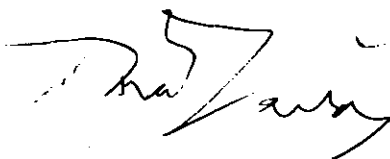
“238 (1) subject to sub-section (2) any court may convict any person of any offence alleged against him in the charge on the single evidence of any competent and credible witness.”

I have, earlier in this judgment, found, on evidence that P.W.2 was not an entirely credible witness. I am not prepared, therefore, to accept his evidence unless it is confirmed by the evidence of a more reliable witness. P.W.1 who told the court that amongst the people she saw assaulting the deceased at the chief's place was number 2 accused, who hit the deceased on the head with something she could not clearly identify, was herself not such a reliable witness.

In the light of the aforesaid evidence, it is obvious that the view that I take is that the questions I have earlier posed viz. whether or not the two accused, before court, are the persons who assaulted the complainant, in Count II, with intent to cause her grievous bodily harm and inflicted the fatal injuries on the deceased, in Count I, and, therefore, brought about his death, must be answered in the negative.

In the result, the two accused persons are found not guilty and discharged on both counts.

My assessor agrees with this finding.



B. K. MOLAI

JUDGE

For Crown : Miss Dlangamandla

For Defence : Mr. Putsoane