IN THE HIGH COURT OF LESOTH0

In the matter between:

REX

v

ELLIAS PHISOANA RAMAEMA
SECHABA RAMAEMA
KEKETSO RAMAEMA
TOKA LETSIE
DAVID MASITO
BONGANI MASITO
NTSIE SEBATANA

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu
on the 11th Day of April, 2001

The accused are charged with murder and robbery:

COUNT 1: MURDER

In that upon or about the 21st of January 1999 and at or near Florida in the district of Maseru, the said accused acting in concert, each or

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other or all of them, did unlawfully and intentionally kill PATRICK KENNEDY HICKEY.

COUNT II ROBBERY

In that upon or about the 21st day of January 1999 and at or near Florida in the district of Maseru, the said accused acting in concert, each or other or all of them did unlawfully and with the intention of inducing submission by the deceased PATRICK KENNEDY HICKEY to the taking by the accused the following items of to wit:

1. White Toyota Hi Lux Van Registration Number AM273
2. Cellular (mobile) phone Siemens S6
3. Wallet containing M100 in cash.

threaten the said PATRICK KENNEDY HICKEY that unless he consented to the taking by the said accused of the said property or refrained from offering resistance to them in the taking of the said property, they would there and then stab him; did then and thereupon take and steal from the person of the said PATRICK KENNEDY HICKEY the said property of the deceased or in his lawful possession, and did rob him of the same.

The Crown applied for a separation of trials in respect of accused 7 Ntsie Sebatana who had absconded and had not been re-arrested. The application was granted. Nevertheless for convenience Ntsie Sebatana was still

referred to as accused 7.

All the accused pleaded not guilty to both charges.

Crown Case

The Crown called nine witnesses.

The first witness was John Paul O'Donoghue (PW1), from the Irish Consulate, now stationed in Maputo. Duly sworn, he said in January 1999 he was stationed in Maseru, where he was the Attache for Development. The late Patrick Kennedy Hickey worked in the rural foot-bridge project of the Government of Lesotho which was supported by the Irish Government. He was an old man in his seventies and was living alone. He was an extremely fit person in the view of PW1.

Deceased had been allocated a white Toyota Hi Lux van AM 2731 for his work. On the 30th January 1999 PW1 was requested by the CID to come and identify that vehicle. He was able to do so as he had brought its registration book Exhibit "D". This Registration book for the vehicle AM 273 is commonly known as the Blue Card.
PW2 was also able to identify the vehicle because he had the duplicate keys of AM273 - these keys together with the key to the alarm system commonly known as the immobiliser, fitted the vehicle and could start the vehicle - as the ignition key fitted the vehicle. Deceased (the late Patrick Kennedy

Hickey) had the other set of keys. In the Blue Card the vehicle is described as a Toyota Hi Lux Van, model 1998, fuel diesel. It had been registered on the 18th April 1998 as AM 273.

PW1 found the number plates different, but the engine and chassis numbers still remained unchanged and consequently corresponded with those on the Blue Card. The paint work was disturbed or painted over where blue stripes had been. Originally this van AM 273 had a blue stripe on both sides below the windows running from the front to the back of the vehicle. The keys that fitted the vehicle AM 273 were handed in as Exhibit 1 without objection. PW1 noted that there was still a strong smell of pipe tobacco inside the vehicle - as deceased was a pipe smoker. No questions were put by the defence to this witness.

The second Crown witness was Mosemako Hlalele (PW2). This witness was an accomplice. After being declared an accomplice, the court asked him if he was willing to give evidence PW2 said he was willing. The court then told him that he would be granted immunity at the end of trial if he gave his evidence honestly and satisfactorily. PW2 was very ill. He was sometimes supported with pillows in court. The court had to have several adjournments so that PW2 could have medical attention. He was very lean and weak throughout the trial. The case had to proceed because there had been far too many postponements.

When accused 5 and 6 went to Thamae's, at the business premises of accused 2, they invited PW2 to come along with them. Accused 2 met PW2 directly there. PW2 told him, accused 5 and 6 that he would take them later to go and see the vehicle he wanted. It was still too early to do so as the man who had that vehicle knocked off at 4 pm. At about 3.30 pm accused 2, 5, 6 and PW2 boarded a van belonging to accused 2 and went o Khubetsoana where the said vehicle was parked. It was outside a building that had government flags. Accused 2 showed them the vehicle. It was a white 4x4 Toyota van. It had a stripe in the middle of its body. It was shiny with a mixture of metallic colours.

Accused 2, 5, 6 and PW2 waited for the owner of the vehicle to knock off from work where he was going to pass on the road to the Agricultural College. When that man passed in the white Toyota 4x4 which accused 2 wanted, they followed him. When they got to Seputaneng the traffic lights closed and they had to stop while the white Toyota 4x4 drove on - consequently they lost sight of that vehicle. They looked for it, when they emerged from the railway station, they saw it at a distance going towards the Maseru Bridge. They drove around Hoohlo village looking for it, until they found it parked outside a house. Having identified the owner's residence at Hoohlo's they went to Thamae's. When they parted, accused 2 said they should come back the following day.

PW2 says accused 2 had asked them how they planned to take that

vehicle. They had said they did not know. Accused 2 suggested that one of them could pose as a policeman. If so, he would prove white gloves. They should find a hat that was similar to that of traffic policemen. Then the white man (deceased) who was the owner of that vehicle would be stopped by what he thought was a traffic policeman, they would way-lay him and take the vehicle. As they discussed what would happen, they decided that accused 6, who was taller, would wear white gloves and a hat similar to that of the traffic police and stop the vehicle and they would then point a gun at him and take the vehicle. PW2 says he did not know what guns would be used because they did not have them. The plan did not proceed further because they did not find the hat.

They went to accused 2's place of business at Thamae's. Accused 2 said since they had not found a hat, they should go to deceased's home to see with whom he stayed. PW2, accused 5 and 6 went to check if deceased stayed with anybody. PW2 had letters which he would pretend to be delivering but were wrongly addressed. When he knocked, he would hand them to deceased and as deceased looked at their letters, he would take note if there were any people who stayed with deceased. PW2 in the afternoon went to the home of deceased with wrongly addressed letters. He found two people from West or Central Africa, they were in the outbuilding next to the garage. They told him to enquire in the next house. PW2 went to accused 2, 5 and 6 to report that there were people staying in the outbuilding. This fact was noted. They left and did not go back that day.

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On another day accused 2 took PW2, accused 5 and accused 6 in a car and dropped them at the school at Hoohlo nearby. It was already dark. The four of them had discussed a plan of hiding in deceased's yard if deceased went to the Hotel. The three accused would catch deceased and take away his vehicle when deceased came back from the hotel. They hid at different places in the yard of deceased. PW2 says they saw deceased go out in his vehicle. Deceased did not return. They reported their failure to accused 2 the following day.

The following night after dark accused 2 took the three of them to the school at Hoohlo. PW2, accused 5 and accused 6 hid in the yard of deceased. Two people entered the deceased's yard. It was still the West or Central Africans. Deceased left in the vehicle they wanted. The sight of those two people made them afraid to act. Shortly after the deceased had left they had to go. They reported this failure to accused 2 the following day and accused 2 did not comment. This was a third failure after Ntsie Sebatana had joined them and had been introduced to accused 2 who had taken them to Hoohlo school.

The following day they did not go because it was raining. The day after that PW2, accused 5, accused 6 and Ntsie Sebatana decided to go without going to accused 2 because they realised they had failed too often and they believed accused 2 must have become fed up with them. Accused 6 suggested that they should reinforce their squad with Toka Letsie

accused 4. They agreed and accused 4 was included in their group. That night the five of them went to deceased's place. They were armed. PW2 was armed with a dagger with a Brown handle. Its blade was about 12 centimetres. The other accused were armed with knives. They hid at different places. The plan was to catch deceased when he entered. They hid at difference places. Accused 5 was at the gate. PW2 was at the opposite corner of the house. While Ntsie Sebatana, accused 6 and 4 were hiding in the bushes next to the fence nearest to where deceased would park the vehicle.

When deceased alighted from the vehicle, Ntsie Sebatana, accused 4 and 6 did not get hold of the deceased from behind as planned. It was PW2 from the opposite corner who rushed at deceased from the front. They wrestled but the others did not come. Deceased threw PW2 to the ground they both ended on the ground. Deceased got up while PW2 was still clinging to deceased. They separated and deceased hit PW2 with a fist and PW2 felt dizzy and had to support himself with the wall of the house. PW2 stabbed deceased on the chest. At that point accused 6, accused 4 and Ntsie rushed towards deceased. Accused 6 stepped on the neck of deceased who had fallen and stabbed him on the chest and ran away. Ntsie Sebatana and accused 4 also stabbed deceased and also ran away. They ran towards town. PW2 ran away towards the river in the opposite direction from the one the other three accused had taken. Accused 5 had also run in the direction of the river (which was the same direction that PW2 had taken).

They had heard a siren of an ambulance.

Later PW2 and accused 5 returned to the deceased. Accused 5 was reluctant to go back but only did so when PW5 convinced him that deceased must be dead. They found deceased indeed dead. Accused 5 groped for the keys of the vehicle on the ground and found them. They searched deceased, took his wallet plus the waist cell phone. Accused 5 drove the deceased's Toyota vehicle that they wanted and together with PW2. They went to Motimposo and to Khubetsoana where they bought tobacco and beer at the bar of Lechalaba at Khorong. From there they went to Ramaema's place at Upper Khubetsoana. They drew the attention of the watchman at Ramaema's gate to draw the night watchman's attention to them. Eventually they were admitted into Ramaema's yard where they met accused 2. It was at about 10 pm at night.

Accused 2 asked why they had not removed the number plates of the vehicle. Accused 5 said they forgot to do so. After they had removed the number plates at the back of the vehicle a child said that accused 2 was being called into the house by Mr Ramaema. Accused 2 went into the house. PW2 told the court that he did not know how to remove the number plates, it was accused 5 who had removed them. When accused 2 came back from the house, he said the old man had said they should park the vehicle they had come with in the garage. Accused 2 brought hot water from the garage and they removed the stripes at the side of the vehicle.

They then took all the papers in the vehicle they had come in. Accused 2 took them to their home in a Venture motor vehicle. On the way they threw the number plates into the Maqalika dam.

- The court went on inspection *in loco* to see where deceased was killed and where PW2 and the other accused were hiding. The garage of the vehicle was in the outbuilding with a servant's quarters The vehicle had been parked outside the main building on the drive-way to the garage facing the garage door. The deceased had been killed a few paces behind the vehicle at the side of the main building on the way to the front entrance. He fell 3 paces from the corner of the building.

Accused 2 had been given the deceased cell-phone but accused 2 did not know where he sold it. After taking PW2 and accused's 5 home, it had been agreed that they should come and see accused 2 at Thamae's the following day. This they did. Accused 2 asked them how much they wanted for the vehicle - accused 5 replied and said accused 2 could pay them what he found fit. When this was said by accused 2, those who were present were PW2, accused 5 and accused 6. Accused 2 did not pay them except for M600-00, and gave them problems until they were arrested. He had promised to make an appointment with the bank for the rest of the money.

PW2 could not identify the cell-phone he was shown because he was

not sure. He was shown a dagger that looked like small bayonet with a 20centimetre blade and a black handle - he said it belonged to accused 4, and that accused 4 used it on the deceased. He (PW2) had used a dagger with a brown handle and a 12 centimeter blade and a scabbard to stab deceased. It was handed in as Exhibit "2". PW2 said he had borrowed it from a man he could no more remember, and from whom he used to borrow that dagger often.

Cross-examined, PW2 said he does not know when he was arrested. His date of arrest that counsel for accused said was the 31st January 1999 he could not deny since it came from documents in the (hands) of counsel.

PW2 answering further questions said he had been arrested early in the morning at the house of a friend. Many armed policemen had surrounded the house he was in before sun-rise. They were so many that he could not count. They knocked at the door and when he opened the door they demanded the knife he had used. Not many questions were fired at him during interrogation because he told them the truth.

He spent 5 to 7 days in custody. He was not released after making a statement - he was detained though it was not for a long time. He signed his statement but it was not read to him. He was taken to a Commissioner of Oaths on a different day from the one he made his statement. He does not recall all these events very well. If counsel, from papers in his

possession, claimed he was before the Commissioner of Oaths on the 5th February 1999, PW2 will not deny that. Similarly if documents in counsel's possession show he was arrested on the 31st January 1999, PW2 will not deny this. He does not recall if he made his statement on the 3rd February 1999 from what appears on the statement, PW2 will not deny that. He was not arrested at his girl friend's place but at the home of Ekang, whose home is at Mafeteng where he had put up that day.

Cross-examined on why he stabbed deceased, PW2 said deceased had hit him with a fist and might have done so again to finish him (PW2) off. PW2 said he was not remanded to custody with the other accused, his case had been postponed. PW2 said his home is at Fobane, Ha Mosae and that is where he will go when the case adjourned. He had not absconded to Carletonville in the Republic of South Africa as he is ill. He had been told to report to the police if he should leave the country. He had not done so because he had no money to come t o Maseru. The police went to arrest him on Friday on a day he cannot remember. He had not been promised a reward because it was said he is a killer. He had no problems with the police - he was lying down as he said this. The case had to be adjourned to the following day because PW2had become very ill.

The following day when cross-examination continued, the condition of PW2 was still bad, but his illness was less acute although PW2 still looked ill. Answering questions, PW2 said he left home without telling his

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mother and sister where he was going. He had merely told the chief he was going to South Africa without specifying the place because he himself did not know. He had told his sisters he was going to look for work in South Africa. He was not yet ill then. PW2 denied he had been given a reward to testify as he was doing.

PW2 answering questions about his presence at the Ramaema residence said, he cannot remember if they hooted at the gate. It was the first time he went there that night. He does not know the number of houses in the site. The only person he talked to there was accused 2. PW2 said he does not know that he had ever said there was an instruction from the old man that one vehicle in the garage should make way for the Toyota they had brought. Accused 2 just drove that vehicle into the garage. He does not recall ever saying they blew the horn at the gate or talked to anyone else except accused 2.

The above cross-examination had been by the first defence counsel Mr *Phafane*, who appeared for accused 1 and 3. The next counsel to cross-examine PW2 was Mr *Ntlhoki* (counsel for accused 2).

Answering questions from Mr *Ntlhoki*, PW2 admitted that he had become ill earlier after the death of deceased. He was in Queen Elizabeth II hospital and during his illness, he even had a mental breakdown. He was even nursed back to health by traditional doctors.

Cross-examined further on behalf of accused 2 PW2 confirmed that accused 2 had talked to accused 5 and 6 at the recruitment stage even if accused 2 now seeks to deny this. At that stage, accused 2 did not know PW2. He was brought into the conspiracy by accused 5 and 6. Accused 2 was aware that PW2 had been told everything by accused 5 when accused 2 first met PW2. Accused 2 lies if he says he never sent them on a mission to go and steal a motor vehicle. If accused 2 claims he had played no part in this mission, he has to explain why the vehicle was found in his possession. The court observed that at this stage of the cross-examination, the health of PW2 suddenly improved and his mind became very clear. PW2 admitted that accused 2 did not participate in the actual stealing of the vehicle, but he did give them advice on how to go about taking the vehicle, consequently PW2 said he does not understand how and why accused 2 claims he did not participate.

Dealing with more questions from counsel, PW2 insisted that accused 2 who was driving a venture on that occasion had approached accused 5 and 6 - and these in turn spoke to PW2 whom accused 2 did not know at the time. Initially PW2 had not been in the conspiracy but accused 2 involved him as he came to know him. Accused 2 must have been aware that accused 5 had told him everything. It was the first time PW2 hijacked a motor vehicle, but accused 2 was not sure he was a beginner or not.

According to accused 2, they were to obtain police attire first and

hijack the vehicle. PW2 could not specify the time of the highjack in broad because the plan failed. It was not a good plan because that period of the day is the busiest period in terms of traffic. Whether the plan of one of them pretending to be a policeman was odd or not, that was the plan. After the vehicle had stopped, the others were supposed to rush at the driver and seize the vehicle. PW2 said he has forgotten what was supposed to happen in respect of obtaining a fire-arm. They were supposed to acquire gloves and headgear of the traffic police. Accused 6 who was taller was supposed to be the traffic policeman. A white shirt and khaki trousers were easy to find. Being referred to his statement before the police - PW2 a ZCC hat would have sufficed so long as it would make a person look like a traffic policeman. Of the five people who went to the house of deceased, only accused 5 did not stab deceased.

Dealing with accused 2's version of events, PW2 said he does not know Seeiso Seeiso or Ptjoemptjoete from Matelile. He did not hear from Seeiso Seeiso that accused 2 wanted a van. If accused 2 wanted a twin cab van PW2 would not have know. If accused 2 put the date at 26 January 1996, PW2 said he does not know the date on which they met. Accused 2 lies when he says PW2 sold him a van. Accused 2 lies when he says PW2 drove the vehicle in question because PW2 does not know how to drive. Accused is not telling the truth when he says PW2 ever promised to bring papers for the vehicle in question. He never bargained with accused 2 over the price of the vehicle. The price of M65,000-00 which was brought down

to M60,000-00 for the vehicle in question never cropped up in their conversation. If accused 2said he ever promised that he would pay PW2 such an amount of money, that is not possible because PW2 does not believe he could ever had had such an amount of money - if he paid PW2 such an amount of money accused 2 would have nothing to live on. The only thing that is true is that accused had promised to go to the bank (which he did) and brought only M600-00. He had not mentioned the amount he would bring from the bank. If indeed accused 2 was waiting for the papers, he could not have given them M600-00 to share among the three of them.

Dealing further with accused 2's version of events, PW2 denied he ever left the vehicle at the home of PW2 because he claimed it was not safe where PW2 was staying. Accused 2 had volunteered to take them home. He did take them home the day they had come to ask for their money. That day when they got to Lechalaba's, they had heard over the radio that anyone who provides a clue as to the death of the deceased would be given the sum of M10,000-00. Accused 2 said to them, that was not true, anyone who went to the police would be arrested. PW2 admitted that had he not been arrested, he would not have told the police anything.

PW2 hearing the version of accused 2 of events, said he never showed accused 2 his premises or those of his girl friend. PW2 said the police arrested him at Motimposo near the dam. It was the first time he heard accused 2 says, he (accused 2) was responsible for the arrest of PW2.

PW2 was emphatic that he did not know the residence of accused 2, it was accused 5 who knew, and who drove that Toyota vehicle there. PW2 denies he ever came to the home of accused 2 at 8 am accompanied by a girlfriend. PW2 also denied that on that occasion he left the vehicle at the residence of accused 2 promising to bring papers.

It is true that when accused 2 first met PW2 at the police station accused 2 assaulted PW2 accusing PW2 of bringing disgrace on the family of accused. If accused 2 claims he told a policeman called Ramatabole and that PW2 had vanished, PW2 says he was at Motimposo at the time. PW2 denies there was ever any need to trace him at the time.

PW2 answering questions insisted that accused 2 conveyed them to the area where deceased's home was. PW2 said he had forgotten the number of occasions this happened. The court wanted an estimate and after hesitation PW2 said it could be about five times. The statement of PW2 to the police showed it was about two times. If in his statement to the police PW2 is recorded as having said they hooted that is wrong, they flicked the lights. The statement showed some difference from the evidence in court because it showed accused 2 had opened the gate and that accused 2 removed the plate numbers, bent them and threw them to the ground. PW2 insisted what he said in court was correct although there were things he might have forgotten to say in court. He blamed the police for not recording his statement properly. PW2 said they threw the plate numbers

and the papers they had found in the vehicle into the Maqalika dam.

Taxed about his failure to mention a further M300-00 which his statement to the police show PW2 and his colleagues got from accused 2, PW2 said that was for the cell-phone which accused 2 sold for them. That cell-phone belonged to PW2, accused 5 and accused 6, it had nothing to do with the motor vehicle. Accused 2 who had gone with accused 6 said he sold the cell-phone for M300-00, PW2 is not sure if this is what he in fact sold it for. It is accused 2 who showed the police where he sold it – even if he were to deny this. The statement to the police is correct when it states that they went to the wife of accused 2 drunk in the absence of accused 2 threatening harm to accused 2 unless he paid them more money. PW2 said it is true that he presently hates accused 2 and harbours a festering grudge against accused 2.

Miss *Mahase* who appeared for accused 4, 5 and 6 was the last to cross-examine PW2. PW2 insisted that he was a friend of accused 5 despite a suggestion that he was not a friend of accused 5. They had with accused 5 and 6 at one time stayed at the home of Mampolokeng. PW2 insisted that he rented a room jointly with accused 6. He denied that accused 6 was merely accommodating him. They were involved in robberies with accused 6. Accused 6 lies when he said he stayed with his wife who is Mampolokeng's daughter. PW2 never quarreled with accused 6 over cassettes - those cassettes belong to accused 5.

Answering further questions, PW2 said accused 4 was never his friend but they stole together. They quarrelled with accused 4 when PW2 and accused 5 took away a firearm of accused 4. That fire arm in fact belonged to the brother-in-law of accused 4. Relations between him and accused 4 soured but even so they robbed together. If accused 5 denies he was involved the day deceased was robbed, PW2 insisted accused was involved. Accused 5 drove the deceased's vehicle because PW2 could not drive. PW2 insisted he, accused 2, 4, 5 and 6 did plan to rob deceased. PW2 hd been recruited for the hijacking job y accused 5 and 6. PW2 did not normally hijack motor vehicles. PW2 at one stage during cross-examination said he did not go about with accused 5 and 6. He later corrected this statement and said he did not go with them but not all the time.

The aim in the robbery had been to scare off deceased and take his vehicle. Accused 5 and 6 had said white people are afraid of knives. If we could put a knife at the neck of deceased, deceased would be scared and accused 5 would drive off with he vehicle. PW2 admitted he stabbed deceased and deceased fell, and the others stabbed deceased after deceased had fallen. PW2 had rushed and caught deceased from the back. Deceased had screamed as they grappled until they both ended on the ground. The other accused who were nearby did not come to his assistance. They were all supposed to get hold of deceased - they were not supposed to stab deceased. The others only came when deceased had already fallen to the

ground. PW2 admitted that it was the first time he said deceased had screamed, but he had recalled that deceased screamed. Things did not work according to plan. PW2 ran away from where deceased was when the others ran away.

When Miss Mahase quoted from the statement of PW2 in a manner that was not fair, the court ordered her to read relevant passage as a whole. The following passage was read about deceased:

> "Then he came, switched off the vehicle, got down, locked the doors, and lit a torch on his way to the house. It was then that I caught him, he screamed (or shouted). I was holding a knife in my hand he got hold of my hand and we fought for possession of the knife. We ended up having fallen to the ground, then Bongani came and stepped on him on the neck. I was then able to pull the knife and step back. Toka Letsie came and then Bongani said 'stab him'. Toka stabbed him. I had already stabbed him on the chest first. Toka stabbed him three times while deceased was still screaming. Ntsie then stabbed him two times."

PW2 said what he said to the police was correct, he may have forgotten some of the issues. PW2 said accused 2 caught him (PW2) as they were running down. This PW2 conceded he had not said before but it was true

that accused 5 did catch him. PW2 had convinced accused 2 later that the deceased was dead, they could take the vehicle

PW2 denied that he had ever said to the police a toy gun was supposed to be used at the time one of them pretended to be a policeman. Accused insisted that despite the fact that it did not appear in the statement, they did lose sight of the deceased at the traffic lights. PW2 insisted that what he was saying is true. At the stage of their arrest, it was very bad. He was pinched a little before he could tell he truth. He was pinched a little at the time of arrest. By being pinched a little PW2 said he meant that he was whipped a little. He was whipped by the police before he could produce the knife. After that PW2 says he was not whipped again because he told the truth.

The Crown then called Thabo Fosa PW3. PW3 testified that accused 2 between 1998 and 1999 came with someone to supermarket at Borokhoaneng where PW3 was working looking for a buyer of a cell-phone. PW3 found a buyer for the cell-phone and put that person (Mothae is his name) in touch with accused 2. Mothae left with accused 2and his companion and PW3 does not know what transpired. Accused 2 was their regular customer. Answering questions from counsel for accused 2, PW2 confirmed he himself had bought a Nokia cell-phone from accused 2 in January 1999. After that accused 2 had said he was selling a Siemens cell-phone. This was the cell-phone Mothae eventually bought. It had no

specific distinguishing features.

PW4 Mothae Nonyana confirmed that PW3 had put him in touch with two people he did not know. These people were selling a cell-phone. Asked to look carefully at all the accused, PW4 said one of them is accused 2 who is wearing glasses. They left PW3 and went to negotiate a sale. The price they quoted was M500-00. The price was eventually fixed at M350-00. PW4 went to the bank, withdrew M300.00 and gave it to them. He was given the cell-phone after promising to pay M50.00 through PW3 later. The cell-phone was a Siemens S6. One day he police came for it. PW4 under cross-examination insisted a Siemens cell-phone was sold to him even if accused 2 denied this.

PW5 was Paseka Maphale who had lent PW2 a dagger with a brown handle. This knife had been demanded by the police after PW2 has returned it. This witness said PW2 and accused 6 had borrowed this knife from him. PW5 said he did not know accused 6 at the time but was taught his name by the court, he only knew accused 6 by sight. PW2 had returned the knife of PW5 accompanied by accused 6 and accused 4 whose name he also learned here in court. Under cross examination, it transpired that in his statement to the police PW4 had never referred to accused 4 and 6. His statement was clearly inconsistent with his evidence on this point.

PW6 Tikoe Matsoso said deceased a Siemens S6 cell-phone. He

could identify it with some scratches on it. He said before the police, he identified it with those scratches and a strong odour of pipe tobacco that is had. This came from the heavy pipe smoking that deceased indulged in. PW6 is a Lesotho Government employee who had worked closely with deceased. Under cross-examination it emerged that PW6 had said nothing in the statement to the police about those scratches and the strong tobacco odour in the Siemens S6 cell-phone that PW6 had said before court that had identified the cell-phone with.

PW7 Mthimkulu Mavuso had told the court that he had been an occupier of deceased's servant's quarters. On the night deceased died, he had heard nothing because he had been drinking and had fallen into a deep sleep. The following day when he woke up he found many people , policemen outside. When the police invited him to approach he saw deceased lying prostrate and there was blood on the ground.

PW8 detective Trooper Tlotliso Mphephoka gave evidence as a crime-scene officer. He had taken photographs of the deceased lying prostrate on the ground, together with injuries on the deceased. He also took some post mortem photographs before a medical officer at the mortuary. He handed in a photo album Exhibit B. There were signs of struggle. He also observed crops of blood at the gate on entry. There was blood where deceased had been lying and drops of blood on the outside wall of he house that had been near that spot. He had also photographed the

spot where the keys of deceased had been found.

The evidence that followed was that of PW9 Inspector William Mosili. He told the court that when he took over the investigations, the deceased's death had been given extensive radio and press coverage. A reward of M10,000.00 was also offered for any information that might lead to the arrest of the culprits.

Particulars of deceased's vehicle had been given and PW9 had recorded them in his note book. The vehicle of deceased was a Toyota Hi Lux Twin Cab, with a canopy. Deceased (from information PW9 had) had not only been robbed of that vehicle, he had also been robbed of a cell-phone and an amount of M100.00. Investigation continued.

On the 29th January 1999 - a week after they had got information about deceased's death - the police got information during the night. On the 30th January 1999 early in the morning PW9 and several policemen raided the home of Major General Ramaema, the first accused. The information he acted upon was not from the late Detective Ramatabooe. It was at 5.30 am when they got there. On arrival, PW9 saw accused 2 Sechaba inside the yard of accused 1 at a time the gate was still locked. He called accused 2, whom he had known since 1989. Accused 2 ignored him and went to the eastern side of the house and got out of sight.

Accused 1 went to the gate and asked what the police wanted at his home. Detective Warrant Officer Lephole said they had come to search the place. Accused 1 demanded a warrant. Warrant Officer Lephole told him, his rank entitled him to search without warrant. The discussion was long, it lasted until 6 am when accused 1 was persuaded to open the gate and did so.

Then PW9 started searching the garage which had been locked. They found a Mercedes Benz and a white Toyota Hi Lux Twin Cab after the garage had been unlocked. It bore the registration number D0440. PW9 demanded the Registration Certificates of those vehicles. Accused 1 could only produce papers for the Mercedes Benz. He had none for the Toyota Twin Cab. PW9 warned and cautioned accused 1. PW9 then examined the engine and chassis numbers of the Toyota Twin cab and found they corresponded with those of the deceased's Toyota Twin cab which he had recorded in his note book. Accused 1 gave an explanation voluntarily and referred PW9 to accused 3 the wife of accused 2. Accused 3 provided PW9 with a bunch of keys which fitted the Toyota Hi Lux twin cab. The keys fitted the doors and the ignition of the vehicle, their immobiliser could operate the vehicle's alarm system. Accused 3 was cautioned and gave a voluntary explanation.

There was a canopy outside the garage. Accused 1 gave PW9 an explanation about it. There is a big house and other small houses. Accused

3 had brought the keys from one of the small houses. Accused 2 knew PW9 is a policeman and they knew each other very well. PW9 arrested and duly charged accused 1 and 3 with the crimes of robbery and murder. He took the Toyota Twin Cab and the canopy both of which he had seized. At the Criminal Investigation Division Office, the Toyota Hi Lux Twin Cab was identified by PW1 O'Donoghue in the presence of accused 1 and 3. PW1 had a Registration Certificate of that vehicle, spare keys and immobilizer which operated the vehicle. The chassis and engine numbers corresponded with those of the vehicle.

On the 31st January 1999 PW9 found accused 2 and his attorney Hae Phoofolo sitting in a car. PW9 cautioned and warned accused 2 but accused 2 in the presence of his attorney freely and voluntarily gave PW9 an explanation. Accused 2 took PW9to Tsiu's where he pointed out accused 5, 6 and Ntsie Sebatana (accused 7). Accused 2 gave an explanation. PW9 cautioned accuseds 5, 6 and Ntsie Sebatana (accused 7) and arrested them. At that stage PW9 was only with PW8. Accuseds 5 and 6 and Ntsie Sebatana (accused 7) took PW9 to Lower Tsiu where PW9 arrested PW2 - the accomplice. PW9 introduced himself and arrested PW2 as well. Accuseds 5, 6 and Ntsie Sebatana (accused 7) took PW9 to Motimposo where they pointed out accused 4 who was arrested after being cautioned accordingly. PW2 took PW9 to PW5 and demanded the dagger exhibit 2 and PW5 gave it to him.

Accused 4 took PW9 to Pusetso Matsepe where accused 4 asked for a dagger which Pusetso Matsepe handed to accused 4. Accused 4 gave it to PW9 after giving an explanation. The dagger was handed in and marked Exhibit "4". Accused 2 took PW9 to PW3 Thabo Fosa who gave PW9 an explanation that eventually led to PW4 Mothae Nonyana who gave PW9 a Siemens S6 cell-phone with an explanation. It was handed in as Exhibit "5". PW6 handed in the Toyota Hi Lux Twin Cab 4 x 4 seized from accused 1 and it was marked Exhibit "6".

The court went to examine Exhibit "6" the Toyota Hi Lux Twin Cab 4 x 4. It found it white in colour. On its bakkie there was a white canopy. At the back it bore registration number D0447. All windows bore the number 0005100. The bonnet was opened and the Engine Number was 3L 4408343 Chassis Number AHT31 LN6700005100. The vehicle is all white - there is no evidence that it ever bore any other colour.

Under cross examination it emerged that the RLMP12 forms that were presented to the Clerk of Court to authorize the keeping of exhibit were filled by other policemen who claimed to have seized the exhibits. PW9 said he authorised them to fill them on his behalf as they were working as a team and were present.

PW9 said he knew accused 1 and had known him as a Major General who led the country until 1993. PW9 said he did not know if he normally

uses an old van D2250. That van had been parked outside the garage. PW9 conceded that accused 2 is a married man who lives in a house in accused 1's yard and that accused 2 is the eldest son of accused 1. PW9 did not know that accused 1 gave accused 2 the vehicle D0440 many years back. PW9 said his investigations revealed it was registered in the name of accused 1. PW9 admitted he did not know the parking arrangements in the garage. There were 35 policemen divided into 4 sections the day they went to accused 1's home at 5.30 a.m.

All that accused 3 had done was to hand over the keys of Exhibit 6. She had said accused 2 would account, she did not know about the vehicle Exhibit 6. PW9 said he also took Khojane, accused 2's younger brother, that day as part of the investigations, although he did not interview Khojane personally. PW9 knew nothing about the issue of plate numbers and the instructions of accused 2 to Khojane.

Asked about PW2, PW9 confirmed that he had said PW2 had absconded. PW9 found that during this period PW2 had been working at a mine in Carletonville. After missing PW2 when PW9 went to Carletonville PW9 eventually found PW2 at he right mine and told PW2 to go home. PW9 denied that he himself pinched or thrashed PW2. He was merely firmly told to produce the knife and he produced it. He could not be thrashed because PW9 was there.

Asked by counsel for accused 2 PW9 agreed that he had previously given accused 2 his cell-phone number. He also confirmed that he and accused 2 worked harmoniously while Mr. *Phoofolo* - the attorney was there. PW9 denied it was accused 2 who 'phoned him, he said it was the attorney for accused 2 who did. PW2 said he and the others stole the deceased's vehicle on the instructions of accused 2. Accused 6 pointed the deceased's Siemens 6 cell-phone that had disappeared. PW9 traced it. PW9 said even if accused2 denies he went with PW9 to trace the cell-phone, PW9 said accused 2 did so. Accused 2 showed Thabo Rosa PW3 to PW9 who otherwise would not have known him.

In answer to further questions PW9 insisted that accused 2 was there on the 30th January 1999 when they went to the home of accused 1. Accused 2 had been given the cell phone number of PW9 by PW9 himself not by the late Ramatabooe. This was in 1998 in connection with other cases. The attorney of accused 2 Mr *Phoofolo* is the one who 'phoned PW9 and they met next to that attorney's office. They went to Tsenola with accused 2 and PW8 in Mr *Phoofolo*'s car, PW2 was not there. Accused 2 pointed out accused's 5, 6 and 7 (Ntsie Sebatana). When PW2 was pointed out by accused 5, 6 and 7 other policemen had come and PW9 arrested him. PW9 denied that accused 2 ever pointed out the home of the girl friend of PW2 while Mr *Phoofolo* was there. PW9 said Mr *Phoofolo* had been asked to go as two vehicles bringing police reinforcements driven by Senior Inspector Baholo and Trooper Mahao had come. It is untrue that PW8,

PW9 and accused 2 were taken to the police station in the attorney's car.

It is true that when accused 2 first met PW2 at the police station, accused 2 assaulted PW2. His complaint was that PW2 had given him a stolen vehicle whose owner had been killed. PW9 did not believe Khojane could have mixed up Exhibit 6 a 1998 model with the 1988 twin cab - such a mistake was not possible. He was not aware those plate numbers were put by Khojane by mistake on Exhibit 6 on the instruction of accused 2.

In anwser to question by counsel for accused 4, 5 and 6 PW9 said he arrested accused 5, 6 and Ntsie Sebatana between 5.30 and 6 am and he had been led to them by accused 2. He did not pass them on the way, he found all three sleeping with girls. PW9 at that stage was with accused 2 and PW8. These accused later showed PW9 where PW2 could be found. Accused 2 knew accused 5 and 6 before PW9 could arrest them. In the written report dated 12th January 2000 PW9 had mixed up the knives that had been obtained from accused 4 and PW2. To the question that demonstrated the coincidence that all accused just co-operated to produce exhibits and show PW9what was needed, PW9 retorted that the accused did co-operate as PW9 had testified. PW9 denied bringing a knife accused 4 did not know and claiming accused 4 had stabbed deceased with it.

The defence formally made the following admissions:

1. The body that was examined by Dr Molapo (the district

surgeon) was that of the deceased Patrick Kennedy Hickey.

2. The body of deceased until it was examined by Dr Molapo had sustained no further injuries.
3. The vehicle registration D0440 a Toyota Hi Lux Twin Cab van had ben registered in the name of Elias Phisoane Ramaema long before 21stJanuary 1999. This was had been beige in colour ad had been a 1988 4x4. Its fuel was petrol. These numbers had not been reallocated as at 3rd February 1999. The engine and chassis numbers 4YQ177090 and YN670015951 respectively.
4. The vehicle registration number AM273 a 1998 Toyota Hi Lux van had been registered in the name of Irish Consulate (Rural Development Support Project). Its fuel was diesel. The engine and chassis numbers were 3L4408343 and AH T31LN6700005100 respectively - This was handed in as Exhibit 6.

In examining Exhibit 6, I had observed it was also a 4x4 twin cab. I noted from the Oxford Pocket Dictionary that beige is a pale sandy fawn colour. Exhibit 6 was by observation of the court white. This question of the difference between beige and the white colour of Exhibit 6 was not put in issue during trial.

There was another set of admissions by the defence. These were:

1. The contents of the post-mortem report exhibit "B" which included the findings of Dr Molapo and that these were Dr Molapo's findings relating to the body of the deceased, PATRICK KENNEDY HICKEY on the 25th January 1999.

   2·1 That photographs K,L,M,L,M,N,O, and P were taken during the postmortem.

   2·2 The wounds were caused by a sharp object such as a knife.

   2·3 Wound No.1 was fatal and for a short time deceased might move after the wound was inflicted before deceased died.

   2·4 The other three wounds were not fatal except that wound no.2 might be fatal over a long period.

   2·5 The body of deceased was discovered by Makenete Molapo a water metre reader at 7.40 a.m. on 22nd January 1999.

   2·6 The deceased's body was lying in the manner depicted in photographs B, c and D of the album.

The photo album in the second set of admissions is marked as Exhibit "C" while the album in court was marked Exhibit "B".

At the end of the Crown case, accused numbers one and three were released after an application for their discharge.

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It was clear that accused 1 had been charged because his number plates were on the stolen vehicle exhibit 6 which had been in the garage of the house of accused 1. It was not disputed that the plate numbers found on exhibit 6 were those of a vehicle that accused 1 had given to accused 2. It was not disputed that accused 2 also had the use of the garage of accused 1.

Accused 2 still lived in the premises of accused 1 as he was the son of accused 1. Accused 3 had been charged merely because she produced the keys of the vehicle and because she was the wife of accused 2. Indeed there were definite indications in cross-examination and the Crown case as a whole - that it was accused 2 who would account for the presence of the vehicle Exhibit 6 in accused 1's premises.

Defence Case

Accused 2 was he first witness for the defence. He stated he was 38 years old and is married to accused 3. Accused 1 is his father. Accused 2 consequently lives in one of the outbuildings in the home of accused 1. This outbuilding in which accused 2 lives has four rooms. Accused said he has two brothers namely Motlatsi and Khojane. Accused 2 said he is a business man. He has a shop which has a bar at Thamae's. He also owns several taxis.

Accused 2 then told the court that he had known PW9 Inspector

Mosili since 1997 and PW9 knows him too. PW3 Thabo Fosa also knows him well as accused 2 used to buy often at a Chinese wholesale at which PW3 works . PW4 Nonyana whom accused does not know also does not know accused 2 although he pointed accused 2 in court in a dubious manner. Contrary to what PW2, the accomplice, had said before the court, accused 2 had had no dealings with accused 4, 5 and 6 or Ntsie who was accused 7 in the indictment.

Accused 2 told the court that he does know PW2 they were brought together by Ptjemptjete whose real name is Seeiso Seeiso. Seeiso had known since November 1998 that accused 2 wanted a Toyota Twin cab. On the 26th January 1999 Seeiso had 'phoned accused 2 and asked him if he still wanted a Toyota Twin Cab. Accused answered that he still wanted it, whereupon Seeiso said there was a person selling one and he would bring that person to accused 2's shop. Seeiso brought PW2 to the shop of accused. That is when accused 2 met PW2 for the first time.

Accused 2 said Seeiso brought PW2 to the business premises of accused 2 and parked outside it. Accused 2 went to the vehicle (a white Toyota Twin Cab) got inside it and found PW2 at the steering wheel. Seeiso introduced PW2 to accused 2 and accused 2 learned that the name of PW2 was Mosemako Hlalele. The vehicle bore an expired South African special permit on its screen. It had no number plates. Accused 2 asked PW2 why he was selling such a new vehicle. PW2 said the vehicle

belonged to his parents. PW2's father had died and PW2's mother had agreed with PW2 that it should be sold because of his late father's debts. Accused 2, who is a qualified mechanic, could see the vehicle is new.

PW2 asked for M65,000-00 as a selling price for the vehicle. Accused 2 negotiated for a reduction of the price, eventually the selling price was reduced to M60,000-00. It was agreed that accused would pay a deposit of M40,000-00 and pay the balance within 3 months. Accused 2 did not pay for the vehicle there and then. He asked for papers for the vehicle. PW2 said he would bring them from his home at Fobane Ha Mosae in the Leribe district. PW2 said he would not be able to go to Leribe in that vehicle because the special permit for the vehicle expired on Monday the 25th January 1999 - which was the day before. He would not want to drive it to Leribe and thereby get into trouble with the traffic police. They were still at the shop of accused 2 when PW2 said all this. Accused 2 said nevertheless he would go and arrange for the agreed deposit for the vehicle. In the meantime PW2 should go and get the papers.

PW2 expressed concern about where he would park the vehicle. It was agreed accused 2 should follow him to see where he stays when he is in Maseru and where he could be found. He said he stays at his girlfriend's place at Ha Tšiu. Accused 2 followed PW2 who was driving the Twin Cab while accused 2 was driving a 4x4. PW2 showed accused 2, PW2's residence and that of his girl friend at Tšiu's. Before they parted, accused

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2 gave PW2 directions to the home of accused 2.

The following day (27th January 1999) at about 8 a.m. PW2 came driving the Toyota Twin Cab Exhibit 6 to the home of accused 2 at 8 a.m. Accused 2 was preparing to go to Ladybrand to get money from the bank. PW2 introduced accused 2 to the lady whom he said was his girl friend. PW2 said he was on his way to Leribe to get papers of the vehicle, but he could not leave it at his residence as it would not be safe. Accused 2 allowed PW2 to park the vehicle Exhibit 6 in the garage. PW2 had said he would come back on Wednesday 27th January 1999. PW2 drove the vehicle into the garage and left accused 2 with the keys. Accused 2 took PW2 and his girl friend to the Maputsoe Bus terminal. Accused 2 went to his bank in Ladybrand.

PW2 according to accused 2 did not show up on the 28th January, 1999. Accused 2 told the court that he takes precautions as regards purchases he wants to make. On the 4th day of his possession of the vehicle, he wanted to go to Ladybrand (it was Friday the 29th January 1999) he wanted to get the vehicle cleared before 12 noon which is the closing time. Seeing PW2 did not show up he took the particulars of the engine and chassis number and phoned Mr Ramatabooe in the police vehicle squad. He also informed the late Ramatabooe that the vehicle bore a South African special permit. Ramatabooe asked accused 2 to bring the said special permit. Accused 2 took the said special permit to the CID vehicle squad

and found them having lunch.

Ramatabooe 'phoned accused 2 at 4.30 pm and asked accused 2 how he had come across that vehicle and its whereabouts. Accused 2 told him about PW2 and that the vehicle was in accused 2's garage. The late Ramatabooe said they should go and look for PW2. They did so and went to Tšiu's where PW2 lived. They did not find him. After their return, the late Ramatabooe told accused 2 that the vehicle in question was stolen and it was being looked for. He then gave accused 2 the telephone numbers of PW9 and said this case was handled by PW9. Accused 2 already knew PW9's telephone number. Ramatabooe had said accused 2 should 'phone PW9 as soon as PW2 arrived - but should on no account release the vehicle to PW2. Ramatabooe also told accused of the reward of M10,000-00 that was being offered. The vehicle would be used as a trap. Accused 2 and Ramatabooe parted at 5 pm that day. Accused 2 added that Seeiso Seeiso had been found not there at the time they went to look for him with Ramatabooe at Motimposo. They thought he had gone to his home at Matelile.

Continuing with his evidence accused 2 told the court that he had removed the canopy from the Twin Cab exhibit 6 in the morning, just as he was preparing to go to Ladybrand that Friday. He had intended to carry the second hand sofas that he had decided to buy in Ladybrand after getting the vehicle given a clearance by the police. Unfortunately PW2 did not show

up with the papers.

After he had finished with Ramatabooe at 5 pm, accused 9 continued doing business at his shop until 9 pm when he closed the shop. He then went to a function at Cabanas and returned home with his wife around 12 pm. After leaving his wife at their home at Khubetsoana, accused 2 proceeded to Qwaqwa in the Republic of South Africa. On Saturday 30th January 1999 he had tried to 'phone his wife while he was a Qwaqwa during the day but failed. He returned to his home at about 3.30 am on Sunday 31st January. He found his father accused 1, his wife accused 3 and his younger brother Khojane arrested and the 4x4 vehicle Exhibit 6 taken by the police. Accused 2 says he immediately telephoned PW9's cell-phone number to find out what was going on. It was around 4 am and PW9 was at his home at Sehlabeng. Among the things he said to PW9 was that PW2 had brought that vehicle to accused 2's home for sale. PW9 informed him that the vehicle had been stolen and the owner killed.

At that stage accused 2 'phoned his attorney Mr Phoofolo and told him to take him to the police as he was in trouble. Mr Phoofolo came in his vehicle and found accused 2 at Mookoli trying to go to the residence of PW9. The attorney took him to the home of PW9. PW9 said they should go and look for PW2 with him. They first went to the CID office where they waited outside while PW9 went in.

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They went to Tšiu's to go and collect Detective Trooper Mphephoka PW8 with PW9 in Mr Phoofolo's car. They then went to the home PW2 had shown them, but found PW2 absent. They then went to the house of the girl-friend of PW2. When they went to these homes, accused 2 was accompanied by PW9 and PW8, Mr Phoofolo used to remain in his motor vehicle. PW2 was not found, consequently they went back to the CID office. Other policemen had come, it was between 6 and 7 am. PW9 said accused 2 should remain at the CID office as professionals were taking over. Mr Phoofolo at that juncture went back home.

Accused 2 says he was allowed to go home to wash and to return to the CID office as soon as possible. Accused 2 returned to the CID office between 9 and 9.30 am and found PW2 already there. There were many policemen at that stage. Accused 2 immediately attacked PW2 hitting PW2 with fists. He was saying PW2 attempted to sell him a stolen vehicle thereby putting the family of accused 2 in trouble. The Police intervened. Accused 2 says he was not under arrest at that stage. He did not know any of the four other accused consequently he does not remember seeing them that day, even if they were there. By four other accused, he meant accused 4, accused 5, accused 6 and Ntsie Sebatana who would have been accused 7. It is not true that he pointed out accused 5, 6 and 7 as PW9 claimed he did.

Accused 2 says he was surprised at the time he was outside the CID

office with his younger brother to find the registration number D0440 screwed on the vehicle Exhibit 6. Khojane told him that he had misunderstood the instructions of accused 2. These numbers had been supposed to be put on a 1988 Toyota Twin Cab 4x4 which was still at the panel-beaters at the railway station. Accused 2 says his younger brother Khojane was released but his father accused 1 and accused 3 his wife were not. Accused 2 asked PW9 for his M10,000-00 reward but got no help.

The following day 1st February 1999 accused 2 was taken to the magistrate and charged with his father accused 1 and his wife accused 3. At that stage accused 4, 5 and 6 were not with them.

Concerning the cell-phone, accused 2 denied he participated in its recovery. He never had anything to do with PW3 in respect of the cell-phone. He only sold PW3 a Nokia cell-phone. Accused 2 had not asked PW3 to get him a buyer for the Siemens S6 cell-phone - nor was he put in contact with PW4 by PW3. Accused 2 denied selling the cell-phone to PW4. He also denied what PW2 had said to the effect that he went with accused 6 to sell that cell-phone and that he gave PW2, accused 5 and accused 6 the M300.00 the Siemens S6 cell-phone had been sold for.

Accused 2 denied that he had invited accused 5 and 6 to his business premises so that he could show them a vehicle he wanted. He denied taking PW2, accused 5 and accused 6 to a Government office complex with flags

and showed them the vehicle Exhibit 6 which he wanted them to rob deceased of. He denied following deceased to his home and hatching a scheme to rob deceased with PW2, accused 5 and accused 6. He denies that he did transport PW2, accused 5 and accused 6 on subsequent days dropping them at Hoohlo next to the school so that they could be able to seize the vehicle from deceased at night. He denied PW2 and accused 5 brought the vehicle to him on the night of the 21st January 1999. He insisted on his version that PW2 had been brought in contact with him by Seeiso Seeiso and that PW2 left the vehicle with him on the 26th January 1999. He denied ever paying PW2, accused 5 and 6 the sum of M600.00.

Accused 2 denied PW9 had seen him and called him on the morning of 30th January 1999 because he was at Qwaqwa.

Cross examined by Miss *Mahase* for accused 4, 5 and 6, accused 2 insisted he did not see accused 4, 5 and 6 at the CID office. He first saw them in December 2000. When accused 2 was first remanded in custody, these accused were not there.

Cross examined by Mr *Griffith* for the Crown, accused 2 told te court that he was the eldest son of Major General Ramaema who was chairman of the Military Council that governed Lesotho before the 1993 democratic elections. He had done Cambridge Overseas School Certificate and did a 4-year diploma in Lerotholi Polytechnic in Motor mechanics. He was a

grocery store owner, and runs a bar in which liquor is served. He has three taxis. He also has houses to let.

Accused 2 said he does not listen to the radio except occasionally for mucic. He is a musician. He does not read newspapers. He lives in a four room house which is situated in his father's large site. His father lives in the main three bed-roomed house. There is a double garage attached to the main house in which his father lives. 4 or 5 motor vehicles can be parked in the yard. The site is surrounded by a security fence 3 to 4 metres high.

His father had given him a 1988 Toyota Twin Cab 4x4 registration D0440 in 1994. It was white in colour. It had been involved in an accident and had been panel-beaten for M2500. It had been damaged at the front (the headlights, grill, radiator and bonnet). Accused told the court that he had first known PW9 in 1997.

Accused 2 answering questions said he first met PW2 in January 1999 when PW2 had been brought by Seeiso Seeiso (a friend of accused 2). Seeiso knew that accused 2 wanted a Toyota Twin Cab 4x4, and that accused had wanted this vehicle since November/December 1998. He wanted a second Toyota Twin cab so that he could hire it out to LCU and he was keen to find that particular vehicle. Accused 2 said he does not know if Seeiso Seeiso was still alive and where he is. He last saw him after his (accused 2's) arrest. Accused 2 says he would wish for Seeiso Seeiso

to give evidence. He cannot look for Seeiso because he (accused 2) is in prison and is short of money. He has 3 businesses that are doing well - but not very well. Accused 2 said he has done nothing so far beyond telling his counsel about Seeiso Seeiso. In any event, their personal relations deteriorated since he had brought PW2 who was selling him a stolen car fraudulently.

When he saw the vehicle Exhibit 6, it had done less than 5000 kilometres. Today it might fetch M93500.00, accused 2 is not sure it could fetch M82500.00 because he is not a car dealer although he is a motor mechanic. Accused 2 said he owns about 8 motor vehicles. At M60 000 this diesel Twin Cab 4x4 Exhibit 6 was a bargain. That is the price they agreed with PW2. All that was left were papers because accused 2 wanted to find out if the vehicle was authentic. Accused 2 said he did not suspect it was stolen. PW2 had told him he would not be able to drive it to Fobane to fetch the papers because its special permit had expired. Accused 2 said he was told by PW2 that its permit had expired on the 25th January 1999. It was already being driven illegally. PW2 had said he would go to his place of residence so that PW2 could go and look for him when he had the money. Accused 2 being keen on the vehicle therefore followed PW2 in another vehicle to see PW2's residence and that of his girl-friend.

The next day accused 2 saw PW2 and his girl-friend between 8 and 8.30 am at his home. He was called by the watchman to the gate. Accused

2 had the vehicle put in the garage for shade. Accused 2 became suspicious when PW2 did not come back. He has heard PW2 killed deceased but he cannot be certain PW2 did, because PW2 is trying to extricate himself. PW2 was in any event pinched or brutally assaulted. He could say anything. The vehicle came to his shop on the 26th January, 1999. Theft of motor vehicles is prevalent in Lesotho. There is even a special vehicle theft unit.

Accused 2 says he did withdraw the required amount from a bank in Ladybrand and had kept it in the house. He contacted the late Detective Trooper Ramatabooe in the morning hours of Friday 29th January 1999. Ramatabooe had previously assisted accused 2 in respect of another vehicle. Ladybrand is where vehicles are checked for lawfulness. There was no way he could go to Ladybrand so he had to resort to Ramatabooe. Accused 2 says after Ramatabooe had told him the vehicle was stolen he and Ramatabooe went to look for PW2 and Seeiso but did not find them. But the late Ramatabooe never went to accused 2's home. Ramatabooe never told accused 2 of the death of the deceased. It was decided between them that the vehicle should be used as a bait to catch PW2 so that accused 2 could get the M10,000-00 reward. Accused said the M10,000-00 was for the death of Mr Hickey but withdrew this answer and said the M10,000-00 was for the recovery of the vehicle Exhibit 6.

No arrangements were made to catch PW2 if he came while accused

2 was in Qwaqwa. PW9 must have heard of the whereabouts of the vehicle Exhibit 6 from Ramatabooe. Accused 2 says he did not tell PW9 about his plan with Ramatabooe because of fright. Relations between accused 2 and PW9 were good at the time. They worked harmoniously with PW9 on 31st January 1999. PW9 started not to look at accused 2 in the face when accused 2 asked for a M10,000-00 reward. PW9 is wrong when he said accused 2 was arrested on the 31st January 1999. Accused 2 denied he pointed accused 5 and 6 to PW9 and said he only showed PW9 where PW2 stayed.

DW2 was Khojane Ramaema who duly sworn told the court he was 26 years old and that he is the younger brother of accused 2. He is an artist. On the 30th January 1999, he had been arrested with accused 1 and 3 who were discharged at the end of the Crown case.

DW2 told the court that on the 29th January 1999 accused 2 had told him to go and screw the plate number D0440 on to the Toyota 4x4 which had just been panel-beaten at the Industrial Area near the railway station. This had been early in the morning. DW2 attended to his own business at TY (Teyateyaneng) and forgot about what accused 2 had said. When he came back in the late afternoon he found that vehicle in the garage and screwed on the back plate number and when he was supposed to screw the front plate numbers, he noticed he had only one screw. Therefore he did not screw the front plate number on. He was completely unaware that he

instructions of accused 2 He had made a statement to the police about this mistake. He did notice the paint work made the vehicle Exhibit 6 appeared new but he thought it had merely been resprayed. When he had at one stage used the words overturned he did not mean it literally - he only meant it was involved in an accident. Court was invited to see on the vehicles outside tht vehicles which have mount for plate numbers sometimes screw the plate numbers on them as well. This was done in re-examination.

DW3 was Hae Phoofolo an attorney who had been engaged by accused 2 to help accused 2 to surrender to the police. Duly sworn he told the court that accused 2 'phoned him to tell him that the police were looking for him. DW3 was asked by accused 2 to accompany im to the police. They would meet at Lancers Gap at 4.30 am. After DW3 had collected accused 2 he went to the home of PW9 and there he handed accused 2 to PW9. As PW9 had no transport to take him to the CID office, DW3 took him there. The idea was for accused 2 to point out the person who gave accused 2 the vehicle Exhibit 6.

When PW9 did not find a police vehicle to drive him and accused 2 to this person, DW3 offered to drive them there. They first picked up a policeman who would assist PW9 at Mabote, Khubetsoana. Accused 2, PW9 and the other policeman went to two places. DW3 did not go out of the car but allowed them to go to these places. They then returned to the CID office where DW3 left them and went home. No people had been

arrested from these two places. DW3 says it was 10 am when he left the CID office. DW3 says accused 2 and PW9 had left again, he does not know where they were going. DW3 said PW9 was mistaken when he said DW3 did not go to the home of PW9.

Under cross-examination DW3 said he had known accused 2 for several years. He had heard of the death of deceased over "Radio Lesotho". It was 5 am and it was bright when he got tot he home of PW9. PW9 was expecting them but DW3 had not found it necessary to 'phone PW9. DW3 said he did not know accused 2 had 'phoned PW3. Later he recalled accused 2 had 'phoned PW3. It was on Saturday when they went to PW9.

DW3 said his office was about 200 metres from the CID office. He did not leave until 10 am because he was having a chat with the police who are his friends. DW3 then recalled it was Sunday. He had gone to Tšenola between 7.30 and 8 am. They came back between 8.30 and 9am.

Accused 4 gave evidence in his own defence as DW4. Duly sworn accused 4 said he was 22 years old. His occupation is washing motor vehicles at a dam call Robert. Accused 4 said he knows PW2 and had heard what PW2 had said in evidence against him. He had known PW2 as one of his employers because PW2 used to come driving a small Nanana van which accused 4 would wash.

In November 1998 when PW2 had come for a car wash, he showed PW2 4 tyres that he was selling for M4000.00. PW2 went to see them. PW2 took them after promising to pay M500.00 deposit and paying the balance of M3500-00 later. PW2 never paid the balance for the tyres. Accused 4 quarreled with PW2 because his brother-in-law Motšuoe Thamae told accused 4 that PW2 had taken his fire-arm. When he asked PW2 about this, PW2 became aggressive and they fought. PW2 was annoyed because accused 4 was interfering in something that did not concern him. They never met again until 31st January 1999. That day PW2 came with the police who invited him to the CID office. He was not aware he was being arrested. It was between 11 and 12 am.

Accused 4 was asked if he knew accused and PW2. This happened at a pre-fabricated building. He said he did not know them. He was told he was not speaking the truth and was then locked in a cell at police headquarters. Later they brought him and tortured him by suffocating him with a tube of a motor vehicle. His hands and feet were handcuffed. He was told he robbed and killed a white man at Florida, a thing he did not how. Two knives were brought and three policemen who were interrogating him wanted him to admit he stabbed a white man with it. After torture and a threat of further assaults that he was told what they were doing would cause him to urinate blood he admitted knowing the knives. After this admission, the torture stopped.

Accused 4 did not know accused 5 and 6 but on Wednesday, he met them three or four days after, he was taken to the Magistrate for remand. He had never been recruited by accused 5 and 6 to go and rob and take a white man's vehicle. He does not even know accused 2 with whom PW2 said they had bad relations.

Cross-examined, accused 4 said PW2 was the most trustworthy of his customers until he took his tyres, he was generous and also sympathetic to accused 4's condition. Accused had not asked for a reduction in price when he bought the tyres of accused 4. PW2 only gave accused M500.00 so accused 4 released the tyres believing PW2 would pay the balance. PW9 was not there when he was tortured, but Trooper Mahao was there. It is false tht he ever demanded the knife Exhibit 4 from Pusetso Matsepe. He never joined accused 5, 6 and 7 (Ntsie Sebatana) and PW2 in robbing the white man. At the end of cross-examination both counsel agreed that brand new tyres cost between M750 and M1200-00 per tyre depending on quality and size.

Accused 5 gave evidence as DW5. Duly sworn he said he was 28 years old. He said knows PW2 very slightly because he has seen him passing his stall at which he sells vehicles. Accused 6 is his younger brother. He does not know accused 2. He does not know accused and Ntsie Sebatana who should have been accused 7.

PW9 did not arrest him on the 31st January 1999. PW9 arrested him in February. He only saw PW2 near the police vehicles. It was on a Monday. Accused 2 was not there. Accused 5 and accused 6 had gone early in the morning to Ntsie's place to get the cassettes of accused 2. When they got near Ntsie Sebatana's place, they saw two men passing them in a hurry. When they got to Ntsie's house accused 5 says they knocked and entered. As soon as they entered, they found two gentlemen who were in a hurry - the men told them they were CID policemen. After they had got their names, they told accused 5 and 6 that they were looking for them. One of these men was PW9. They then handcuffed Ntsie and accused 5 together with foot-cuffs. They held him (accused 5) by the belt and took them to their vehicle. They were taken to CID offices and locked in different cells.

At about 11 or 12 am he was taken for interrogation. He was asked if he knew accused 2, he said he did not know him. He was asked if he knew PW2, he said he had seen him in the village. He was asked about the killing of the white man, he said he knew nothing. He was shown Exhibit 6 which he could see through the open door - accused 5 denied knowing it. He was then told to undress. He was then whipped with a sjambok on the buttocks. He was badly assaulted, to this day he still bears the scars. When in answer to their questions he still did not satisfy them, they suffocated him with a tube of a motor vehicle until he lost consciousness. He regained consciousness when they poured water on him. He was then taken to the

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cell. PW9 and PW8 were not there when accused 5 was tortured in this manner. Trooper Mahao and two others not in court did the torturing.

On Wednesday PW9 charged him with murder and robbery, they were then taken to the magistrate where they were remanded to custody. Accused 5 denied he was with accused 4 and 6, PW2 and Ntsie when deceased was killed and that he drove the deceased's vehicle to the home of accused 2. He denied he was involved in the planning of robbing the white man of his vehicle Exhibit 6. Accused 5 said he cannot even drive. He did not know accused 4 before they were charged together.

Cross-examined, accused 5 said he never lived a Mampolokeng's with PW2. PW2 has his own rented premises where he lives with his wife. He knows where PW2 lives, he knows this because he used to visit his brother, accused 6. Accused 5 was surprised that counsel did not put to PW9 that they were arrested on Monday 1st February not 31st January as PW9 claimed he had. PW9 had arrested them between 6 and 6.30 am in the morning. PW9 was with one other policeman. Prison authorities did not take accused 5 to a doctor although he showed them his wounds. Accused 5 said it is wrong that PW2 pointed at him. Accused 5 denied he pointed out where PW2 and accused 4 lived. He used not to go and see his brother accused 6 often. He did so 3 or 5 times.

The next defence witness was Mampolokeng Motšoetšoane DW6.

She had been sitting in court while accused 2 was giving evidence. Duly sworn DW6 told the court that she is a licensed traditional doctor and she also makes brooms. PW2 was his patient who stayed from 4 months at her house in 1994. PW2 came again in 1998, when he asked him to pay PW2 ran away, this was bad because PW2 was from work in Johannesburg. PW6 saw PW2 in January 1999 after his arrest. He arrived at her place with the CID. PW2 never stayed at her house with accused 5 and 6. She rents two flats which are not hers. She stays with her children, her husband is a chief in Leribe. It is just two rooms.

Cross examined she said one room is used as a kitchen, the other as a bedroom. In January 1999 she was living at Mapoteng, Makhoroana, she found them arrested. She had gone to treat people, she does not know how long she was away. She returned quickly because her daughter was pregnant. In January 1999 she was sleeping with her daughter and new born child in the bedroom. The others slept in the kitchen. PW6 in her household of two rooms lived with 9people in all. Her daughter came to have a child in February 1999. In January he daughter was living with her husband.

In that household, she also runs her medical practice and consults patients. She examines people in the kitchen. Accused 6 is her son-in-law. He visited accused 6 to give him food. She was approached the day before yesterday to come and give evidence. PW2 lived for four months in her

house in 1994 under those conditions. He even wanted her daughter who married accused 6 after he had been cured. She refused to allow them to marry because PW2 still owed her M1000-00 or an ox for the treatment. At that time PW6 did not know accused 6 Bongani.

Evaluation of the evidence

It is clear from the outset that the evidence of an accomplice in this case plays the central role. Section 239 of the *Criminal Procedure and Evidence Act* of 1981 provides

> "Any court may convict any person of an offence alleged against him in the charge on the single evidence of any accomplice, provided the offence has by competent evidence other than that of the single unconfirmed evidence of the accomplice, been proved to the satisfaction of the court to have been actually committed."

The letter of the requirements of this section have been satisfied because the robbery and the murder have taken place. It is not disputed through the evidence of PW1, PW7 and PW8 that indeed the deceased was found killed and his vehicle Exhibit 6 taken. Indeed even the accused do not deny this fact. They all only say they have nothing to do with this crime.

The crown is obliged to prove beyond reasonable doubt that the accomplice PW2 is telling the truth.

Courts have over the years developed a practice and a procedure that protects innocent people from conviction by mistake. This practice and procedure is known as the cautionary rule. As Elyan J said in *Regina v Nkwetini Ndwandwa* 1955 HCTLR 13 at 14 BC

> "But the trial court must always have in mind the danger of accepting accomplice evidence.
> It was laid down by their Lordships of the Privy Council in the case of *Gideon Nkambule v The King* 1926-53 HCTLR 181, the evidence of two accomplices unsupported by other testimony, is sufficient, if believed and if due warning of the danger of accepting it is present in the mind of the judge and assessors...."

In other words, even where there are more than one accomplice, the trial court must remain on guard against the dangers of the evidence of the accomplices. In the case before me there is a further danger that on many issues, the accomplice is a single witness and there is nothing factual or circumstantial to check the evidence of this accomplice PW2 against. This in itself increases the danger of wrongful conviction.

The danger inherent in the evidence of an accomplice, especially a single one was summarised by Schreiner JA in *Rex v Ncanana* 1948(4) SA 399 at page 405 in the following manner:

> "What is required is that a trier of fact should warn himself, or, if the trier is a jury, 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.... The risk that he may be wrongly convicted although section 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 has shown himself to be a lying witness, or if he does not give evidence to contradict or explain that of the accomplice. And it will be also 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 is, in such circumstances, only permissible where the merits of the former and demerits of the latter are beyond question."

This passage from the *Ncanana* case was cited with approval by the Privy Council in *Bereng* Griffith *Lerotholi & others v The King* 1926-53 HCTLR 149 at page 153.

It has to be noted that PW2 was not forthright about his sojourn in the Republic of South Africa when the police had to go and look for him. PW2 says he came back because of illness while PW9 says he persuaded PW2 to come back home. This fact the court noted and was put on guard and had to scrutinise the evidence of PW2 with caution because of it.

Even in exercising caution Maisels JA in *Buta Phalatsi v Rex* 1971-73 LLR 92 dealing with an accomplice's evidence at page 95F to 96B said:

> "There were unsatisfactory features in Joseph's evidence, such as his attempt to minimise the importance of his role but the learned judge quite clearly approached his evidence with the necessary caution and was mindful of the dangers of accepting accomplice evidence. Sidwell and Sera were by no means satisfactory witnesses. ...Of course the fact that any one or all of the accomplices lied on material points does not mean that the court is therefore obliged to reject their evidence in its entirety."

Even in *R v Sekhobe Letsie & Another* 1993-96 LLR 1041 the trial court still found the accomplice an impressive witness although it did not believe the first accused in that case incited the murders in that case. I therefore noted that PW2 was unwilling to concede that he did what he could, to avoid giving evidence before this court.

Furthermore PW2 did not mince his words about his hatred for accused 2 whom he accuses of bad faith. PW2 says accused 2 did not pay them a fair amount for robbing deceased of his vehicle, he only paid them M600-00 when they had expected him to be much more generous although no specific amount had been named when they handed the vehicle Exhibit 6 to accused 2. The court had to be on guard, lest this hatred dominate the evidence of PW2, thereby causing PW2 to fabricate evidence against accused 2 that will lead to the conviction of accused 2 when such evidence is false.

These incidents had happened a long time ago. Not only was PW2

very ill but his recollection of events was not always perfect. Indeed even the mind of a healthy person, after such a long time, would have considerably dimmed. The court had to be careful that the evidence of PW2 should not prejudice the accused by substituting conjecture for fact. It was vitally important to treat the evidence of PW2 with care because he had had a mental breakdown during the period December 1999 and February 2000.

PW2 as a witness was labouring under a disadvantage, not only of being an accomplice but of having given his statement to the police under fear of being tortured if he did not. At the beginning of cross-examination PW2 had said he told the truth from the very beginning to avoid torture. Nevertheless towards the end of his evidence PW2 of his own volition quite innocently said, it is always the done thing to pinch an African so that he can speak the truth. PW2 then revealed that at the beginning he was pinched or thrashed a little by the police. As a result of this pinching or thrashing he produced the dagger with which he stabbed deceased. After that he was never tortured, he just told the police the truth. At places PW2 accused the police of recording his statement badly. Although PW2 said his evidence was true, the court had to approach the evidence of PW2 with caution. His attempt to bolster the value of his evidence by denying any torture was noted. The court also noted that from the beginning PW2 implied there had been improper pressure from which he saved himself by talking. The court became cautious of his evidence because of this

pressure.

PW2 is the only person who says accused 2 invited accused 5 and 6 to his shop at Thamae's. PW2 says accused 2 told accused 5 and 6 together with PW2 that he had identified a white Toyota 4x4 Hi Lux Twin Cab at a Government Office Complex where deceased worked. Accused 2 undertook to take PW2, accused 5 and accused 6 to the Khubetsoana Government Complex, so that he could identify it to them. This, accused 2 did. When they had seen it, PW2 with accused 2, 4 and 5 waited for deceased to see where deceased stayed. Although they lost deceased at some traffic lights, they looked for the vehicle until they found it at the part of Hoohlo known as Florida. It is this Exhibit 6 vehicle of deceased that ended up in the garage of accused 2's father where the police seized it.

Even apart from the evidence of PW2, accused 2 had been connected to the crime by the finding of Exhibit 6 (a vehicle which belonged to deceased) in the possession of accused 2. Furthermore this vehicle had been fitted with the plate numbers of a vehicle in the current possession of accused 2. This was highly corroborative to the evidence of PW2. Accused 2 could only escape liability if his exculpatory explanation could reasonably be true. Consequently accused 2 bore the evidenciary onus of explaining the presence of the vehicle Exhibit 6 and of showing the evidence of PW2 was untrue.

Accused 2 admits he was brought in contact with this vehicle by PW2 and that it was brought by PW2 at the home of the father of accused 2 where accused 2 stayed. There are major differences in their versions. Accused 2 says PW2 was brought to him by a friend of accused 2 called "Ptjemptjete" whose real name was Seeiso Seeiso. Accused 2 says he learned from Seeiso Seeiso by telephone that PW2 was selling Exhibit 6 which had the description that fits D 0440 (a vehicle which had been given to accused 2 by his father). I looked at the description of D 0440 in the list of admissions it was a 4x4 like Exhibit 6. It was almost identical in description to Exhibit 6 belonging to deceased save for that D 0440 was a 1988 Model which used petrol and was beige in colour while Exhibit 6 was a 1998 Model which used diesel and was white in colour. In the way the trial was conducted, counsel on all sides assumed beige and white are the same. That being the case the trial was conducted on the basis that white and beige are the same. I have come to the conclusion that both vehicles were similar in colour save for year of the model, nature of fuel and the engine and chassis numbers.

The crisp issue for determination is - how could PW2 know the exact vehicle that deceased wanted?

Seeiso Seeiso was not traced, nor was he brought to give evidence. Accused 2 says when they went with the Late Detective Trooper Ramatabooe on the 29th January 1999, Seeiso Seeiso could not be found at

Tšiu's where he was supposed to stay. Accused 2 says Seeiso Seeiso visited him in prison, but he did nothing to alert the police to this possible partner in crime who had brought him in a contact with PW2. It remains a mystery in the absence of Seeiso Seeiso that PW2 could have known that accused 2 wants deceased's vehicle which was almost similar to that of accused 2 in many respects. Indeed the numbers of D 0440 when fitted on Exhibit 6 would have deceived many people. It is doubtful that Seeiso Seeiso exists as a person. If he does, he had nothing to do with PW2 and accused 2 in respect of the deceased's vehicle Exhibit 6.

Accused 5 avoided saying PW2 was staying with his younger brother accused 6. It did not escape my attention that earlier he had said he only knew PW2 by sight. When accused 5 now said PW2 lived with a wife at his own premises, the remote acquaintance became closer. In cross-examination, it had been said accused 6 would say PW2 lived at accused 6's residence. To which PW2 had responded that there are co-tenants. Accused 6 (if we are to believe DW6 Mampolokeng) also lived with his wife in the same house. Accused 6 never gave evidence because he was aware that the position of denying close acquaintance with PW2 was untenable. One wonders why accused 5 tried to distance himself from PW2 in this way if it was not because PW2 was telling the truth.

PW2 said accused 2 gave them tips on how to seize the vehicle of deceased. He first said they should have Bongani accused 6 play a traffic

policeman, but the scheme failed because the right hat could not be obtained. The only option was for accused 2 to take them to Hoohlo school about twice, there they failed for one reason or the other. They ended up recruiting Ntsie Sebatana and finally accused 4 on the day accused 2 did not know they would proceed with the mission. On this issue, the evidence of PW2 stands alone save only that the denials of the accused 2, 5 and 6 have been coloured by their lies where circumstantial evidence corroborated the evidence of PW2.

Accused 4 told the court that PW2 had been fairly prosperous at the time between 1998 and 1999 immediately before the tragic death of deceased. Accused 4 said PW2 drove a Nanana van which accused 4 washed regularly and was paid M15.00 per wash. If it was so, accused 6 would not have given the impression through cross-examination, that PW2 was sponging on him.

It should at the outset be noted that PW2 has left the court in no doubt that he is the first one tht tackled deceased from behind. Before the others came, everything went very wrong because the deceased proved too strong and fought for his property. In fact the other partners namely accused 4, accused 6 and Ntsie Sebatana let PW2 down because they hesitated and were slow in coming to the aid of PW2. Deceased was virtually overpowering PW2 and had hit PW2 with a fist and the blow made PW2 dizzy. It was then that PW2 stabbed deceased on the chest and

deceased fell to the ground. It was at that stage that accused 6 came out from the bushes and stepped on the neck of deceased and stabbed deceased on the neck and ran away. The others namely Ntsie and accused 4 also stabbed deceased and ran away.

It is clear beyond any shadow of doubt having regard to the nature of the chest stab wound that it caused deceased to fall down almost immediately and that PW2 is the real and actual killer of the deceased. PW2 says he also ran because the others were running away. This court noted that PW2 is not only an accomplice but the sole killer of the deceased. The reason being that 30x5 milimetre wound that he inflicted did great damage. It was according to the doctor a penetrating incised wound on the left side of the chest level. It penetrated the heart apex causing plus or minus 15 mililitres haemotheral, 150 to 200 mililitres haemopericadirem. It had been deep - level 4th to 5th intercostal space, 100 milimetres left midline 200 milimetres from midlclavacular line. The wound direction was from front to back. It is not surprising that from this one stab wound deceased fell fatally wounded. The accomplice witness in cross examination said the deceased was crying for help during his struggle with him. It is not surprising that the other accused and PW2 ran away as deceased lay on the ground. PW2 said in court he stabbed deceased only once.

According to PW2, the other wounds were caused by the others.

The other wounds on the deceased were, according to the doctor's admitted post mortem report, an incised superficial wound on the left shoulder anterial superficial aspect and a superficial incised wound on the right side of the chest. The last would which was actually more serious than the other two was a 100x30 milimetres penetrating incised wound on the right arm's interior aspect, but had not injured any major vessels. These wounds have and where they are situated have been shown on the diagram which is part of the report of the post mortem examination.

In his statement to the police, PW2 had tried to minimise his role in the killing of deceased by saying:

> "I caught deceased, and then deceased shouted, I had a knife in my hand. Deceased caught my hand and we fought over the knife. We had fallen to the ground, then Bongani (accused 6) came and stepped on the deceased with his foot on the deceased's neck. I was then able to pull away my knife and retreat. Toka accused 4 came, then Bongani accused 6 said, accused 4 should stab deceased, accused 4 stabbed deceased. I had already stabbed the deceased first on the chest. Toka accused 4 stabbed deceased three times. At that time deceased was still shouting. Ntsie then stabbed the deceased two times."

If one compares PW2's statement it is not identical with what he said in court in his evidence. In his statement to the police, not only does PW2

minimise his role, PW2 claims others did the damage on the deceased, the wounds inflicted on the deceased ought to be over seven in number. PW2 reluctantly put the fact that he had first stabbed the deceased on the chest. The defence drew my attention to this demerit.

It seems to me, however, that far from discrediting PW2, his evidence in court is more straight forward about his role as the real killer of the deceased. It also seems PW2 had dropped the attitude of trying to minimise his role in the killing. PW2 further states that as they ran away they heard the siren of an ambulance. This made them run even faster. Accused 5 caught him during the time both had run downwards towards the river. It was then that they discussed what had happened. PW2 convinced accused 5 that deceased was dead and that they should go back and take the deceased's vehicle.

They groped for keys of the deceased, searched the deceased took his wallet and cell-phone. As accused 5 could drive, while PW2 could not, accused 5 drove the vehicle Exhibit 6 to the home of accused 2 at Khubetsoana. PW2 had never been there before. Here too PW2 does not minimise his role in the robbery, he says clearly that once accused 5 had stopped him from running away, he persuaded accused 5 that deceased was dead and they went back to take the vehicle. PW2 was subjected to cross-examination on this point, but he was not shaken.

I have already said PW2 is the only witness that implicates accused 4, 5 and 6. I have also said they lied in everything that showed they knew PW2 before the murder of and robbery of deceased. These lies are on a material issue. Corroboration can sometimes occur through denial, yet even then the court should be cautious lest it convict the accused merely because they are liars. Even so, it remains a fact that lies on material facts can give a strong colouring to evidence that had a neutral dull colour.

PW2 (in cross-examination) admitted readily that they had quarreled with accused 4 over the firearm of the brother-in-law which he and accused 5 had taken. But he insisted that even with this bad blood between them, accused 4 still agreed to be recruited by accused 6 into joining them on the day they intended to seize the vehicle of deceased Exhibit 6. When accused 4 came to give evidence, he invented a ridiculously false story that PW2 had a Nanana motor vehicle in which PW2 used to come to him at the dam for accused 4 to wash. Questions had not been put on this point to PW2 to deal with on this issue.

This was followed by the purported sale of the tyres by accused 4 which he claimed to have stolen to PW2 at a price more than they would have fetched when they were new. It became patently obvious that PW2 knowing them to be stolen could hardly be expected to have agreed to buy them at such an exorbitant price that exceeded that of cheaper tyres of that class. Had PW2 been cross-examined on this issue, it would have helped.

This high profile of PW2 as a fairly prosperous person that accused 4 created of PW2 in the evindence-in-chief of accused 4, differed markedly from the one counsel for accused 4 had created during the cross-examination of PW2. The cross-examination had sought to present PW2 as so poor that he was accommodated by accused 6 at his place out of kindness, rent being paid by accused 6.

It also struck me as strange that Montšuoe Thamae, the brother-in-law of accused 4, could ask PW2 who PW2 was when he knew PW2 had stolen his firearm. Accused 4 did not elaborate on this issue because he was keen on linking it with the tyres that he claimed PW2 was owing him M3500.00 for. Having been told by his brother-in-law that PW2 had taken his firearm, according to accused 4 he quarreled with PW2, as soon as they met, for both the tyres and the fire-arm of accused 4's brother-in-law. On that day PW2, according to accused 4, had been driving a Golf.

The false evidence of accused 4 was markedly different from that of PW2 who claimed he and accused 4, 5 and 6 were petty thieves and robbers who lived on stealing from people. PW2 looked the poor petty thief he claimed to have been. He spoke like an uneducated person from a rural background. When he claimed he could not drive and that he had earned a living by working in the mines, these seemed to be more likely to be true. Accused 5 and 6 were from the outskirts of the growing city of Maseru where they could easily have had contact with motor vehicles as they grew

up. It was however not beyond possibility that PW2 might have learned how to drive in the mines or some other place. It was argued that PW2 might have been an impressive figure before he became ill. While all these might be possibly true, my assessors and I were satisfied that PW2 could not drive. We were satisfied from the demeanour of PW2 that PW2 was telling the truth while accused 5 and accused 4 were from their demeanour and evidence telling a lie when they said PW2 could drive.

We were alive to the fact that only the word of PW2 connected accused 4, 5 and 6 to the vehicle Exhibit 6 and to accused 2. At places, the evidence of PW2 stood entirely alone, while at places it received snippets of corroboration from surrounding factors and lies of the accused. We had to warn ourselves of the risk of accepting such evidence. It will be seen that some circumstantial corroboration of PW2 (the accomplice) will be found in the evidence of PW9 (the investigator) with which I am going to deal with. It is significant as already stated that the finding of the vehicle Exhibit 6 in the hands of accused 2 corroborates the evidence of PW2 in respect of accused 2 to a considerable degree.

At the outset I must point out that there are unsatisfactory features of the evidence of PW9 the investigator of this case. The first cause of concern is that PW9 wrote his report that should have accompanied this docket to the Director of Public prosecutions in January 2000, almost a year after the events had occurred. It was also in January 2000 that the Director

of Public Prosecutions signed the indictment against the accused. This statement of PW9 was signed (according to the indictment) a little before the DPP signed it on the 27th January 2000. In this report, accused 9 has mixed up the dagger with a brown handle used by PW2 on the deceased which was recovered from PW5 with the dagger with a black handle allegedly used by accused 4 on deceased which was recovered from Pusetso Matsepe.

PW9 tried to explain why he made his report later that he should have done, but I was unhappy. He referred to his note book on which he claimed to have noted everything at the scene contemporaneously with his findings. The truthfulness and the genuiness of entries in the note-book could not be challenged. But the possibility that it might be full of cooked up entries could not be discounted. Consequently the court became very cautious in accepting them, despite the fact that their genuiness could not be reasonably challenged.

The court was also struck by the fact that PW9 claimed the dagger of PW2 and the dagger allegedly used by accused 4 were handed to PW9 freely and voluntarily. Yet PW2, whom this court believes, says he was pinched or thrashed before he produced his dagger. Obviously PW9 was not telling the truth when he said the dagger of PW2 and the dagger allegedly used by accused 4 were free and voluntarily produced. I became even more suspicious because these items were found in the hands of third

parties in identical circumstances, so identical that PW9 even mixed them up in his memory. These factors increased my caution in accepting his evidence.

I found it strange that the report PW9 acted upon could also include knowledge that deceased had M100-00 in his purse. The reasonable conclusion is that no person other than deceased knew the amount he had in his purse. PW9 was not telling the truth, he mixed up what his investigation revealed with the report he acted on when he embarked on the investigation. This tendency to mix up facts either deliberately or unintentionally also put me on guard.

I was sceptical of the evidence of PW9 that he took accused 2 with him when he went to PW3 Fosa. The reason I questioned this evidence was that if it was so, PW3 (who knew accused 2 very well) would have said so. As PW2 had told PW9 that accused 2 and accused 6 took the Siemens S6 cell-phone to sell for them, accused 2 may have told him that he took it and sold it to a person known to PW3. It was in following this lead that PW9 got to PW3. The revelation by accused 2 that the Siemens S6 ended with PW4 (a person known to PW3) does not in my view mean he knew it belonged to deceased. Indeed PW2 was at pains during cross-examination that that cell-phone belonged to them (meaning accused 5, 6 and PW2). Nowhere (as far as the record reveals) did PW2 reveal to accused 2 that they obtained the cell-phone from the deceased. I became cautious that I

should not just accept what PW9 said, because of his tendency to bolster the Crown case with improbable facts. I accepted his evidence as much as possible where it was supported by evidence aliunde which could be from PW2, circumstantial or from the other accused either directly or indirectly.

PW9 says he saw accused 2 on the morning of the 30th January 1999 when they had raided the home of accused 1 and 2. He says when he tried to talk to accused 2, accused walked away and disappeared from the view of PW9 and was never seen until the 31st January 1999. It is a fact that accused 2 and PW9 knew each other very well and had worked together on matters in which the police had an interest. Furthermore PW9, according to accused 2, had given accused 2 his cell-phone number long before the robbery that led to the death of deceased. At 5.30 am in January it is already bright because the sun rises at 6 am or thereabout. It is unlikely that PW9 could be mistaken. There is even no similarity in features between accused 2 and his brother Khojane DW2.

Accused 2 says after learning from the late Detective Trooper Ramatabooe that the vehicle Exhibit 6 was stolen and after they had failed with the late Detective Trooper Ramatabooe to find PW2 and Seeiso Seeiso, both of whom were responsible for his possession of that vehicle, he continued with his normal business from 5 pm until 9pm. He did not 'phone PW9, although he had been told to do so by the late Ramatabooe. It is very easy to say anything about the deceased because the deceased is

not there to rebut what is being said. In the case of *Borcherds v Estate Naidoo* 1955(3) SA 78 at page 79 Berman J therefore said "the courts must therefore scrutinise with caution the evidence given by, or led on behalf of the surviving party". In other words this court is enjoined as a matter of common sense not to readily accept what accused 2 said he did with the deceased Ramatabooe in the absence of cogent evidence, both from the accused 2 and the surrounding circumstances.

A reasonable person faced with a stolen vehicle given by two people who could no more be found by him and the late Detective Ramatabooe would have not rested and gone about his normal business. He would have 'phoned PW9 at once as the late Detective Trooper Ramatabooe is alleged to have said he should. I have no hesitation on rejecting the evidence of PW2 that he went to Qwa Qwa at 12 midnight on the 29th January 1999. I am also not persuaded that a businessman like accused 2 could have accepted a vehicle with an expired special permit and kept in the garage innocently. The late detective Ramatabooe would have liased with PW9 and given him the special permit that accused 2 had handed to him. Having found that accused 2's story is false, I accept that PW9 did see accused 2 on the morning of 30th January 1999 at the home of accused 1 and 2. Accused 2 is not telling the truth when he said he ever spoke to Detective Trooper Ramatabooe about this vehicle. Accused 2 could only have spoken to the late Detective Ramatabooe and had this silence maintained and PW9 not told if the late Ramatabooe was a corrupt policeman who consorts, covers

up for criminals and help to legitimise stolen cars within the police force. In the absence of this evidence or even such a suggestion from accused 2, I have no option but to reject the evidence of accused 2 in which he attempts to besmirch the character of a deceased person.

PW9 says he was led to PW2 by accused 5, 6 and 7 (Ntsie). He denied emphatically that he was led to PW2 by accused 2. I have already said PW9 is a witness who in my view is too keen to bolster the Crown case and has demonstrated it. I therefore have to deal with his evidence with caution. It will be shown later that the evidence of PW9 is corroborated indirectly by that of accused 5 where he says he was arrested by PW9 and another policeman between 6 and 6.30 am. It was precisely to make his version credible that accused 2 called his attorney DW3. Accused 2 brought his attorney to give evidence to corroborate his evidence of events of that day.

If indeed accused 2 was afraid to surrender himself, Mr Phoofolo DW3 would have first 'phoned PW9 and told him that accused 2 wants to surrender and arrange a meeting. I do not believe accused 2, whose home had just been raided and was scared, could have telephoned PW9 as he claimed he did. It was DW3 the attorney (as PW9 said) who telephoned PW9. DW3, whose memory was demonstratively bad in court has got his facts wrong. I watched his demeanour, I was satisfied that he is not sure of his facts and was allowing his imagination cover the gaps in his recollection

of facts. Indeed he started his evidence with the words "the general idea was to find the person" who brought the vehicle Exhibit 6 to accused 2.

I do not believe DW3 when he says he does not respect the right to privacy of policemen. DW3, an attorney, would have us believe he felt he could just walk into PW9's home at any time merely because PW9 is a policeman who should be on duty 24 hours a day. DW3 was just being argumentative when he said he and accused 2 went to the home of PW9 that early in the morning. PW9 had no conceivable reason to deny this fact if it did happen. I accept what PW9 said, namely that they met outside DW3's office which is 200 metres from the CID office where PW9 works. They met there on business as they should have.

I do not believe accused 2 knew where PW2 lived. I have rejected the evidence of accused 2 that he accepted the vehicle from PW2 in the belief that it belongs to the late father of PW2. He is not that credulous he is an astute businessman, who displayed considerable skill in the way he answered questions. Only accused 5 and 6 were really known to him, and it was to them that he took PW9. This fact is corroborated by the fact that accused 5 says PW9 was with only one policeman when he arrested them early in the morning. DW3 confirms that he took PW9 and one policeman between 6 and 6.30 am. Although accused 5 claimed it was on the 1st February 1999, I do not accept this because PW9 was not challenged in cross-examination about his evidence that he arrested accused 5, 6 and 7

(Ntsie) at about 6 am on Sunday the 31st January 1999. If we go by what DW3 the attorney has told the court, it should have been much later. If DW3 was still there at the CID office up to 10 am chatting (as he claims he was) he should have seen the fight between PW2 and accused 2 between 9 and 9.30 am when accused 2 first saw PW2 at the CID office.

It will be seen that the evidence of PW9 and that of accused 5 harmonises in as much as accused 5 says they found many policemen near the motor vehicles when between 6 and 6.30am they were led to detention by PW9 and PW8. The only false portions of the evidence of accused 5 is that PW2 had been taken in at that stage and that it was on Monday 1st February 1999. This being the case DW3 as an attorney who acted as a good Samaritan was no more needed because police reinforcement had come. Even if accused 2 had tried to falsely blame PW2, he must have included accused 5 and 6 for his possession of the deceased's vehicle Exhibit 6. What accused 2 has done as an afterthought is to substitute Seeiso Seeiso for accused 5 and 6. If indeed at that stage accused 2 had told PW9 of Seeiso Seeiso, PW9 would have looked for Seeiso Seeiso. I am satisfied therefore that PW9 was led to accused 5 and 6 by accused 2 and that accused 5 and 6 in turn showed PW9 where PW2 was.

If accused 2 had indeed negotiated a M60,000-00 deal for the vehicle Exhibit 6, accused 2 would have told PW9 of this, if indeed it was the honest transaction he would have us believe. PW2 says he could not have

even imagined such a lot of money. It is way beyond what he as a person could expect to get. Having regard to his general appearance, background and standard of education, he was highly persuasive and credible on this point. I therefore have no hesitation in saying accused 2 was not telling the truth. I believe PW2 that they went to the business premises of accused 2 to demand payment. All they ever got was M600.00 and no more.

I also believe PW2 that they heard a radio announcement in accused 2's Venture vehicle that a reward of M10 000-00 was being offered for information that would lead to the arrest of the killer of deceased and the recovery of the vehicle Exhibit 6. That is why accused 2 told accused 5, 6 and PW2 not to go anywhere near the police because the police would not keep their promise, they would arrest them. I am fortified in this by the lie accused 2 told the court that the late Detective Trooper Ramatabooe did not tell him that at the taking of the vehicle Exhibit 6, the deceased was killed. No policeman would ever do that. While I have already said no such conversation took place with the late Ramatabooe, this false story tends to strengthen PW2's evidence that accused 2 did listen to the radio contrary to what he told this court.

PW9 has said he was not the one who brought DW2 Khojane along with accused 1 and accused 3, the wife of accused 2. He was not the most senior officer present. I accept this evidence on this point. I however reject the evidence of DW2 Khojane that he put the plate numbers D0440 on the

vehicle Exhibit 6 by mistake on the instructions of accused 2. There were enough screws to screw the front number plate on. If at all DW2 did (which I doubt) it was deliberately. I accept the evidence of PW2 that accused 2 had from the beginning wanted the vehicle Exhibit 6. When accused 2 got Exhibit 6, he put his own number on it to steal it as it looked like D 0440 which was his vehicle. There was method in this putting of plate numbers on exhibit 6, there was no mistake.

PW9 says the dagger was produced by accused 4. I have however already said it was not produced freely and voluntarily. I have also said the way it was found has become suspect to me because by coincidence it was produced by someone else in an identical fashion with the dagger of PW2. I am aware that the provisions of Section 229(2) of the *Criminal Procedure and Evidence Act* of 1981 which provides:

> "Evidence may be admitted that anything pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which in law is not admissible in evidence against him on such trial."

I noted the words may which are permissive and gives the court a discretion. I observed that the test is fairness to accused - see Hoffman and Zeffert *The South African Law of Evidence* 4th Edition 280 to 281. This Section 229(2) of the *Criminal Procedure and Evidence Act* 1981 has led to strange interpretation. For an example in Natal, Milne JP in *S v Ismail*

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(1) 1965(1) SA 446 at 449 has said the effect of a similar section in South Africa is to allow the courts to admit evidence of a pointing out "even though the relative confession was obtained as a result of acts of gross cruelty inflicted upon the person of the accused". In general as Hoffman & Zeffert in the *South African Law of Evidence (supra)* at page 207 is that judges had narrowed inferences to be drawn from such evidence. Indeed the learned authors question whether a pointing out induced by gross cruelty can in law be deemed to be an act of accused at all.

I am not impressed at all about the way the dagger with a black handle was obtained from accused 4. Therefore I cannot admit it in evidence. In any event no one can be sure it belonged to accused 4 or was in his possession on the day deceased was killed - all PW2 say with specificity is that accused 4 had a knife. The rejection of the evidence of the way this dagger with a black handle was found does not help accused 4 because PW2 whom I have believed says he was there and had a knife - whether it was this dagger with a black handle or not. He was aware that PW2 and the other accused had knives with which to intimidate the deceased in order that he could yield his vehicle to them. There is evidence that he attempted a stab at the deceased after he had fallen. Even if accused 4 missed or had not done so, PW2 did it on his behalf unfortunately their plan went horribly wrong.

Discharge of accomplice

Section 236(2) of the *Criminal Procedure and Evidence Act* of 1981 provides that where an accomplice, "fully answers to the satisfaction of the court all such lawful questions as may be put to him, he shall...be discharged from all liability to prosecution for the offence concerned". I am of the opinion that PW2 Mosemako Hlalele answered all questions put to him to the satisfaction of this court. Therefore in terms of Section 232 (2) of the *Criminal Procedure and Evidence Act* of 1981 I discharge him from prosecution for the offences concerned.

Murder

The test for murder is a stringent one. There has to be an *actus reus* which is the act that caused the death of the deceased. Evidence shows an act of killing. The only issue for determination is, by whom.

The next element to prove is of intention to kill. The test is whether the accused subjectively intended to kill the deceased - not that the accused objectively intended to kill the deceased. The subjective intent as a test has much more stringent requirements than the objective test whose standard is that of a reasonable man. Where the test is subjective, the court has to find the accused's own intention, not what the reasonable man might have done. Like any fact its subjective intention may be inferred from surrounding facts and circumstances. This is known as *dolus eventualis*. If subjective intention to kill has been found from circumstantial evidence it must be the only inference that can be drawn. See *S v Sigwahla* 1967(4)

SA 566.

In cases such as a murder that occurred during a robbery or in furtherance of a robbery, *mens rea* is premised on the doctrine of common purpose. Where common purpose is ascribed to the accused, the court does not inquire into the part played by each accused in the actual killing of deceased. The mere fact that deceased was killed by one of the accused in the execution of a common design to rob deceased (so long as accused is in the vicinity) is sufficient to make all of them liable for murder. See *R v Shezi* 1948(2) SA 119.

In the case of *S v Nhlapho* 1981(2) SA 844, the case of robbers who attempted to grab cash from security guards intention was decided on the basis that the security guard was shot by the other security guard during the cross-fire. Although the *actus reus* or action that killed deceased was not that of any of the accused on a robbery mission, they were found guilty of murder. The reasoning of the Appellate Division per Van Heerden AJA was that:

> "It may be conceded that they hoped to overpower the guards without a shot being fired by the latter, but they must have known that the guards would endeavour to use their fire arms when attacked.... Consequently they also foresaw the possibility of one guard being killed by a shot fired in the direction of the robbers by another guard or, for that matter, a staff member from Makro witnessing the attack. In sum, the only possible inference, in the absence of any negativing

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> explanation by appellants is that they foresaw, planned and executed the robbery with *dolus indeterminatus* in the sense that they foresaw the possibility that anybody involved in the robbers' attack, or in the immediate vicinity of the scene, could be killed by the cross fire." *(S v Nhlapho & Another* 1981(2) SA 744 at page 751 A-C)

Accused 2 (when he hatched the scheme to rob deceased of his vehicle) also hoped that PW2 and accuseds 4, 5 and 6 and Ntsie (who was accused 7) could overpower the deceased without killing him. In other words he had like the robbers in *S v Nhlapho dolus indeterminatus*. He also foresaw deceased might fight and raise alarm (as he in fact did), and that excessive force including killing deceased outright might have to be resorted to by PW2 and the co-accused of accused 2 who are in fact, his partners in crime. This in a nutshell is the Crown's argument against accused 2.

In the case of people who use others to rob on their behalf like accused 2 - and, so to speak, rob through agents - they might be liable. They can be deemed to be liable for the death that might result because they had foresight of the killing but were resigned to the acts of their *socius* in crime. In the case of *S v Mkhize* 1999(2) SACR 632 accused had been party to common purpose to commit a robbery and forseeing the possibility of the participants causing death. The court found that the liability of the accused in respect of murder is not excluded merely because the robbery and the killing occurred at a different place from the one that accused and his partners in crime had planned.

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In respect of accused 2 the issue which this court in this case must decide is whether the liability of accused 2 is excluded merely because the robbery took place on a different day from the one accused 2 expected it to occur. The other one is the fact that the socius of accused 2 had included accused 4 who they knew accused 2 did not approve of.

There is a further requirement which is missing in this respect in connection with accused 2 in the case before me. In *S v Mkhize* the accused had been seen in the company of the others approaching the motor vehicle of deceased, pointing fire arms at deceased. In the case before me accused 2 was not in the vicinity. It was argued in *S v Mkhize* that conspiracy to rob deceased in the yard did not extend to the house where the deceased was shot and killed not far from where accused in *Mkhize*'s case was. Accused 2 was not in the proximity of the house and yard of the deceased where the robbery was supposed to take place according to the plan he had made with PW2, accused 5 and 6. He did not know it was taking place and whether it was still going to take place.

This change of the day of the robbery raises the point of whether in the absence of knowledge that the robbery was occurring and that it was still going to occur, accused 2 foresaw at that moment the possibility of death of the deceased, and that he nevertheless persisted in the robbery reckless of the possibility of death of deceased. In *S v Mkhize* there was no such problem because accused had participated in the steps that led to the

robbery in the yard of deceased, but the deceased was shot inside the house a few minutes or seconds afterwards. In this case the vehicle had been taken to the place of accused 2 which was about 15 kilometres away. There is no clear evidence that accused 2 was in fact told immediately that deceased had been killed as happened in *Rex v Sekhobe Letsie* 1991-1996 LLR 1041.

The problem that accused 2 has is that he gave no evidence that he had dissociated himself from the robbery and its possible consequences at the time it occurred. In stead he lied. In *S v Maelangwe* 1999(1) SACR 133 it was repeated that common purpose entails liability if there was agreement to commit a crime and foreseeing possibility of participants causing death to someone in the execution of the plan yet persisting with the plan reckless of consequences. There is no rule of law that the state of mind of the accused should be determined solely with reference to the facts existing at the commencement of the killing.

In the case before me accused 2 was miles away and did not know that his scheme of robbery was proceeding. How does this court conclude tht he persisted in his participation in the robbery regardless of whether the foreseeable death of the deceased occurred or not? I do not believe subjective foresight can be imputed to accused 2 in the circumstances of the case.

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The only issue is whether accused 2 can be said to be an accessory after the fact to murder. There is no evidence that he was immediately told of the deceased's death. It is true he sold the cell-phone of deceased with accused 6, but even here too there is no evidence that he knew that it was the deceased's cell-phone, and that in disposing of the cell-phone he was concealing the murder. It is true as PW2 (whom I believe) said accused 2 did hear of the death of deceased, the robbery and the reward of M10,000-00 and that he discouraged PW9, accused 5 and accused 6 from coming forward with information they might have. Even here evidence of making accused accessory after the fact in the murder of the deceased is unsatisfactory and insufficient. In *R v Sekhobe Letsie* 1991-1996 LLR 1043 there was direct evidence that the perpetrators had gone to the accused and told him of the murders and that he had concealed this information from the police either alone or with other Military Councillors. Here we have nothing except in respect of the motor vehicle which accused 2 wanted. The conclusion I have come to is that if the standard was an objective one, it would be stretching facts too far and supplementing them with guess-work to find accused 2 guilty as an accessory after the fact to murder.

Accused 2's reaction to events leaves a lot of questions unanswered. His deplorable lack of curiosity after getting the vehicle he had invited his partners in crime to bring is very suspect. But the courts in convicting accused persons do not act on suspicion, they act on evidence. That being the case the state of mind of accused 2 could not with certainty be

determined when PW2 and others had decided to exclude him in the execution of the plan. Accused 2 might not have known that PW2 and the others have not given up. I will therefore give accused 2 the benefit of doubt on this issue.

Accused 4, 5 and 6 were aware PW2 had a knife and they had knives too except that the dagger might not be belonging to accused 4. They were aware deceased was to be intimidated with a knife. This went wrong, deceased fought PW2 in defence of his property and PW2 stabbed him fatally on their behalf. They were all in the vicinity of the stabbing. Whether they all stabbed deceased before or as they ran away is immaterial. They foresaw that deceased might resist and they be forced to kill him as they did. They are all guilty of murder.

Robbery

Robbery is a species of theft. Hunt *South African Criminal Law and Procedure* Volume II *Common Law Crimes* 2nd Edition by Milton at page 682 states that "robbery is theft by violence. Its *animus* or intention is much broader and even crosses frontiers of States. That is why theft is said to be a continuing crime at page 643 of the above mentioned work Milton says:

> "**X** is a socius and guilty of theft if he agrees before the initial taking to receive the stolen goods from the thief and then does so."

As already found proved, accused 2 went beyond agreeing to keep the deceased's vehicle - he in fact instigated the robbery of the deceased. Tindall JA in *R v von Elling* 1945 AD 234 at 247 reasoned that even assisting in preventing the recovery of stolen property makes the participant a principal offender because "theft is a continuing crime which does not end with the original taking, it seems to me to follow that Von Elling by his conduct in assisting Van Rensburg became guilty of theft".

To summarise the facts in respect of Accused 2, I have found as a fact that accused 2 decided on the scheme to rob deceased of his vehicle which was so similar to his that people might not notice it when he put the plate numbers D0440 on it as he in fact did. He planned the initial stages of the robbery by recruiting accused 5 and 6 to go and rob deceased of his vehicle. They in turn brought PW2 who became a member of their robbery team.

Accused 2 took this team to go and see the vehicle Exhibit 6, which accused 2 had initially intended this team should rob deceased of his vehicle on the highway by having accused 6 as a traffic policeman. This plan was abandoned in favour of seizing deceased when he got out of his vehicle at night at deceased's residence, and taking his vehicle. He took PW2, accused 5 and 6 to Hoohlo School twice or three times to carry this robbery. The scheme eventually succeeded, he got the vehicle Exhibit 6 as

he wanted knowing deceased must have been robbed of it. Indeed even if he did not initially know he learned of the robbery. He removed the canopy and fitted his numbers on the vehicle thus making himself not only the principal offender but an accessory after the fact in the alternative - if such a category exists in robbery and theft.

The conclusion I have come to therefore is that accused 2 is guilty of robbery as a principal offender. In Lesotho, in law there is only the crime of robbery. In the case of accused 2, his robbery (evidentially speaking) was an aggravated one as deceased was killed in the robbery.

Accused 5 is guilty of robbery as he took deceased's vehicle Exhibit 6 and drove it to the home of accused 2 expecting a reward, which he proceeded to claim from accused 2.

Accused 6 by knowingly associating himself with the robbery demanding a reward after the vehicle had been taken at the time he had run away made PW2 and accused 5 to remain his agents in the completion of the robbery. When they brought deceased's vehicle Exhibit 6 and cell-phone Siemens S6, accused 2 and accused 6 went to sell it to PW4. Accused 6 is also guilty of robbery.

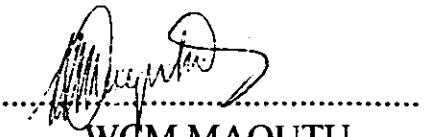
Accused 4 is found not guilty of robbery because he fell completely off the picture after the murder. No taking can be attributed to him.

Stand up accused:

On Count I:
Accused 4, 5 and 6 are guilty of murder as charged.

Count II:
Accused 2, 5 and 6 are guilty of robbery as charged.
Accused 4 is found not guilty of robbery.

My Assessors agree.



WCM MAQUTU
JUDGE

For the Crown : Mr *Griffith*
For the 1st & 3rd : Mr S *Phafane*
For the 2nd accused : Mr M *Ntlhoki*
For the 4th, 5th & 6th accused : Miss *Mahase*