

CRI/T/37/97  
IN THE HIGH COURT OF LESOTHO

REX

vs.

TŠEPO SOLANE MAMOTŠEOA SENYANE

JUDGMENT

Delivered by the Hon. Mr. Justice G.N. Mofolo on the 23rd day of October. 2001.

The two accused persons are charged with the crime of murder it being alleged that on or about the 29th day of May, 1990, and at or near Semphetyane in the district of Maseru the said accused, each or the other of both of them, did unlawfully and intentionally kill Edmond Sefatsa Senyane.

The charge read to accused:

Accused 1 had pleaded not guilty Accused 2 had pleaded not guilty.

2

The crown had then called P.W. 1 'Matumelo Motšeo Alina Senyane (P.W.4 at the P.E.) aged 65 years old who sworn had stated she lived at Lithoteng Ha Seoli and she was literate. She had done Std V at school. Her mother was a teacher. She knew accused persons before court. As for A1, her means of knowing him was related to deceased's case. She had known A1 after deceased's disappearance. It could have been in July, 1990. She knew A2 very well for she was wife of her father being her deceased's father's 2nd wife. Deceased was her father's uncle and hence her great uncle. She says A2 is her great aunt. In 1990 when she was at 'Matlali Mokhothu's home she had known deceased who was her great uncle and brought her up. The deceased 'Mahlalele had arrived. She was at 'Mamokhothu's where they were cooking for a burial society. 'Mahlalele had arrived at about 10.00 a.m and inquired where she had been and she replied. She had then asked her to dress up as she was wanted at Senyane's. She had first asked where her father Senyane was and had been told he was present. In deceased's bedroom many people were gathered and A2 was lying on the bed. She had recognised deceased's two sons namely Simon and Retšelisitsoe. She had waited expecting to be told what for she had been called. She had then announced her arrival. A2 had then asked if 'Mahlalele had not told her deceased was missing and she had replied in the negative. She says she was at deceased's home on a Wednesday and A2 had said deceased had

3

disappeared on Monday night. She had last seen deceased coming in from somewhere accompanied by his young son. She thinks she had last seen him a week before. She had then said she would tell 'Mamokete what she had heard. When told about 'Mamokete A2 had said she already knew. She had said she was going to 'Mamokete's and Lintle and A2 had said 'Mamokete already knew, she had nevertheless gone to 'Mamokete's. Before she went to Lintle's place there had been mention of Lintle and she had gone to Lintle's and told her deceased had disappeared. The witness has testified before going to Little's she had asked A2 circumstances under which deceased disappeared. A2 had said she had woken up at night to

draw water from the kitchen and this is how she realized deceased was not present and was missing. A2's home was a three-roomed house with kitchen, sitting room and bedroom. A2 had said deceased disappeared. A2 had said deceased slept in the kitchen for warmth. A2 had arisen from her bedroom while deceased was asleep in the kitchen. She says she had not asked and in any event A2 had not told what she did on finding deceased missing. The witness says the same evening she put up at A2's home. Waking up in the morning somebody had inquired if deceased had not surfaced but he had said the witness was not to disclose his identity. She says the man who says she was not to tell she had seen Senyane is Sefuli. She says Sefuli had made an explanation to her and she had taken steps. She had gone to a person

4

Sefuli had disclosed to her. The person she went to is Moipone, a female. Moipone was not before court. Having found Moipone she had not said much to her for she is a good investigator. She says when she went to Moipone who stays in South Africa, it was about a month since deceased had disappeared though at the time Moipone was renting a quarter at Seoli's. Moipone's home was at Motsekuoa. At the time she was available at Seoli's for she had come to see her children. As she is self-employed, Moipone was not easily available. When Moipone accompanied her home, she was not with people - the reason she did not talk to her. As she accompanied her Moipone had asked whether deceased had not appeared and she had said he had not surfaced. Moipone had then said Senyane had died and was to be searched for at Shelile's, Phuthiatsana. She had said even if he was not there his clothes were there. She says she was of a mind to report to the police and he had gone to them at Maseru Central Charge office and had eventually known officer Mokoroane. Police were saying Moipone was saying she knew nothing about what happened; this was a week after she had been to the police. She says when it was said Moipone said she knew nothing about what happened was a week after she had been to the police. Moipone was present but she had been to Johannesburg. According to the witness, Mokoroane had sent 5-6 policemen as to where they would find her and she had taken police to where Moipone was. Three

5

of them had left and three had remained with her. Having found her they had returned her home. She had not met Moipone and told her to report. She had subsequently met police and Mokoroane and they had said Moipone was telling the truth. She had returned home. The witness says she then learned deceased had been found. As a family they had gone to Phuthiatsana where they found some of deceased remains. She says she had seen deceased at Maseru Central Charge office or at the hospital and when she saw him he was not alive and there was no flesh on him. He identified him by his teeth and features on his head. She says the head was not recessive and he was not bald. Deceased was much older than her and she had been brought up by him. She believes he was 72 years old but still fresh and working as a teacher. The witness says the deceased has not yet been buried. She says deceased's remains were at the old High Court and the place where his remains were placed did not burn. A2 was about 50 years old and she was a housewife. She knew A2 very well. The relationship between A2 and deceased was not cordial. A2 had often called her to intervene saying deceased did not sleep with her. Emile was a man associated with A2's family. A2 lived with Emile. Emile was about 58 years old and younger than her. During deceased's life Emile was A2's concubine and deceased knew about the affair. She says deceased had complained about the affair saying he had found Emile's pair of trousers in his bedroom

when deceased had accompanied his son Retšelisitsoe. She says it was when she had gone to reconcile A2 with deceased. A2 had queried the complaint saying where would Emile go since it was raining? Emile stayed at Abia's. Deceased was himself and authoritative. This was a family affair and was not reported to the chief. She says what she means is that her father now deceased was head of the family namely Jafeta Senyane.

The trial had been postponed and when it resumed on 1 December, 99 the Assessor Mr. Molapo was not available being engaged in another court. Court decided to proceed in absence of the assessor. Mr. Thetsane says he now wishes to refer witness to exhibits and owing to unhygienic nature of exhibits disposable gloves would have to be worn by witnesses. Mr. Nathane suggests it would be proper for the witness to identify the remains before cross-examination. Court orders cross-examination proceed and when time comes for identification of the remains the witness can wear gloves as suggested.

No questions by Mr. Putsoane.

Cross-examined by Mr. Nathane the witness says she is a spinster and stays with one Borothe. She did testify at the magistrate's court. Prior to deceased's disappearance her relationships with A2 were souring after the death of A2's mother. Relations were so bad A2 had banned her from her

home and for this she was refusing to accompany 'Mahlalele to A2's home. She had not disclosed this for no question had been directed at this. As it was, it was necessary for the information to be elicited from her. She had mentioned this for the Public Prosecutor had led her to it. Put to her A2 could never invite her to intervene between her and her late husband the witness says she went there because she believed deceased was going to reconcile them. The witness insists A2 had called her in the presence of her blood father Jafeta who was deceased. The witness says at the P.E. she had said in reply to 'Mahlalele that it had been said 'she said he was not there' (page 8 of the P.E. is referred to where the witness said: 'I then asked 'Mahlalele where Senyane was. She said he was not there.' We went along. I had in mind that Senyane was going to reconcile us.') She says it was on the way when 'Mahlalele said Senyane was not present. She says she is trying to say 'Mahlalele said Senyane there and not there. The witness says 'Mahlalele did say deceased present and then changed to say he was not present. She says it was on the way when 'Mahlalele said deceased was not there though waking her up she had said he was present at home. The witness says she was merely replying to questions put to her by Crown Counsel. She says between Sefuli and Moipone it was Sefuli who asked her whether deceased had surfaced. No other person had asked her the question. Put to her at the P.E. she said Moipone's companion had said

Senyane had not yet surfaced the witness says it's a long time ago she could have forgotten. Put to her she never told the magistrate Moipone was denying everything and had instead said Moipone was not easy to locate, the witness repeats this is an old matter she might have forgotten what she said at the P.E. for she had first seen deceased's remains at the hospital or likely at the Charge office. They had gone to Phuthiatsana as a family and the remains were

already at the Charge office. She says leftovers at Phuthiatsana were pieces of bones. She says she cannot say what pieces these were. Mr. Nathane holds over the cross-examination for remains to be identified. Mr. Thetsane refers to the remains of the deceased and deceased's clothes. The witness says this is the skull I am referring to; these are the front teeth I am referring to though not all the front teeth can be seen; she says the mollars are intact; as for front teeth, they are now missing. The skull is marked identification 1. She shows what she considers a thigh bone and protests she does not know body parts - it is agreed what she points at is a pelvic bone (marked identification 2). Also a fibular (marked identification 3). She says pieces and remnants found at Phuthiatsana are not before court for they were taken home. She says she did say accused did not have a protruding forehead. She says this is the skull she identified and it is the same as that of the deceased for she knew it. She repeats the head is not protruding. She had seen some clothing at the Charge office or

9

hospital and did not know whose they were. At the charge office she had seen some clothing and remembers what they were - it was a yellowish sleeping blanket. She could not recall the colour of the other blanket. There was also a pair of trousers, a belt and pyjamas - blue. She says this looks like a pair of trousers. She had seen the pair of trousers, pjamas, a vest, a Vasco da Gama (long pants); the other one was in tatters and unidentifiable. She says this is the blanket she could not identify - a donkey blanket and she points at the yellow coloured blanket - she says she was seeing the blanket for the first time; she points to another tattered piece all marked identification 4 collectively.

Mr. Nathane continues his cross-examination. The witness says she cannot deny whether these are deceased's clothing for she did not know them. She says she does not know where the items were from when taken to hospital or Charge office for the clothing was found at Phuthiatsana though she was not present when the items were found. As for the skull, the witness says it is incomplete but says she is positive this is deceased's skull. She agrees in the village deceased was not the only one with the forehead. She insists this is deceased's skull. That the teeth are not peculiar to Senyane she insists it is because Moliehi was present when deceased killed. She says she can't identify parts of a dead person. The witness insists these

10

are Senyane's parts even though there is nothing with which to identify them. Re-examined the witness says the source of enmity between A2 and deceased was that there was no understanding between A2 and deceased and this involved her. A2 had banned her from her home after A2's mother died. It was after the quarrels. She says she was last invited by A2 to reconcile her with deceased on the occasion her late father was present and thereafter there had been no invitation. No questions by Assessor.

P.W.2 Lechaka Makhoali (P.W. 14 at the P.E.) sworn had stated he was 41 years old and resided at Lithabaneng, Lithoteng Ha Keiso. She says she is half literate and did Std. 1. He says he knows months of the year. He says first month of the year is January. He says he does not know years and can count up to 50. He says he knows A2; he says his means of knowing her is that they resided in the same village. He says he is a headman and his senior is Lepipi Mthobi. He says he does not know A1 though he does not see A1 for the first time for he had seen him when first they were before this court. He says he knew Senyane as they were fellow-villagers. He did not know where at present Senyane was. He was related to A2 who is

Senyane's wife. The witness says A2 had come to him regarding deceased though he could not remember when though it was over five years ago. She had

11

reported deceased was missing at home. It was in the morning though he could not remember the exact time but it was before cattle left for pastures and it was before sunrise; it was clear already. He cannot remember day of the week. A2 had not said how long ago her husband had disappeared. A2 had then said the witness was to shut up as her husband had disappeared and she did not like her family matters talked about. He says he had not asked why but had gone to his senior chief same day and explained this to chief Lepipi Mothobi; he had given him a letter which he passed on to A2 to take to the police. He had given the letter to A2 and does not know whether she delivered the letter to the police. He says he does not know the contents of the letter but it was to the effect that A2 was to go to police to report that her husband had disappeared. A2 had not returned to him. He had not inquired from the police whether 'Mamotšeo had delivered the letter to the police. To his knowledge he did not know deceased to have surfaced. No question by Mr. Putsoane.

Cross-examined by Mr. Nathane the witness says A2 came to him because he is a chief. He says even if this was secret A2 did make a disclosure to him. She was not alone when she made the report for there was somebody in her company being a friend of hers. He says it was a secret to say he was not to disclose what she told him. He says she had told him

12

knowing he would not be silent. He agrees it was a stupid thing to do. He says A2 did say he was to keep the information secret. He says it so happened the chief did not have A2 reported to police that A2 had said the chief was to keep the report secret.

Re-examined the witness says he does not know why the chief did not alert police that A2 was saying he should keep disappearance of her husband a secret for he did not know what was going on in the mind of the chief.

No questions by Assessor.

P.W.3 Nthethe Senyane (P.W.8 at the P.E.) sworn states he is 64 years old and resides at Fika-le-Mohala; he is a former Lt. Senyane and is related to A2 who is his maternal uncle's wife. He knew A1 and had known him for sometime. He knew where he lives at Mautsaneng, Mauteng. They were not friends. He knew him while working in his village. He had retired from the force in April, 1990. On 29 May, 1990 he was at home at Fika-le-Mohala. Somebody had come to him being his younger brother Retšelisitsoe Senyane. Though he does not quite recall, it was a little before 12.00 noon. He had reported A2 was saying deceased had gone missing. He had then informed his elder brother who is his father Samuel Senyane now at home. He had further gone to inform his younger brother Lebohang Poling; he says

13

he is referring to Matala area. The following day he had gone to his aunt A2 as a member of the family and there were Selepe Poling, Samuel Senyane, Lebohang Poling, Retšelisitsoe Senyane and himself. They had found A2 present. They had asked A2 how their uncle had

disappeared and she had said he had gone out and it was in the evening and he never returned. He says by dusk he means before going to bed. They had asked if she had reported their uncle's disappearance to the chief and she had said she had not reported their uncle's disappearance. They had gone to A2 on the second day of deceased's disappearance. They had then gone to chief Lepipi Mothobi and there found the chief had not got a proper report and from there had proceeded to the police at Maseru Central Charge office and had found there was no report. He says he does not recall whether they went back to A2' home. He says he remembers police woman Makhoabenyana; he says he had asked her how she knew of the disappearance of the deceased - she lived at Lithoteng near A2's home and did not know if they were friends though they were neighbours and had said A2 had reported the disappearance of the deceased. He had met A2 at the magistrate's court. He says there he had been asked to identify deceased. He thinks they went to A2's place and told her they had found she had not reported to police and she had said she had reported to policewoman Makhoabenyana at her home. They had then left for their respective homes. He had then been called

14

upon by police to identify some items of clothing - he says the year was still 1990 though he does not remember whether it was August or end of July. He was called to C.I.D. office, Maseru and there shown items of clothing by members of the C.I.D. Amongst the clothing he had identified black shoes, off-white pelican jersey, a blue pair of trousers. He had then been taken to the mortuary where clothing was kept. He knew a pair of trousers - he points at a blue pair of trousers and it is marked identification 5. He points at a pelican jersey (identification 6); an off-white cardigan jersey he identified at police station (identification 5 collectively). He had then proceeded to the mortuary to observe bones - he found a skull with no lower jaw with mollars on either side with full set of teeth on the left side; there were no front teeth; a thigh bone and smaller pieces of bone like ribs. He says this is the skull he is talking of and not all the teeth are there; there are mollars - he points at a molar and believes it is deceased's. He says one front tooth has been extracted. He says he notices wounds on the head showing deceased had been struck. He says in his lifetime deceased did not have wounds on the skull.

He says he sees scars on the skull - showing they were caused by a sharp instrument for there are cracks on the skull. He says his uncle's forehead was not protruding and so is the forehead in his hands. He says there

15

is a wound he did not notice above the right eye caused by a sharp instrument. He also refers to the pelvis (Id 2). He says he cannot identify the bones (Id 3); that's all. He says he does not see rib bones. He says he is a close relative of the deceased. Deceased came after his father and the two are blood brothers. In trying to bury deceased A2 had stopped them by order of court. He says it was after the police had taken the bones to Pretoria and it was not in 1990. He says the court order was to the effect that A2 bury the deceased without members of the family. The family had contested A2's action but she had succeeded. He says he does not know why deceased was not buried. He says before the incident the family including himself was not at peace with A2. He says before deceased disappeared there was harmony between A2 and the family. He says the relationship between A2 and deceased was not good. A2 had said deceased did not satisfy her sexually. When his uncle disappeared he was 70 years old.

He had told his father to confront A2 and deceased. He had not taken this to be reasonable. He says his uncle no longer slept with A2 and this he had been told by deceased. He says his uncle's blankets were in a shack outside. Uncle's house is a three roomed house. He says what was found was not a corpse but parts of the body. When bones were found it was two months since deceased had disappeared. There was no postmortem; bones were taken to Pretoria for examination and he was not present when they were so taken to

16

Pretoria.

No questions by Mr. Putsoane.

Cross-examined by Mr. Nathane the witness says he does not know if A2 reported the disappearance to the headman (P.W.2) and the latter had reported to the chief. He says the report could have come after they had been to the chief. He says before deceased's disappearance the family was not on good terms with A2 after all they were suspicious she was responsible for deceased's disappearance. He says that they were suspicious did not mean A2 was responsible for deceased's disappearance. That there were death threats against A2 by members of the family he says he knows nothing about such a thing. They had met in town and she had not told him though they greeted each other and were on talking terms. He denies he told A2 in her face that she was responsible for deceased's disappearance. That he had said 'we' suspected her was an error. They had been shown one and the same skull. He had seen the scars on the skull for the first time when he was shown the skull. He says he cannot say whether or not when the skull was found the wounds were there. He says he can't say whether the deceased was the only one with protruding forehead. As for the jersey and pair of trousers, he says he agrees there are no distinctive marks. He says the clothing is deceased's by size, colour and the clothes looked like deceased.

17

He says when A2 spoke of her husband's sexual inability he had visited their home.

No re-examination

On 29 February, 2000 Mr. Nathane is not before court and accused 2 says she knows that the matter was set down for the day - the reason why she is before court. Accused 1 says he does not know where his lawyer Mr. Putsoane is though he knows the matter was set down for the day. A1 says he will cause his lawyer to appear before court. A2 says she was always hopeful his lawyer would appear. Mr. Thetsane suggests matter proceed on 01 March, 2000 whether or not counsel attend. Court: Matter is postponed to 01 March, 2000 at 9.30 a.m.

On 01 March, 2000 Mr. Nathane for A2 not before court and A2 says she went to see Mr. Nathane and told him the case was proceeding today but Mr. Nathane had said he was proceeding to Leribe where he had a part-heard case. A2 says she is not satisfied that Mr. Nathane is not before court. She says she does not mind case proceeding in Mr. Nathane's absence if a transcript of the proceedings will be made available to him for cross-examination.

18

P.W.4 Moliehi Rantho (P.W.2 at the P.E.) is called and Mr. Thetsane says the witness is an accomplice and has to be warned. The witness is warned that she is an accomplice and that she is to answer questions to the satisfaction of the court. The witness says she is relaxed and sworn states she will try to pick up her voice. She says at present she resides at Malea-lea, Matelile being where she was born in the District of Mafeteng. She says she is literate and did Std 11. She was born in 1950 and knew A before court. She says she knew him over a long period because she stayed with him. A1 was his lover with whom they stayed together in Maseru for about four years. They had stayed together with A1 though she could not say from when. She says by saying he was her friend she means they were in love. They had stayed together as man and wife. She also knew A2 before court and her means of knowing her was that A1 resided at A2's place as a gardener and this was about 1990. When in 1990 A1 worked for A2 she had known A1 for about 3 years meaning she had known A1 from 1986. She says she is wrong to have said 1996 for the correct year is 1986. When she knew A1 in 1986 they stayed at Cheap site commonly known at Lower Seoli. She says she has also said at the time she knew A2 who stayed at Lithoteng Ha Seoli. She knew Edmund Senyane who had since been killed. She says she knows Senyane was killed in 1990. She says events that proceeded Senyane's death are that she had known A2. She knew A2 because her sister had stayed

19

with A2 who was her sister's friend. She had come to know of Senyane's death because of her sister who came after her being 'Mathuso Makhetha. 'Mathuso was looking for job and A2 had said she would find her a job. 'Mathuso had gone to A2's place leaving Moipone's place where she had put up for the night and had asked for a job from A2. 'Mathuso was looking for a job from A2. She did not get the job. In the 2nd month of 1990 A2 had arrived at their residence during the night while she was with A1 and it was around 8.00 p.m. They were then in bed with A1. A2 had knocked and they had opened the door for her because they knew A2. A2 had said she was from Moipone and we were to accompany her; the witness says she was unwilling because she was drunk and A2 had said she had no problem with the witness's state of sobriety. A1 and the witness had agreed to accompany A2. The witness says she felt willing to accompany A2 and the three of them had left accompanying A2 to her home and before crossing the road to Pita's place A2 had said to her: 'Moliehi, she says where she lived with Tšepo (A1) to A2's was from the court to the old High Court (estimated to be about 450 meters). The witness continues saying A2 had said: 'Moliehi, do you know this the day I and A1 have agreed kill Senyane?' She says then A1 was present and close to her. The witness says she had then asked Tšepo (A1) saying: 'is this true what A2 is saying?' She says A1 had replied saying it was true what A2 was saying. The witness says she had then said to A1: 'do you

20

know it's wrong to kill a person' ? to which A1 had replied that he had no choice for how else could he survive? She says as A1 replied to her question they were walking along with A2. The witness says she had said she could not personally participate in killing a person; in saying so the witness says she was directing the words at A1 and A2. A2 had then said: 'if you don't participate, you will be the first to make an end to you meaning, 'we would be forced to kill you if you don't take instructions.' She says she was frightened but not much on account of being drunk. She says on account of being drunk, she had not thought much of the affair.



They had walked until they reached A2's home. She says at A2's home she got frightened when finding deceased asleep in the kitchen. A2 had then said to deceased: 'go with these two people to the other side of Phuthiatsana. A2 had then awoken deceased. He woke up and the witness says he noticed how he was dressed. He wore a blue pjamas with its top and a blue blanket. He wore the blanket, stood up and put on his shoes; then A1 was in the kitchen and A2 brought the iron rod in such a way deceased would not notice. A2 had come with the iron rod from her bedroom. The kitchen was lit with a paraffin lamp. As she was about to enter the kitchen A2 spoke loudly saying to A1 'throw him at a deeper place.' When A2 said this deceased was out of the house already. She says A2 had spoken to deceased saying: go with these people to bring a sheep for children's celebration; she says A2 had said this

21

in awakening deceased. A2 had then given the iron rod to A1. She says she can describe the iron rod if she sees it. She says it looked like a bicycle wheel though where it is to be held was a long rod. She says she sees the rod and it was not like the one A2 was holding; she says it is the one and it is marked identification 6. She says Id 6 is the one A2 gave to A1. After A2 gave A1 the rod id6, A2 had then said the witness, A1 and deceased were to go leaving A2 behind. They had left. She had not known where they were going but A1 had said he knew; they had walked along until they reached Phuthiatsana; Phuthiatsana river is in Maseru district. They walked along with deceased not speaking to each other. At first they walked in a group but reaching fields adjacent to the river there were brambles and her feet had been pricked and she stayed behind. She had not been wearing shoes; it seemed they were closer to the place where the operation was going to take place. She says she was 40-50 paces from where the operation was going to take place. She says it was dark and raining and the river in flood. She had come following and had heard a sharp cracking sound 'kettle' - it was like an axe chopping wood. The sound was in front of her. The sound was in the direction of where A1 and deceased had gone. She had heard a voice after the sound saying: 'hela banna!' (Hey, men!). She had identified the voice as that of deceased. Before the incident she had known deceased for

22

about 2 - 3 months. They had not met often having met about once a month. She says she had then shouted: 'Tšepo' meaning the one she stayed with namely, A1. She says she said: 'Tšepo, you have killed father Senyane?' She says by then she was very close to A1 and realised he was standing alone and she was about 6 paces away from A1. She says she means A1 was alone where previously he was with deceased. She says when she said: 'Tšepo, you have killed father Senyane A1 said: 'yes, I have killed him'. The witness says after hearing the sound 'kettle' ( a sharp, cutting sound) there was also a splashing sound like something falling into the river. She says after Tšepo (A1) said I have killed him she said: 'I am now running away - I am frightened'. She says when she heard the cutting sound and deceased's voice she sobered up. She says when she said she was running away A1 also said he was running away. As it was thorny, they did not run. They had casually walked back to A2's home. She says the cutting sound and splashing of water was very far from A2's home and she is not able to estimate the distance; she says she knows some places in Maseru e.g. where she takes taxis being at the Lesotho Evangelical Church; she says the place could be twice the distance - about 2 km away. Going back to A2's nothing had been discussed for according to the witness, she was frightened having heard deceased's voice which she never heard again. At

A2's they had knocked. She says arriving at A2's they had left for the river about 2 hours before and

23

they could have returned from the river at dead of night. A2 had taken about 15 minutes at their place before returning to her home. At A2's they hadn't taken much time - it was about 30 minutes. She says the 2 hours she referred to were going to A2's, to Phuthiatsana and back. A2 had opened the door and they had entered. A2 was alone. A1 had then handed over the iron rod Id6 to A2 and it was lit in the house. She had taken a look at the rod and she noticed she was being given this thing - it was red - she means it was bloodstained on the upper cross portion up the two immediate holes of Id6. A2 had said she could not accept Id6 for her children would see it. Before handing Id6 A1 had said: 'I have fulfilled your mission me (mother) 'Masenyane and I am asking for my reward.' A2 had then said: 'Tšepo, go to your home, the reward will come with Moliehi' - meaning me. Tšepo (A1) was not able to hand over Id6 to A2 for A2 had said A1 was to carry Id6 away with him for she did not want the children to see it. A1 had then left with the iron rod Id6. A2 had then said the witness was to put up at her home as she was afraid and frightened. The witness had said she could not put up for the night at A2's for what would A2's children say?

After lunch the witness having been warned she was still under oath continues her evidence saying A2 had prevailed upon her to put up for the night at her home and she had slept there. A2 had said she was to sleep in

24

the kitchen where she also slept. A2's house was a 3 roomed house and they had slept until the morning. Early in the morning she had awoken saying she was leaving for fear A2's children would see her. She had not seen A2's children nor does she know the children's names. She had not seen the children previously and she elected to leave in the morning back to the place where A2 had found her and A1 and to where A1 had gone the previous day. He had found A1 and they had stayed. She says there is something she omitted for before leaving A2 had given her money being the amount she promised to give Tšepo (A1); it was M40-00. She says she knew what the money was for. The money was to be given A1 but it should have been R400-00. She had taken R40-00. She had not been satisfied with the money because A2 had said she would give A1 R400-00 after A1 killed her husband. The witness says when she asked why the M40-00 A2 had said the reason for giving R40-00 was because she would have to engage legal representatives in case A1 was arrested should it emerge deceased was killed by them. A2 had taken out R40-00 from a purse containing a lot of money. She had taken the R40-00, found A1 and said to him: 'here is your money Tšepo. He had accepted the money asking where the other money was and the witness had informed him A2 had said with the other money she would employ lawyers. A1 had not seemed dissatisfied. Thereafter 'Molaoa her younger brother she stayed with she had told him something about what

25

happened. She had told him the previous day they were not present meaning herself and A1 as they were fetched by A2; that on their departure the previous day, at Phuthiatsana, A1 had killed deceased. She says when she left with A2 'Molaoa was absent having gone for beer drinking. She says when she told 'Molaoa the stories A1 was absent. When A1 arrived

'Molaoa had asked A1 in her presence what happened the previous day and A1 had told what she had narrated to 'Molaoa saying it was true he had killed deceased. The same day A1 had decided to leave for his home for ploughing purposes - she says it was the 4th or 5th month of the year. A1 had left for his home though not the same day - it was after 2 days and deceased was already dead. She had not joined A1. Before A1 left, A2 and her father had arrived at her place in the evening, A2 had knocked on the window and they were already asleep. When she inquired who it was A2 had replied softly in a low voice saying: 'It is 'Mamotseoa.' She says 'Mamotšeo is A2 'Masenyane. She had asked what she wanted and she said she wanted to be allowed to enter. She had not opened the door at once but had ultimately opened and she had entered along with her father whose name she did not know. A2 had then said to her and A1: This person you see is my father and he has come to see Tšepo (A1) who has done a great job for me'. She explained what she meant by saying: 'by killing Senyane A1 had done a great job. Her father had said in thanking A1: 'I am grateful my child, you have

26

done a great job for me.' A2 and her father had then left. She says this had happened at nighttime. She says when A2 and her father arrived they were long in bed. The following day A1 had left for his home at Mauteng, Matsieng - she says it is Mauteng Ha Sanaha. She remained behind. She says when A1 said he would go home she did not show him she was desirous of joining him for she was working; she says she was working at Bakubung Shopping Centre at Lithoteng not far from where she was staying. After 2 days A1 had left and Tšepo's (A1's) sister Thato had arrived. She came to tell her that A1 had arrived at home and made a report. As a result of this she had left with Thato to A1 's home. The witness says she had not been to A1's home before. At A1's home she had found A1. She says she went to A1's home because she suspected he wanted to run away because he knew he had killed deceased. The witness says she had asked A1 why he was not coming to Maseru anymore - she says he had been 4 days away and as he had gone for ploughing she could not know when he would return. The witness says when she asked why he wasn't coming to Maseru A1 had asked: 'has Thato not told you why?' He had then said what Thato told the witness was true that he had said to Thato he would never go back to Maseru. A1 had said he would not go back to Maseru because he believed he was going to be arrested. The witness says when A1 said these things he was with her. She says she had not returned to Maseru or her residence and they had

27

stayed together with A1 at his mother's home until the police arrested them. She says when A1 and herself were arrested it was about a month or two since deceased was killed. She says when the police came she was asleep and it was during the week, a Saturday. She says when she awoke she saw A1 with the police and they were escorted to the vehicle walking quite some distance and they were taken to Maseru police station. She says they were arrested by policeman Lekata and can't recall others. She says before entering the cell a policeman had asked if she knew Senyane and she had agreed she knew him and had said her means of knowing him was that she knew his home and she had said Senyane was no longer alive. She says she said this same day they were at police Charge station. The policeman had said he was locking up the witness and did lock up the witness in the cell. The following day a Sunday they had not been called out of the cell with A1 and were called out on the Monday and she had been asked how she knew about Senyane and she had said she knew nothing and the policeman had said: 'are you serious you don't know' and the witness had said she did not

know. The policeman had then said the witness was to go outside the office. She says the truth is that she knew about Senyane and the reason she said she knew nothing was because she was frightened. A1 had also gone for questioning. The following day the policeman had questioned the witness again and the witness had said she knew how Senyane died and she was

28

released. She says she told the policeman everything relating to deceased's death and in saying these things she had not been forced. After her release she had gone to Seoli where she stays. She had left Tšepo (A1) in the cell and while she was at Seoli's policemen had arrived including Lekata and others when the Id6 was pointed out. The police had come with A1. She says it was late morning around 10-11 a.m. She says the police had said A1 was to point out the iron rod and A1 had produced it from the house which the witness occupied with A1 underneath a matt; she says it was a knitted wall to wall matt. A1 had produced Id 6 (ID6) from underneath the matt being the weapon A1 killed Senyane with. She says she did not know where ID 6 was. She says nobody forced A1 to produce the iron rod ID6. The police were in their vehicle. She says when A1 produced the weapon police in the presence of Lekata were present in the house; she says she forgets other members of the police present. Having produced the weapon A1 had given the weapon to the police. She says A1 had said: 'Here is that iron rod.' She says the iron rod did not have bloodstains anymore but it was rusty. A1 had then left in company of policemen. They had then gone to A2's in the vehicle and escorted to the river to point out the place where Senyane was murdered. She says the police vehicle took her and A1 to the river. She says they went to the river for the police said they were to point out the scene of crime. She says she mentioned scene of crime to the police. She says she

29

told police events had taken place at a particular place. She says she was not forced to say this. She says she does not know why the police said she was to go along with A1. She says when she got to the scene with the policemen they were asked to point out along with A1. She had pointed out the place. The witness says she had said: 'This is the place and this is where I heard a 'clapping noise'; photographs had been taken. She says when she said this is the place where Senyane was assaulted she was with A1 by his side. A1 had also pointed out the place where he assaulted deceased. She says A1 in pointing out had said: 'It is here.' She says the place she was referred to is Phuthiatsana and knows the place to be called Phuthiatsana. When the place was pointed out A2 was absent. She was no longer staying with A1. She was now staying at her maiden home at Matelile. She says she does not know where at present A1 stays. She says she has no feelings for A1 anymore and she does not know about him though they still greet each other. She had not quarreled with A2 over anything and nobody has forced her to give evidence against the two accused nor had anybody promised her anything to give evidence against the two persons.

The court directs that transcript of the evidence be made available to Mr. Putsoane and if not available to consult crown counsel's notes. This to be done in time before the hearing. On 02 March, 2000 Mr. Putsoane says

30

Mr. Nathane is not available it being claimed he has gone to Leribe again. He says he has conferred with Mr. Nathane's client (A2) and has said she intended to confer with Mr. Nathane and in the event Mr. Nathane is not available A2 would find another lawyer.

The court has explained to A2 that once more her lawyer is not available and that in the event the court would proceed with another witness and have cross-examination of P.W.4 reserved. A2 says she would find another lawyer within a week.

The court has said it does not know the whereabouts of Mr. Nathane for if Mr. Nathane being attorney of record wished to absent himself or withdraw his instructions for any reason, being attorney of record he should have had the courtesy to come to court to say why he cannot proceed with the matter. In the circumstances the court was not disposed to proceed with the case in the absence of Mr. Nathane for A2 would be prejudiced in her defence. Accordingly, Mr. Nathane was ordered to appear before court at 3.00 p.m. in the afternoon to explain himself for his non-appearance in the case. The order of court was to be served on Mr. Nathane's office. The order is annexed to the proceedings.

31

At 3.00 p.m. the court orderly Tpr. Sebe says he served the order though he was not informed of the name of the person on whom he served the order. He had said Mr. Nathane was not in the office and had gone to Sefikeng being on top of Berea plateau in Berea district. He says he was not informed why Mr. Nathane went to Sefikeng. No questions by Mr. Thetsane.

By Mr. Putsoane: Tpr. Sebe says he served the order on a gentleman and can't estimate his age and according to his observation could be 16 years old. He says the gentleman signed the court order. He says entering Mr. Nathane's office he asked a person who was typing where Mr. Nathane was and he said he had gone to Sefikeng; this person was the same one who signed the Court Order.

Asked A2 says she follows what's happened. Told by the court it would seem her lawyer is now not interested in her case she agrees. Told by court crown counsel is desirous of the proceeding with the case A2 says she is asking for mercy from the court to enable her to secure services of another lawyer. She says though she has not paid in full she has paid Mr. Nathane. She pleads to be given days until 10 March, 2000. Both counsel agree the case is a fit one for disciplinary inquiry.

32

The court orders Mr. Nathane appear before court to explain his conduct. He is to appear on 13 March, 2000 when, then, a date of hearing will be fixed.

On 13 March, 2000 appears Mr. Ntaote for the crown who says a similar scenario is repeating itself in that accused counsel is absent though they informed accused they would be before court. A2 says she was at Mr. Nathane's office in the morning and redeemed her indebtedness to him though she was informed Mr. Nathane had gone to Thaba-Tseka.

Mr. Ntaote informs court witnesses are before court.

Since counsel is not before court the court has postponed the case for hearing on 22 - 24 March, 2000.

On 22 March, 2000 owing to the fact that transcript of the record was not ready the case was postponed to 8 - 9 May, 2000.

On 08 May, 2000 owing to absence of the Assessor matter is postponed to 09 May, 2000.

33

On 09 May, 2000 the court has noted that as Mr. Molapo the Assessor was absent for a day he was to be excused from attendance leaving Mr. Khoboko as the only Assessor.

Mr. Nathane though present on 08 May, 2000 is once more absent and his whereabouts are unknown.

Mr. Thetsane says if counsel is going to be absent notice of absence is to be given in advance.

A2 says she last saw her counsel yesterday on 08 May, 2000 and he had told her the case would proceed today. She agrees she has had much trouble with her lawyer and agrees he does not inform anybody if he is going to be absent; she suggests she goes back to him; she says she cannot pre-judge the situation and if she cannot find him would have to engage services of another lawyer.

Mr. Thetsane says it's several times the case has not proceeded because of Mr. Nathane's absence. It was to have proceeded the previous week but the court was not available for well known reasons. The case was to proceed on 08 - 09 May, 2000 but had not proceeded because there was the wrong

34

impression that one of the assessors was missing and yet he had already been excused from attendance. When matter was postponed parties were present and yet this morning Mr. Nathane is absent not having informed the court of his absence. He says there are next-of-kin who would like to see case reach finality and it is crown's duty to inform them why the case is not proceeding. He says there is another crucial aspect being that of witnesses who are under private employment and there are complaints whenever the case is postponed. It was costly to recall witnesses to give evidence.

Mr. Putsoane has nothing to say.

Court orders that case be postponed to 2.00 p.m. for Mr. Nathane to appear failing which A2 to find another lawyer At 2.30 p.m. there is no appearance for Mr. Nathane. Mr. Thetsane says the previous day (08.05.2000) Mr. Nathane had informed him his office had been broken into. He says Mr. Nathane informed him of this even before knowing whether the assessor would be available.

The court has asked A2 to drag Mr. Nathane to court or else case would proceed in his absence. Case postponed to 16 - 19 May, 2000.

On 17 May, 2000 there is full court and both Mr. Nathane and the

35

assessor Mr. Khoboko are present.

The court has noted that when the matter was postponed P.W.4 had given her evidence-in-chief in full but not cross-examined by either defence counsel. Since Mr. Putsoane had no brief from Mr. Nathane it would seem Mr. Putsoane could not cross-examine in the absence of Mr. Nathane.

P.W. 4 sworn and cross-examined by Mr. Putsoane says she does remember that she was declared an accomplice witness. She says it is not correct to say she murdered the deceased. She says she has not participated in the plot to kill the deceased. She says though declared an accomplice she does not know what it means to be accomplice.

Mr. Thetsane stands saying it is clear from the witness's evidence what role she played for she says she played no role in deceased's death. She says in 1990 A2 came to her to say she was wanted. Mr. Thetsane warns counsel is not to mislead the witness when she said it was February, 1990 - he says she was not hesitant. Cross-examination continues and put to the witness A1 agrees it was February, 1990 she agrees she was awakened by A2. She agrees she was very drunk. She says she forgets when she started drinking on the particular day and cannot say at what stage she got drunk. She says she

36

started drinking after 4.00 p.m. with other people. She agrees they left their home after the evening. She says as it was winter she does not agree it was 7.00 p.m. yet. She says although it was February, it was winter for A1 had said he was going to plough. She says she does not agree that A1 never said he was going to plough in February. That A1 left for Mafeteng beginning of April the witness says she does not know A1 to have gone to Mafeteng for after committing the act A1 did not either go to Mafeteng or Matelile for A1's home is at Mauteng. That A1 left for Mauteng beginning of April she says she cannot deny for she has forgotten the months. That according to her evidence-in-chief she said A1 will deny there was ever an agreement to kill deceased on the fateful day she says there was such an agreement made on the same day when they were on their way A1 having said whether A2 had told the witness that deceased was going to be killed and the witness had said she did not know for it was A1 and A2's agreement that they were going to kill deceased. She says A1 and A2 had said they had already agreed. She says she was told of the agreement the same day that the deceased was killed. That nobody ever uttered the words the witness says the same day A2 said she was to accompany A1 and had awokened her from her home the same day deceased was killed. That the witness has twisted things because of her state of drunkenness, the witness says she heard when it was said a person was going to be killed. That she imagined deceased's killing because of her

37

drunkenness she says she did not imagine anything she was frightened. That there was reference to killing she agrees for they had said if she did not go she would be killed. She says A2 had said if the witness did not go to kill deceased she would be killed. Mr. Nathane says he objects to questions arising from cross-examination implicating his client. Court warns Mr. Putsoane to confine himself to events involving his client only. That A1's reference

to the killing was killing a sheep she disagrees for a sheep was only mentioned when they were near 'Masenyane's (A2) home. She says there was no reference to a sheep for it was said the witness was going to be killed if the witness did not go to where deceased was going to be killed by A1. That on the way nothing was discussed save killing a sheep the witness says A1 will be wrong to say this. That deceased knew about a sheep to be slaughtered the witness says she does not know. She says it is true deceased was awakened by A2. She says it is true deceased was told about the sheep for it was said he should fetch the sheep from across Phuthiatsana. She says she did not hear deceased to raise any questions regarding the fetching of the sheep. She says A1 was a gardener at deceased's home. That it was deceased who told her about fetching the sheep and A1 was to accompany deceased the witness says she does not agree for the following reasons, namely, because on the way she was told: do you know we have agreed with A2 that this day deceased be killed? She says she does not agree there was anything A2 said during the day for they

38

had parted company. He was with her at work during the day. She says she wasn't with A1 at his place of work 'during the day. She says she did not hear the discussion between A1 and the deceased and she is not able to deny what was said in her absence for she was then absent. That A1 accompanied deceased because of the earlier discussions the witness says she does not agree considering what A2 said. She says she knew where they were going with A1. She says she does not agree A1 was going to fetch a sheep in accordance with deceased's instructions. Put to her that A1 was going to fetch a sheep in accordance with deceased's instructions and put to her that A1 was to return on deceased crossing the river, the witness says this she does not know of for she was not present when this was said. That on deceased crossing the river A1 found the witness/the witness denies. That A1 saw the deceased cross the river the witness disagrees. She says she does not know what distance it was if measured from where she was to where A1 and deceased were. She says from where she was she could see deceased and hear voices. She says she could not see crossing the river for it was forested but nevertheless did see A1. According to the witness, A1 did not go into the river. She says where A1 was one could see where deceased was after all the river was in flood and a person could not cross. That A1 will say there wasn't much water for deceased crossed, the witness denies saying the river was in flood. Put to her A1 saw deceased cross the river the witness says she does not agree for there is

39

something she heard; she says then she had sobered up owing to the fright she'd sustained. She says she heard sound as if wood was being chopped and a voice: 'hela banna (hey, men) and a splashing sound in the water. That A1 was not drunk and did not hear such sounds the witness says he will be telling the truth. That A1 will say she is not telling the truth when she says she asked A1 a question: 'Tšepo (A1) are you killing father Senyane (deceased) and A1 said: 'yes, I killed him'; further that A1 will deny this for the witness was drunk, the witness says she had sobered up. The witness denies A1 went to deceased's place of work the following day. That at about 12.00 noon deceased arrived bringing a sheep the witness says this is untrue for she would have known as A1 would tell her as he had always done if there was something taking place. She denies A1 is telling the truth that he may omit to tell the witness; she further denies deceased brought the sheep for slaughter. She denies on returning to deceased's home she was still drunk. She says she was not drunk. That in February and the following day up to March deceased was still alive she says she has said she has forgotten the



months. She says on the day she accompanied A1 to Phuthiatsana and returned with A1 she never saw deceased again. That A1 and deceased in February and April and during April when he left for home deceased was still alive the witness says this is not true for A1 left after killing the deceased. She says she did not see A1 kill deceased but she had asked him whether he killed deceased and he said he had done

40

so. The witness says that A1 will deny he killed deceased he will be denying by mistake for to her he had said he had killed him. She says she forgot about the month but otherwise she does not forget. She agrees she was at the time drunk. The witness says A1 is lying when he says in April when he left for home deceased was still alive. She agrees after A1 left she also left because of the sister A1 sent to say A1 was at home. She says she went to A1's home for A1 had said to her sister A1 had fled. She says she is not disputing the month for she made a mistake; she says she has forgotten the month and that this was not done on purpose. She says she neither agrees or disagree that the year was 1990. She agrees she did mention February but it's because she had forgotten for this had happened a long time ago. She says in May she was not in Maseru and A1 was not in Maseru either for he was at his home with her. That deceased disappeared on 25 - 26/05/1990 or thereabout while they were at A1's home the witness agrees during the winter months she was at A1's home; she says when at A1 's home during the winter months deceased had already disappeared. She says when she went to A1's home deceased had already disappeared; by this she means A1 had already killed deceased. The witness has pleaded she does not know the month and wishes to be excused on this. She says she said she followed A1. She says as for months, she has forgotten them. That following months is for her convenience and it is false, the witness disagrees. She denies she murdered deceased. That A1 will deny

41

there was no conversation, the witness says nothing was discussed save the fact that deceased was going to be killed and says in this she is telling the truth. She says it is true A1 said he had killed deceased. That whatever transpired that evening deceased was not killed, she says except that A1 had said he had killed him.

Cross-examined by Mr. Nathane the witness says she did not see deceased's body save a weapon given A1. She says she has said this was in winter and Phuthiatsana was in flood. She says at the time the river was in flood. She agrees before he disappeared deceased was a teacher by profession. She says on being asked by A2 to leave, deceased had left like a sacrificial lamb. That the conduct attributed to deceased was unusual unless he had known his wife's directives before, the witness says she does not know that a person can be sent at that time of night. She says that they were not talking to each other was unusual. She agrees when A1 and A2 arrived at their home she was not aware of the plot and she was drunk. Asked how a person with an evil motive can impart such a motive to a drunken person, the witness says they told her in her drunken sense and she agrees it was senseless. That A2 never told her they had agreed and told her to kill deceased she says they told her on the way to A2's. That it was worthless to involve them in their affair the witness says she followed until the plot was accomplished. The witness

42

agrees she was useless at the time and this had placed her in a tight corner. She says it was because of drunkenness that she was frightened and it is wrong to say because she was drunk she was not frightened. She agrees when events took place she had known deceased for two months and would have met him once a month. That in these circumstances she could not identify deceased's voice, she says she could for she knew deceased's voice; she says what she means is that there were only 3 of them that day and the only voice she heard was that of the deceased. That before hearing a voice which was not A1's she had not inspected the area for other people, she says she had found A1 was alone. She says she had not inspected the area. That 'helang banna' (hey, men) does not import someone in distress or being assaulted, she says that is why she says it was Senyane for he was going to be assaulted. The witness says if assaulted she can say 'helang basali.' She says the words can be uttered by a person in distress or about to be killed.

The witness has testified for the first time she heard the plot to kill deceased it was from her home to where deceased was to be killed. She says when she left her home she did not know where she was going like deceased did. She says she behaved like a grown up for she was told she was to accompany A1. She says on being awoken she did not leave at once for she

43

had said she was drunk to go in the darkness and they persuaded her to go. She says she asked why they wanted to go with her and yet she was drunk. That when she left her home she did not know where she was going she says she knew for she was accompanying A1. Put to her she was too drunk to know what she was doing and behaved irresponsibly, she says it is clear she did something irresponsible for the result was somebody's death.

She says it is not the first time she has given evidence in the case. That at the P.E. (p.3) she said events took place on the 2nd and 3rd month, she says the magistrate could have made a mistake for what she said was it was a winter month but she had forgotten which. That she mentioned February by mistake before this court she was not honest for even before the magistrate she had mentioned the same month i.e. February, the witness says she begs pardon for not being honest about February for she does not know months. She says in Sesotho she cannot differentiate months. She says she does not know Sesotho months and even this February she does not know what month of the year it is. She says she said she did old Std. 11. She agrees the magistrate did not choose a month for himself; she says it must have been herself who said it without knowing what month of the year it was. That the magistrate has not mentioned the month by name but by its number, the witness says she so had said it was either the 2nd or 3rd month. That when she

44

gave evidence at the P.E. facts were fresh in her mind, she says she was terrified then as she is now because of what happened. Put to her it is not true that A2 said deceased was to be killed by her and A1 and buried by being thrown into the deep, the witness says A2 had said to A1: go, take this weapon and throw him into the deep. That A2 never said these words the witness says it is true A2 uttered the words. That A2 never threatened to kill her if she did not go as ordered, the witness says on the way A2 had threatened her by saying if she does not go as ordered she would be killed. She says she said she heard but did not see A1. Read to her what she said at the P.E. (p.3 - lines from the top) that she had said she saw A1 when he killed Senyane, she says she agrees the version is different. That the weapon given A1 by A2 was in

such a way that deceased would not see it, she agrees. That before the magistrate she did not say this (see p.4) but said: 'Senyane went out wearing his blanket with shoes on followed by 'Masenyane with Senyane ahead and that she did not say A2 had hidden the weapon in such a way that deceased would not see it, she says she said it but it was not written the way she said it. She says the record does not reflect what she said. She says she is surprised why the magistrate did not record what she said. That it is her evidence that is false she denies saying she is telling the truth. That A1 came with a bloody weapon and gave it to A2 she agrees. That this is untrue she says it is not a figment of her imagination for she saw what happened with her own eyes.

45

That A1 gave her M40-00 to give to A1 as token of payment, she says this is true for A2 gave her the money. That it is not true A2 had said the remaining money was to be used to pay a lawyer, the witness says this is true. That A2 never came to her home after deceased's appearance she says she did come to her place of abode. That A2's father did not compliment them on the good job done, the witness says he came complimenting A1 for the good job done. She says she does not know A2's father's name for she was not told who he was. She says she did not know A2's father for it was the first time to see him. She says she did say at first she did not know of deceased's death. She says what made her change her mind was because it was useless denying what she saw happen. She says she had been threatened not to tell by A1 and A2. She says no such question was asked. That she was asked the question and had said she was frightened the witness says she said it for A1 and A2 threatened to kill her if she told. She says there was never such a question. She says she was in police custody on a Saturday and she was released the following Tuesday from the charge office. She was not brought before a magistrate as an accused but it had been said she was to keep on reporting. She says she is not implicating accused falsely because the instrument used for killing deceased is here in court. That she was promised not to be charged if she gave evidence against accused, she says nobody told her she cannot be charged. That on the day deceased disappeared neither A2 or A1 saw deceased she says

46

the witness says she saw A2 that evening and A1 was present during the day. That A2 never colluded with anybody that night to kill deceased the witness says it is not true for she has said the mission to kill deceased was a joint one with her and A1. That A2 had no reason to plot with anybody to kill deceased, the witness says this is what she did.

Re-examined the witness says she did say it is not correct to say she killed deceased because she did not kill him but was killed by A1. She says that she said she did not play any part in killing deceased, she meant she had not gone there to kill deceased save that it was said if she did not go she was going to tell. She says this day was not the first time to drink but then this day she was excessively drunk. She had been taking drinks before but this day she did not take Sesotho beer only. She says she started drinking when her father died and it was a month she had been drinking and had been drinking for about 5 years. She says somebody gave her European drink when she had already partaken of Sesotho beer; she says it was that month or a following one. Other than when A2 asked her to accompany her to her home, there was no other time she had asked her to accompany her to her nor had she come to be accompanied to her home prior to this. She says this is the only day she asked her to accompany her to her home. She says 'helang,

banna' connotes something unforeseen and frightening. She says before the incident she had not heard somebody say 'helang, banna'; she says she heard the voice. She says she was arrested on a Saturday and released on a Tuesday of the week. As for what she said at the P.E. (p.3), she says she saw A1 kill Senyane. She says she heard when he said: Mr. Nathane objects saying he was referring to the P.E. and not what was said in this court. The witness says she recalls and was not asked at the P.E. whether she saw when deceased was killed. As for the weapon that at the P.E. she said A2 gave A1 in such a way that deceased would not see, she says she recalls Mr. Nathane saying this. She says at the P.E. she was asked a question about the manner in which A2 gave A1 the weapon; she says she was criticised for accompanying A2 to her abode at that time of night. She says she was not seeing A2 for the first time.

By Assessor Mr. Khoboko: The witness says when she was told to accompany A1 and deceased to fetch a sheep nothing was taken other than the weapon. She says there was no suggestion of the means by which the sheep would be carried. In going to fetch the sheep it was midnight about 8.00 p.m. A2 had said the sheep was to be fetched for she was going slaughter it for her children the following day. None of them had suggested the sheep being fetched in the morning. Deceased had raised no objection or

suggestion to the sheep being fetched in the morning. In going to where a sheep was going to be fetched, they had followed a footpath. They did not get to where a sheep was to be fetched the reason being that A1 had already killed deceased. It had not been said fetch a sheep from such-and-such a place from so-and-so; it was merely said: Senyane, wake up, go with these people to fetch a sheep . By Mr. Nathane through court she says she was not forced to take European liquor.

P.W.5 (P.W.I at P.E.) 'Mathuso Makhetha sworn has stated she resides at Matelile in the Mafeteng district. She says she is literate. She knows accused persons before court. She says her means of knowing A1 is that he lived with Moliehi (P.W.4) in 1989. They just stayed together at Lithoteng, Seoli, Maseru. As for A2 she says she knows her to be her cousin's friend Moipone Lebelo. She says they have been friend since 1989. She says she does not know when Moipone and A2's friendship started but when she arrived at Lithoteng in 1989 she knew they were friends. She says in May 1989 she was not working but looking for a job. She says she did not secure a job. In attempting to secure a job she says she was staying at Moipone's and this was in 1989. One day arriving she had informed Moipone that she had failed to secure a job but Moipone had said there was somebody looking for a domestic worker and named A2 as looking for a domestic worker. The

witness says when Moipone told her this they were in Moipone's kitchen. A2 had then come to the kitchen from Moipone's bedroom. The witness says A2 had then said she had heard from Moipone that the witness was looking for a job and the witness says she had agreed. The witness says A2 had then said to her the job she was offering her would be a little difficult because she had a man she was staying with but the man did not like her children and as women they were not to allow themselves to be cheated by men and A2 had said the

witness, coming far off as she did, can help her by poisoning the man she lived with. She had said her husband loved brandy (European liquor) and she can help poison the liquor especially because in her case, the witness stayed far away and he cannot suspect anything. The witness says owing to fright she had queried this saying although she was hungry, she could not take part in killing a man she did not even know. Persuaded as she was by A2, she had declined the offer. Moipone had supported her saying: my uncle's child, I disagree, I don't like it. The witness says when she spoke to A2 Moipone was present. Eventually the witness, Moipone and A2 had left for A2's. They had left for A2's at about 4.00 p.m. and getting there had got into the house and the witness was left in the kitchen by A2 with Moipone going into the sitting room. When A2 emerged she was holding 2 bottles one of poison and another of liquor and said: these are things I said this person likes. Too frightened the witness says she said: 'however hungry I am, I cannot do

50

what you are asking me to do.' She says by saying even if I am hungry she meant whenever a person seeks a job it is because he is hungry. Moipone had joined them. She says when A2 came in pointing the poison and brandy Moipone was not with them being in the sitting room. She had come in not after a long time. She had then confirmed her resolve not to do what A2 would have her do. The witness says she had then said she was so frightened she intended returning to her home. Moipone and the witness had then gone back to Moipone's. After sometime Molihi (P.W.4) had arrived saying their mother was present from home and she was wanted at home. After two days she had returned home and stayed at home. She says she went back to her maiden home which is also her marital home. She says in 1990 police from Matelile had found them working on water taps and had said to her she was to report at Seeiso's and she had obliged. She had been asked if she knew A1, A2, Molihi (A4) and Moipone and she had said she knew A1 who lived with her sister. She also said she knew A2 who was Moipone's friend and Molihi was her elder sister. The police said they had called because they were investigating Senyane's death. She did not know Senyane. She had secured a job at Roma next to the university. She says Mafefoane is far off for she was next to the university. She says she still works as a cook in a liquor restaurant belonging to 'Maseqao. She had made a statement to the police in 1992 when police fetched her from Roma while working at 'Matikiso's.

51

No question by Mr. Putsoane

Cross-examined by Mr. Nathane the witness says she did not know Senyane. She says she cannot deny Senyane did not take liquor for she did not know him. She says when A2 came to her to poison Senyane she had known A2 for two days. She says such a thing can happen if one has evil motives namely, to kill a person one has known for two days. Put to her no thinking person can do that the witness says she can. That A2 never made such a suggestion to her as she did not know her, the witness says A2 used her for the same reason of not knowing her and she failed. That if she did A2 would be the first suspect, the witness says A2 would say it's the witness and by virtue of A2 living with her husband yes she would be a suspect. The witness says as she was unknown she would not be suspected. She says she did Std. V at school in 1973. She says she gave evidence at the magistrates court in Maseru. She says when she said she was giving evidence for the first time she had not understood the question. Put to her that it's not correct to say she went to A2 the same day having regard to

what she said at the P.E. on page 1 that 'that day passed ...'. On this point the witness requests the court to bear with her as the events happened a long time ago and it is possible to mix up things. As to the issue in point that she is mixed up she says the truth is that a day passed but owing to fright she had mixed up dates. She says the

52

first day she was frightened. She says she forgot and it was then she forgot. As for p.2 of P.E. record the witness agrees she did say at the P.E. talking took place in the bedroom while here in this court she said in the sitting room - she says the latter is correct. She says at the P.E. she said it was in the bedroom because she was frightened. She says she was frightened at the P.E. by questions she had been asked. She says when A2 showed her 2 bottles she was in the kitchen alone with A2. The witness says she has already said this is an old matter and has appealed to the court to bear with her. She says the correct version is what she said at the P.E. and the reason for this is forgetfulness. As for the two bottles, she says one contained liquor and the other something different from liquor. She says she knew what it contained because of explanation given her and apart from the explanations given her she did not know what the bottles contained. She says this was in May. She says A2 did not go to Moipone's to say she was to kill Senyane, now she says she went. That since Moipone knew A2 looked for a job to be done, Moipone had taken the witness to A2's for the same reason. She says she was not taken to A2's by Moipone but A2 took her to her home. That they discussed question of domestic helper and nothing else, the witness says they discussed poisoning her husband and they disagreed. That before working for A2 as a domestic servant she was fetched by her husband from Moipone's, she disagrees. That the reason for looking for a job was because she had marital

53

problems, she says the reason was because her husband was not working and she did not have marital problems with her husband. She says her husband had not fetched her. She denies her husband had not allowed her to look for a job. That A2 never instructed the witness to kill A2's husband the more so because she did not know the witness, the witness says A2 is not telling the truth.

Re-examined the witness says the incident took place a long time ago about 10 years ago. P.W.6 Retšelisitsoe Senyane (P.W.3 at the P.E.) sworn states he lives at 'Mamotho's in the district of Maseru. He says he is literate and did Std.8 at school. He says he knows A2 before court who is his father's 2nd wife i.e. wife of Sefatsa Senyane. He says he knew A1 the day he was arrested and could not remember how long ago he was arrested by the police. On 29 May, 1990 he had met A2 at 'Mamothibe's where he resides. He lived at 'Mamotho's when then A2 stayed at Lithabaneng, Lithoteng. He says she reported to him father Senyane had disappeared. A2 had come to him at 10.00 a.m. She had not come to him by herself for she came with a man driving a peugeot whom he did not know. He had left with A2 for Lithabaneng and A2 had said it was the previous day i.e. 28 May, 1990 when deceased disappeared. He had found Senyane not present at Lithoteng where he stayed. He had gone to a school where Senyane worked being at

54

Lithabaneng Primary School and the witness says he had not found him. He had gone back to Lithabaneng where they resided and thence to 'Mamotho where he resided. The witness says A2 had not told him how Senyane disappeared. Asking her about his disappearance she had said she did not know when he left and whereto he disappeared. The witness says he went back to 'Mamotho's the same day; he had gone straight home. The following day on 30.05.90 he had contacted the police in Maseru. He came to the police to report that Senyane had disappeared. The police had questioned him as to where he stayed and how far the witness was from where Senyane resided and whether he was mentally well. The witness says Senyane was 76 years old then. The police had then said they would inform the witness of the result of their investigations. He had contacted the police on a number of times. The police had informed him they had found the body and some clothing at Phuthiatsana. The witness says it was after a month when the police made a report to him; about July, 1990. The witness has testified he left with the family team from the police where they had identified the clothing. The witness says when he found the report of the clothing and bones he was at 'Mamotho's. He had left 'Mamotho, called by his sister Motšeoša Senyane to the effect that deceased's clothing and bones had been found. He had then gone to identify the clothing. The witness says he was with Motšeoša, Nthethe brother of deceased, Morapeli elder brother of

55

deceased and Lebohang Poling. The witness says deceased is Sefatsa Senyane. The witness says they had gone to the C.I.D. office in Maseru. He says it was in July, 1990 though he forgot the date. He says they had identified themselves regarding the clothing and bones found. The police had taken them to where the clothing was. The witness says he did not know the police. The police had shown them the clothing and he had identified them as those of the late Sefatsa Senyane. He says he identified 2 blankets, a blue pair of trousers, a white Vasco da Gama (long winter pants), a black pair of shoes and a black belt. The witness says he knows the clothing for the deceased wore these in his lifetime. The witness says before he identified the clothing it was about 5 years deceased had been wearing them. The witness says the deceased wore the clothes on visiting them at home on Saturdays. The witness says the C.I.D. had then taken them to show them the bones and they had gone to Queen II's mortuary and were shown the bones by the police. He says he was shown a skull and lower jaw. The witness says he identified the bones, he knew the skull and the teeth thereon. He says he knew the skull as the deceased was clean-shaven, he says it is the clean-shaving that made him identify the skull - the late Senyane's skull. He says his father did not have a protruding forehead but a high raised forehead. He says deceased's head was neither round or flat but a high forehead. As for teeth Senyane had a full set of teeth but on the lower jaw or the left upper jaw he had a brown tooth.

56

He says when he was born deceased was already like that. The witness says he knew the lower jaw because it was found together with other bones. The witness agrees he sees one of the blankets with white and greenish colour. Another blanket is a donkey blanket (ID4), a blue/grey pair of trousers, the long men's underpants; he says there is no blanket and shoes. He says he sees the skull (ID1); he says deceased was not bald. The witness says his father's hair was far above the forehead. He says there was a full set of teeth though now he does not see it. He says both holes (dents) were there when he was at the mortuary. He says he does not see the brown tooth he referred to. He says these are the only identifying marks. The witness says there was a gap in between deceased hair on the skull; he says deceased's head was not big or round though he knew the skull as that of Senyane. He says he identified the

skull at the C.I.D. and postmortem examination. He says he sees the bones and he is not able to explain them. He says when he identified the skull A2 was absent. He says he is not the eldest of Senyane's sons for the eldest is Motaung Senyane and lives at 'Mamotho's. He says the reason deceased's bones were not buried is because in wanting to bury the remains of deceased A2 had stopped him in court. The late Senyane was to be buried at 'Mamotho being where his wife was buried. He says A2 is his stepmother because his mother died. He says it is a long time since the bones have been at the charge office and he wanted to fetch them. He wanted to bury them. He says it was

57

after the bones returned from Pretoria that he wanted to bury them. A2 had stopped him burying them before December, 1990 and the interdict had come as they were making arrangements for burial. He says the case was A2's interdict against, the witness and his brothers. He had been interdicted and appealed. The court had ordered that A2 bury the deceased without their presence. He says he was not satisfied with the decision. He says the interdict was made at the old High Court and he had instructed his lawyer to appeal and he had appealed and it was in 1990 but the appeal had not yet been heard. He says he does not know why the appeal has not yet been heard. He says his lawyer was Ms. Kotelo and he does not know who represented A2 though it was a male lawyer. He says he has had no discussion with A2 regarding the burial of deceased's remains. He says he has had no occasion to discuss deceased's disappearance with A2 . He says the gist of the application for the interdict was because A2 was saying they had no authority to bury deceased as she was their mother. The witness says A2 was not saying how deceased met his death. The witness says papers were read to him. He says day to day relationships between A2 and deceased were bad because since A2's arrival they had never lived in peace. A2 and his late father lived together from 1967. He says the reason for the tension was that A2 had chosen a lover (paramour) while his father was still alive. He says the relationship between him and A2 was that up to now they had not quarrelled. He says before the

58

case commenced before this court there was nothing in common between himself and A2. He says A1 having been given bail skipped his bail and A2 during same court sitting she disappeared.

Cross-examined by Mr. Putsoane the witness says he does not know when A1 skipped his bail for it was a long time ago. He says he did not see him run away. He says by saying he ran away is because he defaulted on his bail conditions. He says he does not know what the bail conditions were for he does not know what A1 was told. He agrees blankets are common in the market. He agrees he has not given any identifying marks of the items of clothing. He says he is not surprised the brown tooth is no longer there for other teeth are still there.

Cross-examined by Mr. Nathane to the effect that the witness can't say with certainty the clothing belongs to the late Senyane for the clothing is available to everybody, the witness denies saying these clothes belonged to the deceased for it is the clothing he wore. The witness says he did agree clothing had no distinctive marks. He says he can identify them as deceased's though they do not come from the same manufacturer. The witness says he knows the clothes as deceased's for he wore them; according to the witness, even if clothing is identical, the clothing was found together with deceased's skull.



The witness has testified that the distinctive mark is that much as clothing may be made from the same manufacturer the clothing is deceased's because it was found with his remains. He says when deceased's clothing and remains were found he was not present. He says he relies on what he saw and although he was absent he nevertheless identified the clothing. He says clothing is not similar, and this is late Senyane's. Referred to p.7 para.3 of the P.E. that before this court he said a black belt is greenish, the blanket whitish or as he said greenish/whitish and as to whether he agrees the two versions are different, regarding the belt and blanket, the witness says they are the same. He agrees he said the skull had a complete set of teeth. Put to him since the skull before court hasn't got a full set he cannot with certainty say that it is the same skull, the witness says he is now not surprised the set is now not full by reason of passage of time before deceased's remains were laid to rest. He says though he saw the skull ten years ago, it is the same skull he saw ten years ago. As for the brown tooth that his father was not the only one to wear, he says though many may have the same tooth and it is now not there because of passage of time, even if some have such a tooth, the deceased had a brown tooth on the left upper jaw and says he knows only his father who had a brown tooth and would dispute other people had the same brown tooth as his father. That there was nothing peculiar to identify the tooth as his father's, he says there is nothing more he can say. He says he has said

relations between him and A2 have always been good. That A2 overheard over the radio that the witness wanted to bury the remains the witness says he did not go to A2 to tell her he wanted to bury the remains after all it was not him alone and somebody could have informed her. He also says he had no means of informing A2 for A2 stayed far from him and he had no means to get to A2. He says he was not alone and could not make it to A2. The witness says she is telling the truth. Put to the witness that A2 kept a lover during deceased's lifetime did not please him, the witness says he felt wronged that A2 stayed with a lover and though he felt wronged, this affected his parents and he could not express displeasure. He agrees he pretended as if nothing was wrong. He says A2 went to court to interdict him and others from burying remains of the deceased. Put to him A2 went to court because she believed the clothing and remains belonged to her husband, the witness says he does not know that the court found A2 did so believe the witness says the court said the remains were to be buried by A2 and not by him. That A2 went to court on a belief the witness says he does not know.

Re-examined the witness says A2 aside, he feels wronged. He says it is incorrect to say whenever he is wronged he hates somebody. He says since identifying the clothing as that of deceased, nobody has come to him claiming the clothing to be his. He says since the interdict against him by A2, A2 has

not come back to him to say she no longer believes the remains to be her husband's nor has she gone back to court to revoke her earlier belief. He says to date nobody has come to him to say he is missing the skull and remains before court.

By court he says the items of clothing before court he has seen since 1997 when he lost his job. He worked in the mines. The reason he knows the clothing was because his father came wearing the clothing at 'Mamotho's where he came to see his children at his original home at his elder brother's home. He says he saw them again on the death of his younger brother's wife when his father put up at his home. The grey trousers was bought by his younger brother in Gauteng and had a paint stain with a tear at the end.

Arising by Mr. Nathane the witness says he did say there were no distinctive marks and had not mentioned the paint and tear.

P.W.7 D/Sgt. Tsiu (P.W.5 at the P.E.) sworn states he remembers 1990 when he was stationed at Mabote C.I.D. He has been a police officer since 1976. He remembered 18 October, 1990 when he was stationed at Maseru C.I.D. He says he is one of the investigators in this case. In relation to the case, on 18 October, 1990 him and his colleague namely D/Tpr Motlomelo,

62

D/Tpr Khanyapa and D/Tpr Lehata and the driver D/Tpr Raboqha they had left in company of A1 from Maseru C.I.D. to Semphetenyana at Phuthiatsana river. He had met A1 at the C.I.D. office and he was in custody. The reason for going to Phuthiatsana was to point to them a place at which A1 killed teacher Senyane. They had asked A1 to take them to the place. He says when he met Tšep.o Solane (A1) it was at Maseru C.I.D. office where he was in custody. He says when A1 took them to Phuthiatsana it was the second day since he had met A1. He says they went to Phuthiatsana at the instance of A1 by asking A1 to take them there. He says it was as a result of A1 's explanation during the course of their investigation that they went to the place. The witness says following Ars explanation they had gone to Phuthiatsana at 12.30 p.m. in an official vehicle. About 30 metres from the place they had left their vehicle owing to fields through which they could not drive. They had walked and A1 was in front and they were behind. Getting to Phuthiatsana they parked the vehicle 30 metres away and they alighted. When they alighted A1 was still with them and had said he was to show them the place and he pointed at it and he led them being in front and they had followed towards the place. They had come to Phuthiatsana river. There the river is wide and there is a curve. At the river bank there is a big willow tree where there is deep water and the river bank is about 2 metres high - the witness points to a place 8 paces away. As A1 kept on pointing the place

63

where he assaulted deceased Senyane, and as he pointed at the place I/Tpr. Motlomelo now an Inspector, was taking photographs. Other than A1 there was another person, namely 'Mapoloko Solane and hears lately she is Moliehi. He says she was present in court and as far as he is concerned she has given evidence (P.W.4). As A1 pointed places Moliehi ('Mapoloko) was present doing nothing and the witness says he spoke to her. In the like manner P.W.4 pointed at the place where deceased was assaulted and A1 was present and could hear what P.W.4 said. P.W.4 said: as we went past this place with deceased in front, A1 and Moliehi, she said it was at the time A1 hit deceased with an iron rod and the river was in flood at the time and after Senyane (deceased) had fallen into the river they went back. The witness says they had then returned to Semphetenyane and requested A1 to take them to deceased's (Senyane) home and A1 showed them the place; they had also asked A1 to go with them to his place to give them the weapon he used. They had gone to his home and from under the bed he handed

a serrated iron. They had then gone back to the C.I.D. office. He says he produced the serrated iron from under the bed, and he agreed it was the weapon he used.

The witness says they went to A1's home following A1's explanation. He says when A1 gave the explanation he was alright for he was not handcuffed. He says no pressure was exerted on A1 to give an explanation.

64

As for pointing at the river, no pressure was brought to bear on A1 to point out the spot where deceased was killed.

On 31 May, 2000 at 3.00 p.m. Mr. Nathane is not before court. At 15.34 p.m. Mr. Nathane arriving. Mr. Nathane says he found his electricity cut and went to negotiate its connection and telephoned to say he would be late. Witness warned he is still under oath. The witness says this is the weapon A1 gave to him. He says this is a serrated iron. He says he does not know what for it is used. The witness says after it was given him by A1 he took it as an exhibit before court and labelled it Exh. 130/90; 130 being exhibit No. and 90 the year, and the case being 75/7/90. He says the weapon has been in his custody and he hands it in as an exhibit - it is marked Exh. 5. He says after 28 October, 1990 they went to Semphetyane at the home of 'Mamotšeo Senyane (A2) to arrest her. He says he arrested her and gave her a charge of murder. He says before charging A2 he explained to A2 the reason he had come to arrest her; he says the exhibit was at the charge office and he confronted her with Exh 5. He says he asked A2 whether she knew the exhibit and she denied its knowledge. He says he confronted A2 with Exh 5 because A1 had said A2 gave him the exhibit. He had arrested A2 and brought her to the office. On 29 October, 1990 he had filled a submission form for Exh 5 to send to Makoanyane though he did not remember after what time. The

65

submission form was in the docket. He says in the course of his investigation after A2's arrest he had dealing with A2 and the deal was with regard to the filling of an insurance form A2 saying he should fill it in for her. He says he refused to fill the form. He says what was to be filled was cause of death in respect of Sefatsa Senyane. He says this was before the P.E. was held. He says at the point in time Senyane's remains were in custody of the C.I.D. police, Maseru. He says he had not acceded to A2's request. When A2 came to the office according to the witness, A2 had shown the witness an insurance form saying insurers had said the form was to be filled so she could claim the money for the burial of the deceased. He says the reason he refused was because she was a suspect in the killing of Senyane. The witness says she did tell him why, in particular, she came to him although it was not the first time the witness was asked to fill such a form. He says as he is an investigator, he is normally the one to fill the form and nobody else; he says this is the usual practice. He says he did deal with the bones, he fetched them from Makoanyane; these were a skull, ribs and an iron rod. He says the bones he has referred to are before court (ID 1-3). He says he fetched ID 1-3 from Makoanyane because he was an investigator in the case. He had fetched them from Cpt. 'Mapeete Molapo. Apart from the bones Cpt. 'Mapeete gave him a report by Prof. Olivier. The report was in connection with the bones and iron rod. He says this is the report - marked ID (6).

Cross-examined by Mr. Putsoane the witness says at the P.E. he gave his evidence on oath. He says there he said they went to Phuthiatsana in the morning. He says he did not say 12.00 noon but said 12.30 p.m. and the magistrate could have made a mistake. He says he also made a mistake to have signed for 12.30 a.m. He says he does not know if Khanyapa had been there before him and he cannot deny because he does not know. That A1 never volunteered to go to Phuthiatsana the witness says A1 did not come to them, he was in their custody. He says he was under his care. The witness says A1 had his liberty. The witness says A1 could not go where he pleased and could not go anywhere without their consent. He says while in their custody they control everything. Regarding this case, the witness says they expected cooperation. He says he did say while in their custody they controlled everything. Whether they controlled even a decision he might take the witness says that is not so. That accused was controlled physically and any decisions they might make, the witness says an accused person cannot make a decision of his own like going to a shop for if he wants to go to a shop he must be accompanied by a police officer. That the witness was hit twice on the chest with knobkerrie he denies. He says he did not control anything accused might say to him. He says A1 can make any allegation against him without him knowing why he makes it. He says it is not true he assaulted A1 for an assaulted person goes to see a Dr. That A1 still bears evidence of severe

handcuffing the witness says if a person is tightly handcuffed he sees a Dr. and cannot be admitted to prison if he has injuries. That A1 was so dominated they controlled what statement he was to make, the witness denies. That at the P.E. he did not tell the court A1 pointed the way to where they were going, he says he doesn't deny that for it is possible the prosecution did not lead him in this direction or directions of how to drive to the place, he says he does not recall. That before this court he did not show A1 gave them directions, he says he said A1 was to take them to the spot. That he gave them directions while on the way i.e. via his home before getting to the spot, the witness says he told the court they left the vehicle and he took them to the spot. The witness says from the C.I.D. A1 did not give or show them the way. The witness says he asked A1 to take them to the spot. Put to the witness he knew the place and drove A1 to the place, the witness says it was the first time to get to the place. That Khanyapa and Lehata had been to the spot before to fetch the bones the witness says he does not know that. The witness says it was him who asked A1 to point out the place and he did not know that Khanyapa and Lehata had been to the place before. He says when he went to Phuthiatsana with A1; Khanyapa and Lehata were present. The witness says A1 could refuse to take them to the spot for he had the right to refuse notwithstanding that he was under the witness's control. He says a person is at liberty to decline to go to a place. That A1 was afraid to refuse,

the witness says A1 is his homeboy and had no reason to fear him. The witness denies his was an order for it was a request. The witness says he suggested to A1 that he take him to the place. The witness also says he made the suggestion: is this the iron you used to kill? and A1 agreed. Put to the witness that A1 did not kill deceased with the weapon (Exh 1) or any other weapon, the witness says following his investigations it is A1 who killed deceased with the

iron rod (Exh 5). The witness says he received a report from the forensic expert regarding the iron and that the forensic expert said nothing about blood. That the iron rod has segments where blood can accumulate and even on the serrated parts blood can be found by scrapping the witness says he is not a forensic expert. He agrees the iron rod was subjected to intensive examination, that if the report does not reflect blood on the weapon it means the weapon was not used to kill deceased, the witness says in the report it is said the weapon was used. That it was probably used the witness agrees saying the possibility is that the person who used it washed it after all it was sent for forensic tests a long time after it was used. He says he did not see anybody use the iron rod (Exh 5).

The matter having been postponed to 12 - 14/07/2000 and 17 -20/07/2000, on 12/07/2000 Mr. Nathane is once more not before court.

69

Mr. Thetsane says he wishes to place it on record that when the matter was postponed to today for hearing apparently Mr. Nathane for A2 was not available. He had been in court at 8.30 a.m. and neither Mr. Putsoane or Mr. Nathane were in court.

Mr. Putsoane says he is ready to proceed and had not heard from Mr. Nathane. As for his late arrival he had transmitted a message that he would be delayed. Mr. Thetsane has suggested if counsel is going to be delayed the D.P.P. is to be informed of the delay. A2 says she last saw Mr. Nathane last Friday saying he would be in court. That the court is ready to proceed A2 says she requests to see her counsel.

Court: Matter is postponed to 13/07/2000 and it is ordered Mr. Nathane appear before court to explain the reason for his non-appearance today (12/07/2000).

On 14/07/2000 there is no appearance for accused persons. Mr. Thetsane says this is a 10 year old case and verdict is awaited by the interested and yet there is dragging of feet in the case. Matter is postponed to 05/09/200 - 08/09/2000 and 12/09/2000 15/09/2000 because of Mr. Nathane's illness.

70

On 04/09/2000 there is no appearance for A2, court is shown letter of 04/09/2000 from Mr. Nathane saying as he is attending conference he will not be able to attend court on 05/09/2000 because he is attending a conference in Zambia as representative of the Law Society on the Road Fund Board from 05/09 - 09/09/2000.

Mr. Thetsane has complained of the way Mr. Nathane goes about his business for if serious Mr. Nathane should have approached the court in advance of his proceeding to Zambia. The court has warned A2 to consult with his lawyer before 12/09/2000 to ensure her lawyer is before court and if for some good reason he will be unable to attend to inform the Registrar of this court so that fresh arrangements are made in advance.

On 12.09.2000 Mr. Nathane for A2 is before court and explains reasons for his absence the last time the case was postponed. Mr. Nathane is warned not to leave or act on matters of postponement too late as this inconveniences court.

P.W.7 is reminded he is still under oath. Cross-examined by Mr. Nathane the witness says the insurance form A2 asked him to fill was still with A2. It was given A2 filled. He says he assisted her fill in the form though he

71

showed that she was a suspect. He says he did say he refused to assist A2 fill in the form for she was a suspect. He agrees the two statements are not the same. The witness says he agrees the court cannot say he refused to assist her. That according to A2 she did not give him the insurance claim the witness says she did and he was not alone when she brought the form. That A2 is not illiterate, the witness says actually the form is not to be filled by her, it is to be filled in by the police officers as to cause of death. He says he did not consider it desirable to keep a copy of the form for himself. That the form never existed the witness denies for this was in the presence of other people.

Re-examined the witness says he was then with the then Sgt. Mokoroane who is now Senior Inspector and L/Sgt. Selebalo, L/Sgt. Khanyapa and Sgt. Lehata. He says there are many ways of filling in the form i.e. cause of death unknown, person coming with the form suspect in the case.

No questions by Assessor.

P.W.8 No.2409 D/L/Sgt. Khanyapa sworn has stated he is at present stationed at Maseru C.I.D. and remembered 1990 when he was stationed at C.I.D. Maseru. He says he is one of the investigators in the case and got involved in the investigating on 26 July, 1990 when already stationed at Maseru C.I.D. He says he knows accused persons before court. He says he

72

knew A1 at the C.I.D. offices in 1990 and does not quite remember the month. As for A2, he knew her in 1990 though he does not remember the month. He says he does not have a pocket notebook and may have misplaced it. On 26 July, 1990 he had received a report from the chief of Tsoapo-le-Bolila at Shelile's and as a result of the report he had proceeded to Phuthiatsana; the report was to the effect that boys had seen a human being's bones at Phuthiatsana around Tsoapo-le-Bolila. Having received the report he had gone to the place and met the chief in the morning hours at about 9 10 a.m. with Capt. Lerotholi, Policewoman Ramohau and Sgt. Lehata though then was a Tpr. The chief they met was Fako Ratšoane of Tsoapo-le-Bolila village who led them to the place at Phuthiatsana where he noticed bones like those of a human being at the bank of the river. He says the river was not then in flood. In the river below at backwater, they had noticed a skull like that of a human being; they also noticed some clothing - a grey blanket, another blanket grey and yellow, vest like a skipper; there was also a Vasco-da-Gama (long pants); there was a grey trousers, he says the colour of the trousers was lighter than the one worn by counsel - it was grey. There was also a belt and a pair of shoes. Shoes were black in colour; there was also a white jersey. Other than the skull he says he had seen some bones on the ground. They had taken the things to the C.I.D. and sent the skull to Queen II mortuary as well as the bones and the remains had remained in the family

73

until members of the family and next-of-kin came. He says he remembers Retšelisitsoe Senyane (P.W.6) who identified the remains found at the river as that of the deceased Senyane his father. Because of constant change of office shoes and belt could not be found. The skull and bones were sent to Makoanyane. Retšelisitsoe Senyane identified the skull and bones at the time they had been called to the mortuary at Queen II and the witness says when he identified them he was present. The witness says the items he has spoken of are before court. Counsel on either side agrees clothing, skull and bones have been sufficiently identified and it is not necessary for the witness to identify them. Clothes are mark Exh.4 collectively. He says the skull and bones were sent to Makoanyane by Lehata who in turn directed L/Sgt. Selebalo to send them for examination whether they are those of a human being; the witness says they were brought back but were left at Queen II mortuary until they were handed in court.

Note: at the P.E. bones were not handed in. He says the bones were in his custody save being handed in to the High Court. He says he formally hands them in as exhibits in the case - skull - ID1, pelvic bone - ID2, fibular bone -ID3 in Exh. 1 collectively (exhibits all before court but for hygienic reasons not handled). The witness says other than RetselisiLoe to the best of his knowledge, in his presence, he does not recall any other person identifying these bones. He says in his presence no other person identified the bones.

74

The witness says he met A2 in C.I.D. office in connection with this case and she was a suspect in relation to her husband's death. The witness says he does not quite remember what transpired between him and A2. He says he does not remember whether subsequently he met A2. The bones were not buried. To his knowledge there was a dispute in the High Court. He says he knows there was a dispute between Retšilisitsoe and A2 and the case had reached finality though he was not in court or read the judgment.

He says the exhibits were in police custody throughout and this is what he said at the P.E. The bones were kept at the mortuary until they were removed to Makoanyane. He says he does not remember for how long the bones were kept before they were removed to Makoanyane. He says they kept the bones until they were produced in court. He says they were shifting from one office to another. As they shifted from office to office he cannot say where they were kept. He says as they shifted from one office to another it was when being taken to Queen II and Makoanyane, back to Queen II to Bloemfontein. He agrees there are major points of difference between the skull as originally found and present skull. As to whether by reason of the points of difference we are talking about the same skull the witness says there was a distinctive mark in the form of brown tooth. He says the skull is in any event the same. He agrees he has not explained the transformation of the

75

skull from the time it was identified to now. Mr. Thetsane objects to the line of questioning saying the witness is to be shown the skull in order to comment on it. Though Mr. Thetsane had earlier said it was not necessary, the court agrees it is necessary. He says the skull had a brown tooth and now there is no brown tooth owing to moving from place to place. The witness says when he came by the skull there was a full set of teeth. He says when he first saw it it was without the lower jaw. He says at the P.E. and before this court he did not say he

took the exhibits before the Clerk of court as is the law of labelling. He says he did not do this, No cross-examination by Mr. Nathane.

Re-examined the witness says this is the skull he received from Phuthiatsana in that there is a scar on the head. He says the scar is on the occipital bone on either side of the head. He says he noticed the brown tooth was missing at the P.E. and also noticed that the other teeth were missing. Other than this skull he had had no dealing with other skulls. He says he does not recall colleagues dealing with human skull cases. Case is postponed to 13.09.2000.

On 13.09.2000 Mr. Thetsane says though summons served on the witness the managing director has said in order to attend court, a witness is

76

to obtain leave of absence and accordingly the witness is unavailable.

P.W.9 No.7480 D/Sgt. Chaka Lehata sworn has stated in 1990 he was stationed at Maseru C.I.D. He remembers July, 1990 in connection with the deceased Senyane. He says it was in July, 1990 when he received a report that there were bones at Phuthiatsana. The report was from the chief of the area. Consequent thereon he had followed the report by him and Cpt. Lerotholi. D/Sgt. Khanyapa and D/Sgt. Ramohau had gone to Phuthiatsana river. The area is called Semphetenyane near Letsoapo-le-Bolila. The chief of the area is Fako and he is not sure if he is chief or bugle. He says the chief took them to Semphetenyane with officers he has mentioned and on their arrival the chief had shown them the bones. He says the place where the chief took them nearby is a rivulet. He says on the left hand side as you go down had been found bones. Among the bones a human skull and a thigh bone and some others were found. Apart from these there were two blankets muddy and heavy. There was water into the rivulet. In relation to the skull, the blankets were about a metre and ½ away. He says senior police officer Ramohau took photographs and they took the bones to Queen II mortuary and clothes were taken to C.I.D. office; he says they immersed them in water to determine their colour; he says the result was a grey blanket, a grey-yellow blanket and he forgets the colour of the trousers; he says the shoes were black.

77

He says the skull and the rest of the bones were in water. He says there were pieces of flesh looking like that of a human being and there was a set of teeth looking like that of a human being. The skull had teeth looking like that of a human being. He says bones had flesh. He had had a close look at the skull. He says there was a crack on the skull though he is not sure if it was on the forehead or behind the head. He says Exh. 1 is like the skull he had referred to - the fracture is still there but it is now bigger - it is on the right-hand side towards the back of the skull. He says the fracture is above the right ear. As for the teeth, they are still there though he cannot say whether or not it is a full set. The skull is the same though it is now finer. He says he went into the air and made a publication regarding the clothing to say members of the public were to come to identify the clothes and said nothing concerning the bones. He says he remembers ex-officer Senyane responding and identifying the clothing as Sefatsa Senyane's (deceased). He says the identification has continued until they suspected the bones were those of the deceased. As there was a report of deceased's disappearance, as the C.I.D. team under Sgt. Tšiu as the principal investigator they had continued with their investigation and in October, 1990 had received a report leading to Mautsaneng at Mauteng



and the suspect who is A1 Tšepo Solane having found him he had identified himself; he says A1 was from a funeral. He had warned him, cautioned him and arrested him and taken him to look for

78

Moliehi Rantho whom he had also arrested and come down to Maseru with her. At Maseru C.I.D. investigations had continued and this was all, according to the witness, he did. He says A1 and Moliehi had led them to the scene of the crime. He says they were led there voluntarily by A1 and Moliehi. He says they were not forced to lead them to the scene. He had proceeded there with other officers and arriving there having been shown the way by A1 and Moliehi, the place they pointed out was where bones and items of clothing were found. He says the pointing was not forced. The witness says when they got to the place Moliehi showed them where she was standing, which was a little away from the scene. She had showed them where she was standing when deceased was killed. Tšepo (A1) also showed them where he assaulted the deceased. The distance between where Moliehi was and Tšepo was estimated to be between 5-7 metres. He says it is the distance between where the witness is and A1 - about 11 paces. Counsel agree it is 8 - 9 paces. Senior officer Ramohau had taken photographs. Senior officer Ramohau had not given evidence at the P.E. and they had returned to Maseru C.I.D. The items were in police custody and the skull and bones were sent to Makoanyane for forensic purposes to determine whether the bones were those of a human being or animal, male or female. He says he had sent the cast iron to Makoanyane - he points at it, it is labelled Exh. No. 130/90 though the writing looks like that of Sgt. Tšiu. The witness says he does not recall who

79

fetches it from Makoanyane though it has been in his custody and he wishes to hand it in as an exhibit, Exh.5. The witness says he has seen this river bed. He says he does not recall whether the water was clean or dirty. He says he is not able to say whether the river bed had stones. He says the river banks are not steep. He says if a person falls into the river hitting stones he can get injured. He says the difference is that a man falling into the stream water the force is not great and can only carry away a weak person. He says he did not know the man of 76 years and cannot say whether the river would have carried him down. He says it is possible if deceased fell into the stream while the river was in flood for in the case he would be washed down stream. As for the small fracture on the skull that it could have been caused by a bump on stones, he says he does not know what caused the fracture. The witness says the skull has some other cracks and he does not know what caused them. Put to the witness that Exh.5 (the iron rod) wielded with tremendous force could not cause the small fracture but a big one, the witness says he does not know. The witness says he inspected the place shown by A1 and there were no bloodstains for the place has much vegetation and a special machine would be required to determine whether there were bloodstains. The witness says he did not see blood. He says in April, 1990 the crime took place and they had come in in July and even were there blood it could have been washed off. He says A1 said he went to the place in February, 1990. He says clothing was

80

not taken for forensic observation before washing and this was a mistake. He says the clothing was washed and if A1 assaulted deceased there would be bloodstains and washing

them had hid or killed the evidence. He agrees if clothes not washed there would be bloodstains to prove that deceased was assaulted. The witness says when items of clothing were found they did not have bloodstains though they were muddy. That forensic experts would at least have found hairs matching the owner i.e. deceased, the witness says he does not agree that in washing the clothing vital evidence was removed or interfered with. The witness says he has already said that the clothing was muddy. That it is not enough to identify a person with clothing, the witness says he hears but even if there was blood it was difficult to say whose it was. The witness agrees identifying a person with clothing is not sufficient evidence. That bones not identified in his presence, the witness says only the clothes were identified. That bones not Senyane's the witness says he does not know. That A1's evidence will be that he was last at the scene on 16/02/90 the witness says he does not agree for they were there with A1 after he was arrested and they had gone to the scene with A1 in October, 1990 though he did not remember the exact date. The witness says he arrested A1 in October, 1990 and A1 took them to the scene in October, 1990. The witness agrees A1 was at the scene earlier. The witness says though A1 was there earlier on 16/02/90 to fetch a sheep, the evidence points to A1 being at

81

the scene in April or May. That there is no evidence A1 went to the scene in April or May, the witness says his investigations reveal A1 was at the scene in April or May. Put to the witness A1 left for his home in April, 1990, the witness says he cannot deny this. That A1 got acquainted with the scene for having gone there in February, 1990 the witness says he does not know that but he denies if A1 says he went there once. The witness says A1 volunteered to go to the scene and he did put A1 in a police van with other policemen. The witness says he arrested and cautioned A1 and A1 had given an explanation which the witness followed. The witness says it was as a result of the explanation that A1 said he wanted to show them where it all happened. The witness says if he did not say anything about an explanation this was a mistake and it depends on questions he was asked. That at the Charge office A1 did not volunteer to go to the scene of crime, the witness says he did for he was with Tšiu, Selebalo and Khanyapa. He says he denies he assaulted A1 with the others he was with though he does not know about the others. He says in his presence and presence of other police officers, A1 was not assaulted. That A1 never volunteered to go to the place but was taken there for he was not driving, the witness says this is true that A1 led them to the place much as they already knew it. The witness says A1 was saying go this way, go that way and denies this to defend himself. The witness says Moliehi was also present when they were taken to the place. The witness says

82

it is not true that Moliehi said she was escorted to the place for A1 and Moliehi took them to the scene. Mr. Nathane says he has a transcript for Moliehi said they were escorted there and asked to point out the spot. On the other hand, Mr. Thetsane says Moliehi's (P. W.4) version is that when they arrived at the scene they were asked to point out the place and she had said: 'this is the place.' According to Moliehi, A1 was present when she pointed the place where he assaulted the deceased. Actually, according to my record, Moliehi (P.W.4) is recorded as having said:

'when we got to the scene with the police we were asked to point out along with Tšepo. I pointed out the place and said: 'this is the place and this is where I heard the clapping noise —' when I said this is the place where Senyane was assaulted I was with A1 side by side.'

Put to the witness A1 never volunteered to go into the vehicle the witness says this is wrong. That they were shepherded to the place he agrees for they were under arrest. That they were told to point out the spot the witness disagrees saying they said the vehicle was to stop a little away as the path was bad and A1 and P.W.4 took them to the scene of crime and showed them where they were standing. That Moliehi (P.W.4) never said they were to stop the vehicle, the witness says he does not know. That A1 never asked any policeman to

83

stop the vehicle, the witness says one of them did stop the vehicle though he cannot say who it was who stopped the vehicle. That Moliehi (P.W.4) did not say she stopped the vehicle the witness says one of them stopped the vehicle. That the police in stopping the vehicle escorted A1 and P.W.4 to the scene of crime, the witness says they did not drive them to the scene. The witness says A1 and P.W.4 were in front in going to the scene. The witness says a man under arrest is always in front and not behind. The witness says he does not remember whether an explanation was taken from A1. He says he does not remember whether he wrote the statement for they were many. He says there perhaps could be proof if the docket is consulted.

Cross-examined by Mr. Nathane the witness says a person who says Exh I was found at Phuthiatsana river is right. The witness agrees he never said exhibits were found in a swampy, muddy area. The witness says he does not agree that what he said at the P.E. differs from what he said in court. He says a river bog and swamp are different. He says he did say bones had pieces of flesh. He agrees at the P.E. he had said flesh had been removed. He agrees the statements are different. The witness says he does not know what has made the crack larger though they have been moving from place to place. As for the other two cracks he says he does not know what caused them. He says when A1 showed them from where he was standing the skull was found about

84

1 ½ metres away. He says at the P.E. nobody asked him where the bones were found. He says at the P.E. he was not asked to explain. He says at the P.E. he was not asked to describe the place where the exhibits were found. As for the crack he had mentioned, he knows who caused it. He says if somebody is going to point out, he is always in front and if he is going to point out he travels with the police since he is then under arrest. In a suspect going with the police that is escort.

By Assessor the witness says the bugle reported what the boys had told him and he does not remember whether the police questioned the boys. He says the police had concluded the bones were similar to those of a human being. The witness says he will be available on Monday the 18th September, 2000.

P.W. 10 (P.W. 1 at the P.E.) 'Mapeete Pauline Molapo sworn has stated she is at present working at Mountain Brewery in the brewing section. Sometime in 1990 she was member of the L.M.P. attached to the forensic laboratory and her rank then was a Captain and she had

been attached to the laboratory section where she was head of the section. She had been head of the department since 1986.

85

Her educational background was a B.Sc. Degree in biology and chemistry at N.U.L. She had joined the RLMP in 1985 and was attached to the forensic department. She had gone to Scotland at a university where she did a graduate diploma in forensic science for a year. As a forensic biologist she had done blood classification and grouping. She says she sees the document. Sometime in 1990 she received this form, the form had been brought to the office by Dt. Selebalo and she had received it on 07 August 1990. The form is marked identification A (IDA). She says articles required examination and she had taken photographs and notes. She says the back of the paper describes what articles were brought for examination and the paper has a questionnaire to be filled. She says she was to carry out a test whether the bones were male or female. She says as there were fibres on the skull she could not say whether skull male or female. Age and sex could only be determined by a pathologist of which she was not. She says this is one of the items brought to her for examination, it is a human skull. She says there were other bones and an item like a cutting machine, these were extremities. She says the weapon she has referred to is the one before her which looks like a farming implement. She says the skull brought to her was a human skull without some teeth but with distinctive features with scars on it which were already on it when he received it. She says it has not got a lower jaw. If she remembered well, there was a lower jaw though she is not certain whether it

86

was attached to the skull. She says she made notes of what had been brought to her and took a photograph. She had not herself taken photographs but were taken by the department responsible. She says photographs were taken in her presence by the late Selebalo who died about 3 years ago. She had made notes of her findings which were in the police file. She had looked at the file this morning which was in police custody. She says she has the photographs which are shown defence counsel and are marked identification B (IDB). The photo shows the right side of the skull - the most damaged. She points to a hole on the right side and another hole on the right and says the two appear on the photo; second photo is the left side of the skull and points at a hole on the photograph, 3rd photo is the frontal part of the heard - something is not on the right socket and remaining distribution of the teeth -marked Exh. "A" collectively. She says the other bones were miscellaneous human bones - the skull had fibre tissue. She says she calls it fibre tissue because of its distribution and says the condition of the bone depends on weather conditions. She says she sees the bones but she is not a pathologist -she says this a pelvis. She says there is tissue but there is considerable deprecation - bones are collectively marked Exh.1. She says it would not be correct to say Exh. 1 (the skull) is not the one given her by D/Sgt. Selebalo. She says she packaged the bones and forwarded them to Bloemfontein laboratory to Prof. Olivier of police laboratory to determine sex and age and

87

whether it was a human skull. She had received items back plus the report. She says this is the report from Prof. Olivier.

Mr. Thetsane says he has agreed with defence counsel to have the report handed in as an exhibit. Mr. Putsoane says he has no problem the report being handed in though he does not necessarily accept the contents thereof. Mr. Nathane says he accepts the report - the report is handed in and marked Exh "B". The witness says the Prof, has said the injuries were consistent with being caused by the farming implement (Exh. 5).

Cross-examined by Mr. Putsoane the witness says there were marks on the skull when she received the exhibit. She says she does not know where the skull was found. She says when the skull was brought the set of teeth was not complete but there were more teeth than now. She says the teeth are delicately attached and need handling with care. She says she did not see a brown tooth though, according to her, the teeth are brown.

Cross-examined by Mr. Nathane the witness says the bones returned to Lt. Khomohaka. The witness says genetically monkeys are closer to human beings but distinctly different to a trained eye. She says what makes man different from a monkey is teeth.

88

Re-examined the witness says the teeth resemble those of a human being. Lt. Khomohaka worked in the same department as herself and received the items from her and he had noted them in the register and returned them to him.

By Assessor the witness says a layman cannot make a distinction between man and monkey. She says she has no knowledge of where the bones were found.

From 21.09 to 30.11.2000 Mr. Thetsane has been assuring this court of his intention to call Prof. Olivier. On 30.11.2000 finally Mr. Thetsane had capitulated by saying since counsel for A1 had insisted on Prof. Olivier being called it is the reason he wanted to call him but that both defence counsel had now agreed that the report by Prof. Olivier be handed in by consent in terms of Section 227 (iv) of the Criminal Procedure and Evidence Act, 1981. The report had been handed in by consent, read into the record and marked Exh. B. Postmortem report had also been read into the record, handed in by consent in terms of Criminal Procedure and Evidence Act, 1981 and marked Exh. C.

Crown Case.

91

and Senyane was present and paid him the 4 months. He says in leaving Senyane he had received a message from home that he was wanted. The message had come from his grandmother. He says the message from home was received the same year that the sheep was slaughtered. He says he reported to Senyane and A2 that his grandmother was saying he should go home to plough. Senyane had given him the money and asked him to return. He says he had told Moliehi he was going home and P.W.4 had suggested she accompany him and he had not agreed because he had said she was not known at home and he had gone alone. He says he agrees with Moliehi that he went home to plough in April. He says he was going to plough. Asked by Mr. Putsoane whether he had any quarrel with Moliehi (P.W.4) saying he went home in April, the witness says he has a quarrel with Moliehi saying it was in April. He says he quarrels with Moliehi saying it was April because he went home during the 10th month being a ploughing season month. He says he is positive it was the 10th month because he had gone home on two occasions the first occasion being during the 10th month

going to plough and the second occasion was during the 4th month when he was going to plough for a wheat crop. He says having left in April he returned on the 5th month when he did not meet Senyane for he had then not returned to Senyane's as he found work at the station. He says he does not recall the month when he was arrested though it was the same year he received a message to go to

92

plough. He says he was arrested at Mauteng. He says he did not go back to Phuthiatsana. He says after his arrest he was taken there with P.W.4 by police officers. He says the police took them there. He says he was not free for he was under arrest. He travelled in a van. The witness says he was at the back of the van with P.W.4 and the van was driven by a C.I.D. policeman. He says he did not direct the police where to go for they were driven to Phuthiatsana. The vehicle had stopped above the fields and a policeman had given an order to alight. They had alighted and walked along the fields. They had walked in single file with P.W.4 in front with the witness A1 following her. At the river P.W.4 had pointed saying; this is the place adding; this is where Senyane was killed. Asked to speak he says he had said he knew nothing. That P.W.4 had said he hit Senyane with an iron bar in February, the witness says he knows nothing. That it was on the occasion of fetching the sheep the witness says he has heard this and in any event Senyane did not die on the occasion of fetching the sheep. The witness says he had no reason to kill Senyane and at no time did he hit Senyane with a weapon. He denies he killed Senyane.

In answer to Mr. Nathane's questions the witness says he knows nothing about conspiring to kill Senyane with A2. He says A2 did not give him a weapon with which to kill Senyane. He denies he was a hired killer. The

93

witness says A2 did not give him money to kill Senyane. The witness says P.W.4 never gave him M40-00 saying it came from A2. He denies they returned to A2's after killing Senyane for he did not kill Senyane.

Cross-examined by Mr. Thetsane the witness says he is a Roman Catholic and can tell lies from the truth. He says he knows the Sesotho proverb that a beast is caught by horns and a man by what he says. That he has not been truthful he denies. He says he did say up to 1989 P.W.4 was his lover and they stayed together. He says in 1989 in going to fetch a sheep he had stayed with Moliehi (P.W.4) for a long time. The witness says he can count up to ten (10) and had not stayed with P.W.4 for 10 years for they had stayed together for a year and this is a long time. That P.W.4 said they stayed together for 3 years he says she is lying. He says 3 years is too long. That P.W.4's evidence was not challenged that they stayed for 3 years the witness says he does not know why P.W.4 was not challenged on this. The witness says he did not cohabit peacefully with P.W.4. That it is the first time he says this the witness says they quarrelled because of P.W.4's drinking problem. He says despite this he did not hate her and still embraced her as his lover. He says he seldom drank and now drinks excessively perhaps because of age. He says it is true he did not drink much then and he hated anybody drinking much. He had not left P.W.4 because he loved her. There

95

order that P.W.4's evidence may be disregarded, he says this is not correct but he is wrong not to have told his counsel these things.

He says he does not know how many months of the year there are. He says the 6th month is a winter month and he does not know its name. He agrees P.W.4 is not conversant with months of the year and he says he noticed this when she gave evidence. The witness says he does not know when Senyane died. He says he learned of Senyane's death on being arrested. The witness denies A2 came to his home where he was with P.W.4. He says A2 does not feature in these matters. He says it is wrong (according to his lawyer) that he was awakened by A2. He says it was put to P.W.4 that she was terribly drunk though not to the extent where she could not recall what was happening. The witness says he was not awakened by A2 and does not deny that what his counsel said is what he told counsel. That A1's counsel put to Moliehi (P.W.4): 'A1 says it was in February, 1990 when deceased was killed---- Mr. Putsoane stands up objecting that this is not what he said . According to this court from the record, it would appear this is what Mr. Putsoane suggested to P.W.4.

He says A2 normally comes to his home during the day. Put to the witness that his counsel said to Moliehi (P.W.4): 'when A1 left it was after

96

dusk, the witness says it was 4.00 p.m. Mr. Thetsane remarks he has lost count of stories which A1 has denied of his counsel. That being asked by his counsel P.W.4 had said it was 7.00 p.m. when A2 came to A1's home, the witness says he cannot deny. Put to the witness he gives the impression when he left deceased's it was daylight so people could have seen what happened as against P.W.4 that it was around 8.00 p.m., the witness denies. He says on going to Phuthiatsana they were from Senyane's. He says Senyane invited him by sending a child and they met at Senyane's home in presence of A2. As for fetching the sheep, A2 had said the witness was to go along with the old man. A2 had said he was to go with Senyane to fetch the sheep. The witness says he'd asked where the sheep was to be fetched from and it was said at Matukeng. He says he did not ask from whom the sheep was to be fetched. Put to the witness that A1's counsel in cross-examination of P.W.4 had put it to P.W.4 that deceased was awakened during the day when the sheep was fetched, the witness says the deceased was not awakened.

The witness says they went only as far as Phuthiatsana where they left the deceased. The witness says he met the deceased at 'lefikeng' bus stop at about 8.00 a.m. He says he found deceased at 'lefikeng'. That A1's counsel had asked P.W.4; at 12.00 noon deceased arrived with the sheep the following day, the witness says as to the discrepancy in time he knows 8.00 a.m. The

97

witness has testified he is aware the court will have to decide whether to believe Moliehi (P.W.4) or himself. That deceased did not arrive the following day at 'lefikeng' he says this is what happened. That on the day deceased died A2 called at A1's place according to P.W.4, the witness says this is not true. That it was at about 8.00 p.m, the witness says A2 did not call at his place at 8.00 p.m. He denies saying P.W.4 was jealous. That on the way A1 was reminded this was D-day to kill deceased he denies. Put to the witness after hearing this P.W.4 was loath to go into the scheme to kill and for this she had been promised death, the witness says

he does not admit this. Put to the witness that going with A2 and before crossing the road towards Pita's to their home A2 had said: 'I and Tsepo (A1) have agreed to kill Senyane this day' the witness says this is figment of Moliehi's (P.W.4) imagination for the story is unknown to the witness. A1 says Moliehi's (P.W.4) seemed mentally deranged. The witness says he did not tell his lawyer about Moliehi's (P.W.4) mental derangement and it depends on the court whether or not he will be believed on this score. The witness says Moliehi (P.W.4) was his girl friend and he does not know why she implicates him falsely, though the reason could well be that they were no longer on good terms. The witness says he did not even know that Senyane had disappeared. He says he has not asked A2 where Senyane is. The witness now says he did a long time ago ask A2 where Senyane was. That according to Moliehi (P.W.4) they had proceeded to A2's

98

home he denies. He denies Moliehi's (P.W.4) allegation that A2 had said him, Moliehi (P.W.4) and Senyane were to go to Phuthiatsana. The witness says they were to leave for Phuthiatsana during the day and this was the only time A2 had sent him with deceased to fetch a sheep at Phuthiatsana. He says he was in company of Moliehi (P.W.4) and the time was at 4.00 p.m. That the witness says it was broad day light and yet P.W.4 says it was at night is because he is hiding because he knows it was at night, the witness denies. The witness says it was Senyane who said a sheep was to be fetched from Matukeng and P.W.4 had elected to join them. He says A2 had asked P.W.4 whether she would make it and she had agreed. The witness denies he is conveniently removing A2 from the crime. That he does so because he has been paid to kill Senyane, he disagrees. That according to P.W.4 A2 gave him an iron rod shaped like a sickle with teeth, the witness denies this.

Put to the witness when he was given the weapon deceased had left, the witness denies. That A2 said he was to fell Senyane in deep water as said by her lover, the witness agrees though he says she was not speaking the truth. The witness says at Phuthiatsana the sun was still shining. He says at Phuthiatsana P.W.4 was falling and Senyane had said he was to return with P.W.4 and he would go alone and come back to him at Lithabaneng. The witness says when Senyane said they were to return, they were 4 kilometres

99

from their destination; he says they had travelled a shorter distance - about 1 ½ kilometres. Put to the witness Senyane never invited him to go with him, the witness says he is honest with the court. Put to the witness P.W.4's story is more plausible than his, the witness says he does not understand what P.W.4 said. Asked why he did not put it to P.W.4 that he said they were to call at A2's and P.W.4 had said it was late, the witness agrees he did not put it to P.W.4; that it was necessary to report to A2 as to how they parted company with Senyane and he did not do this because what he says is figment of his imagination, the witness disagrees. The witness says he reported to A2 the following day and A2 had said she was aware P.W.4 was drunk; he agrees this was not put to P.W.4.

The witness has said according to him deceased returned from Matukeng for they had met the following day. He says he last saw deceased when deceased was from Matukeng. He says he forgets what day of the week it was for he had then gone home. He says he went home a week after he had been to Phuthiatsana with deceased. The witness says he went home after receiving a message he was to go home. The witness says it is not correct to say he left for



home for fear of being arrested. He says when he left deceased was still alive. He says he left after Senyane made a feast. He says police came to him looking for him after he had been home for two (2) weeks. He

100

says when he left deceased was still alive. The witness says he does not agree when he left deceased had died. He says he has nothing to do with deceased's death. The witness says a person who says he killed deceased is maligning him. He says at present Senyane is no longer alive. He says he learned of this when the police came to his home. He says he did not discuss with A2 how Senyane met his death. The witness says he met A2 when he was from custody. The witness says he did not have time to meet A2 to ask her about circumstances of Senyane meeting his death. He says the police gave him no chance. He says when he said he wanted to meet A2 police had asked him what he was going to discuss with A2. The witness says after he was released from custody he had occasion to talk to A2 regarding circumstances of Senyane's death.

The witness says when he asked A2 as to where Senyane was A2 had said she too was looking for Senyane. He says at the time he met A2 about deceased A2 had said Senyane's bones had been found at Phuthiatsana at the time of looking for him. He says he met A2 at home. He also says he heard when it was said A2 applied to bury Senyane's remains; though the witness had denied hearing this, he now says he remembers. As to the suggestion by A2 that up to then she did not know where Senyane was, the witness says he does not know -; the witness says A2 knows where Senyane is. He says he did

101

not ask why, up to now, Senyane's remains had not been buried. He says he cannot deny the skull is Senyane's for he knew him while he was a live and now he cannot say whether or not the skull is his. The witness says he can't dispute the evidence that the skull is Senyane's. The witness says the police are not telling the truth that he gave them the serrated rod for it was produced by P.W.4 under the matt being the home where he (the witness) and P.W.4 stayed. Put to the witness it was never suggested to P.W.4 it was P.W.4 and not him who produced the serrated rod, the witness says he was not aware this should have been put to P.W.4 and that it was not put to P. W.4 the witness says it was his own fault. He says it is up to the court who to believe. He says if crown counsel persuaded the court to believe P.W.4 he would have no quarrel with that. He says the sickle-like weapon is dangerous if used for assaulting a person. He says the weapon can cause injuries only. He agrees if applied to human skull with considerable force it can cause injury resulting in death. That he voluntarily took police to where he assaulted deceased he denies. He says P.W.4 led the police to the scene i.e. Phuthiatsana. The witness says at Phuthiatsana he said they were at Phuthiatsana and P.W.4 had said: this is the place and this is where Senyane was assaulted by the witness (A1). He says when P.W.4 said this he denied saying she was not telling the truth as he knew nothing concerning Senyane's assault. The witness says the police did ask him about the Phuthiatsana

102

matter but it was not true they showed him where he assaulted Senyane. The witness says he did show the police where he parted company with Senyane at Phuthiatsana. He says the question of sheep is not smokescreen.

Re-examined the witness says other than P.W.4 nobody has said he murdered Senyane. He agrees P.W.4 did come to him at home but she had not asked him why he was running away from the police.

On 12 January, 2001 owing to the absence of Mr. Nathane matter had been postponed to 15 - 16 January, 2001 and on 15 January, 2001 owing to Mr. Nathane's absence matter had been further postponed to 27 - 28 February, 2001 and 01 March, 2001. On 27.02.2001 matter postponed to 28.02.2001 on account of Mr. Nathane's illness and on 28.02.2001 matter postponed to 15 - 18.05.2001. On 15.05.2001 matter postponed to 16.05.2001.

On 16 May, 2001 Mr. Nathane called D.W.2 'Mamotšeo Senyane who sworn had stated she resided at Lithoteng, Maseru and knew Sefatsa Senyane who in his lifetime was her husband. She says she knows A1 in this case her means of knowing him being that he was employed by her husband to do garden work towards the end of 1988. She says she is aware that A1 and

103

herself are charged with murder of Sefatsa Senyane. She says she last saw Senyane in 1990 and if she remembers well it was May, 1990. She says in the morning he got missing in his bedroom being in the kitchen where he slept. Prior to his death according to the witness Senyane was a teacher at Lithabaneng school. She says on disappearing she had waited for a while though it was not too long for she knew he was to go to school and she had reported to the headman of the village Lechaka at Lithoteng. She says Lechaka testified as P.W.2 in court. She says since her husband's disappearance she has not seen him since. She says she knows 'Mathuso Makhetha (P. W.5) her means of knowing her being when she was brought by P.W.5's cousin one Moipone on the occasion of P.W.5 looking for a job. She says at her home they had a discussion to the effect that she was still looking for a domestic helper and P.W.5 had accepted to do domestic duties; she had not returned to her but had instead received a message to the effect that she had returned home. She denies P.W.5's evidence that the work for which she was wanted was a difficult one. That she (A2) also said deceased was treating her children badly and P.W.5 was to help poison deceased the witness denies. That she gave P.W.5 a small bottle of poison and liquor to pour into deceased's liquor she denies for deceased did not take liquor all his life. She says she knows Moipone for they resided together and was at the material time her neighbour. She says she also know Moliehi (P.W.4) and had known

104

her on visiting her cousin, Moipone. 'Mathuso (PW.5) and Moliehi (P.W.4) are Moipone's cousins. The witness says she knew Moliehi (P.W.4) a little and cannot recall when she first knew her. That according to Moliehi (P.W.4) A1 and herself (A2) conspired to kill deceased the witness denies. That she went to A1 with Moliehi (P.W.4) for the purpose of killing deceased she denies. That though P.W.4 drunk she (A2) had threatened killing P.W.4 if she did not fall into place, the witness denies. That according to P.W.4 she awoke her husband to accompany P.W.4 and A1 to fetch a sheep, the witness says this is impossible for she would not give orders to deceased. That she gave A1 the iron rod she denies; she also denies after the mission P.W.4 returned to her home. The witness also denies in the morning she gave P.W.4 M40.00 to give to A1 and calls such a gesture surprising. The witness says she recalls the occasion when A1 and deceased went to fetch a sheep being about February, 1990;

according to A2's evidence, the sheep was to be fetched to slaughter for her younger child. The sheep had arrived and necessary rituals performed. The witness says when deceased disappeared A1 was no longer working in her home. She says she cannot recollect when deceased's remains were found but it was after a few months he had disappeared. The witness says she was called by the police to identify deceased's remains at the C.I.D. She says she was told things were found but she was not shown them. She says she was not told what these things were and she had returned home.

105

The witness says she recalls what deceased was wearing when he disappeared being a brown corduroy, a scotch shirt (red, grey and yellow); a jacket (scotch); brownish and yellowish i.e. check jacket and a white T-shirt; a short underwear, and a black pair of shoes with no laces. Prior to deceased's disappearance the witness says she had been married to him in 1967 when she was 19 years old and deceased 50+ years. The witness says there was no reason to kill her husband. She says generally speaking before his disappearance relationship were warm being from the beginning to the time of separation. She says she does not know where her husband is. She says she did not kill him or order that he be killed. She says A1 stopped working for them about April, 1990 when he left. She says since deceased disappeared she did not have occasion to meet A1 or P.W.4. She says in 1990 she was a hawker and had done Std. VII at school. Other than A1 working in their garden the witness says she had no other relationship with A1 nor did she have any personal discussion with A1 for the reason that she was not in a habit of discussing anything with him and spoke to him only as an employee. No questions by Mr. Putsoane.

Cross-examined by Mr. Thetsane the witness says she is positive she was on the best of terms with her husband and this was so. She says she never reported to a family member about her dissatisfaction with the deceased. She

106

says she has never complained about deceased's sexual inactivity. She says she could never disclose her problems to Nthethe because he was younger than Senyane. She says she has never complained to Nthethe's father and her relationships with Nthethe's family were good. She says there is a reason she is being implicated falsely. She says when she got married nothing showed there were relations between Senyane and Nthethe's family for when she was married the two families were not friendly to each other. She says the Nthethe's were not happy with her marriage to Senyane. Sefatsa the deceased and Morapeli did not seem to get on well together. She says even between herself and the Nthethe's family relationship were ordinary.

The witness says her house has three rooms one of which is a bedroom, another a kitchen and a sitting room. She says although relationships were cordial deceased preferred to sleep in the kitchen for warmth. She says though where relationships are good husband and wife sleep together and when not good sleep separately, with this proposition she agrees though in their case it was not so. She says she knows one Emile a man and Dr. who assisted in the family; she says Emile is a medical Dr. and at present was at his home at 'Masemouse. She says when deceased lived with her Emile was already practicing medicine and deceased knew him. That deceased complained about the Emile affair with her, the witness denies this saying

whoever makes the allegation against her is implicating her falsely. She says she did say she knew 'Mathuso Makhetha (P.W.5) with whom they discussed employment issues. When she left, it had been agreed to take up employment but she had not turned up because her mother had come to fetch her by reason of the fact that her husband had arrived. Put to her her evidence was P.W.5 had just vanished the witness denies. She denies she fetched P.W.5 for a specific purpose for afterall, she did not know her. She says P.W.5 was introduced to her by Moipone and when she saw P.W.5 she was seeing her for the first time. She says they had met at her home and meeting for the first time there was no bad blood between the two of them. She says she has denied she asked her to kill her husband. She denies she asked her to poison her husband. She says it is surprising she asked P.W.5 to poison her husband for, since Senyane did not partake of liquor she would not ask that poison be poured on liquor. She says it would seem for no apparent reason P.W.5 did not like her. She agrees a person can plot one with others. The witness says looking at things now, she suspects Moipone and part of Senyane's family have hatched a plot against her. The witness says Moipone stayed with Matsepe of Lerotholi family like herself. Matsepe having left his family came with his child of his elder wife saying he does not understand how he parted with his family and for this Moipone was not happy. On arriving Moipone was not satisfied with this and as she could have been in the kitchen and

unhappy, it is the reason relationships between her (the witness) and Moipone could have soured. She says Moipone was saying she (the witness) did not support her and hence the bad relationship between her and Moipone because she was at odds with Matsepe - she says this goes for P.W.5 and events happened before P.W.5 came to her home for employment and although relationships between her and Moipone were not good she had decided to engage P.W.5; put to her this makes no sense and P.W.5 is to be believed the witness disagrees P.W.5 is to be believed by court. She says she had not had bad relationship with P.W.4 much as she stayed with A1. She says P.W.4 sometimes visited A1 at her home. She disagrees she (the witness) and A1 conspired to kill deceased. She also disagrees the same night deceased disappeared it was planned to kill deceased. She says she does not know why P.W.4 implicates her falsely. The witness says P.W.4, P.W.5 and Moipone are cousins. That it is for the first time the court is told of sour relations between P.W.4, P.W.5 and Moipone, the witness says she is doing so because she is being asked. The witness says she told her counsel of her suspicious against P.W.4, P.W.5 and Moipone.

Mr. Thetsane continues cross-examination of D. W.2 who, warned to tell the truth -. Mr. Thetsane intervenes says the right position is that A2 complained to Nthethe that Senyane was not satisfying her. The witness

denies and as an after thought she says relationships between her, P.W.4, P.W.5 and Moipone are not good. She repeats P.W.4 and P.W.5 are implicating her falsely. She says it's not all lies, for they have mixed the truth with false testimony. She says she has not had quarrel with these people. The witness denies it's her who has not been honest with the court. As for now, the witness says she does not know where her husband is for he has since disappeared; she says her husband's whereabouts are unknown. She says he disappeared in 1990 and has not

been heard of since. The witness says she reported to the police that she was looking for Senyane and she had been trying to find the whereabouts of deceased. She says she had not mentioned this in her evidence. That she conducted no search for her husband she denies. She says she does not want the court to presume that her husband is still alive for nothing shows he is still alive. She says she did hear something but not from Senyane. She says she consulted witchdoctors, the C.I.D. visited relatives in Bloemfontein all in vain. The witness says she first reported to the Senyane family in Lesotho. The witness says Senyane's first family came to her from time to time. She says it's an old matter and she cannot say how many times consultations with Senyane family have taken place. She says from 1990 she went to the police when called by them. She believes she went to the C.I.D. in 1990 and 1991 where she met the late Penane in 1991 and asked him how far they were with the investigation of

110

Senyane's disappearance.

The witness says one witchdoctor had said Senyane was still alive locked up somewhere; the witness says she believed this though she does not remember the year. She says Senyane's original home is Khololikane, Maseru district. She says Khololikane is near Ha Tlali, Koro-Koro area. She says she never said Senyane was to fetch a sheep for he went to fetch it himself. She says in fetching the sheep Senyane was with A1 and P. W.4 expected to return the same day. She says deceased left at about 1.00 - 2.00 p.m. The witness has testified Senyane was to leave with A1 by her (A2's) arrangement with Senyane. She says she saw them leave. The witness says Senyane said he was to go with A1 so he could assist him (deceased). She says she heard when A1 said along the way he parted with Senyane; she says she got this information from Senyane when he arrived the following day. She says Senyane did not return the same day and A1 had not reported to her the same day they left. She says A1 did report to her the following day that they parted company with Senyane and Senyane was around. The witness says A1 advanced no valid reason why he parted company with Senyane. The witness says Senyane said he was hurt by things P.W.4 wanted done for she was drunk. She says A1 had said Senyane made him return on the way. Put to the witness that A1 said he returned on the way with P.W.4 and the following day came home with

111

Senyane, she says Senyane came alone to 'Lefikeng' from where he sent a boy to come with a wheelbarrow. She says A1 and Senyane came together and it was after their arrival she learned A1 had returned on the way. Put to her this is figment of her imagination for this never happened, the witness denies. Put to her the correct position is that stated by P,W.4 she denies. As for the evidence that remains before court are similar to Senyane's the witness says she has heard this. The witness says she denies the remains are similar to those of Senyane. She says the basis for her denial is because she basis herself on the clothing, the skull and clothing. She says she disagrees the remains are Senyane's; she says she can't say the remains are similar, and denies they are similar. She says the remains are not similar to Senyane's, they are different and are not Senyane's. She says she was married in 1967 and they parted in 1990. The witness says she did hear of Senyane's remains from the C.I.D. who said she was to identify them though they did not show them to her she says she found Mokoroane. She says she did make an application to court disputing Senyane's body. She says it is an application in which she interdicted some people from burying Senyane. Shown the

application she says it is the application she made and points at her signature in CIV/APN/194/90 being

Applicant A2 v. Retselisitsoe Senyane & 3 others.

112

She says in the application she was interdicting the respondents from burying the remains of Senyane. Put to her at para.7 she knew where Senyane was and yet this differs from her evidence before court, she agrees her affidavit was read back to her and agrees there is a difference between her evidence before court and what's contained in her application. She says the application was before the High Court and the presiding judge was Lehohla, J. She says although in the application she says she was shown the bones the fact is she was not shown the remains. She came to court to stop the burial because she believed her husband dead. She says when she saw the remains at the magistrate's court she changed her mind. She says in the application the remains were released to her and they appealed against the judgment; she says she did not inform the family to go ahead with the burial of the remains as she was not pursuing the application anymore. She says the appeal was dismissed on a technicality and judgment remains in her favour. Put to her her conduct is consistent with the fact that she knew remains were Senyane's, the witness disagrees.

The witness has testified under cross-examination that when it was finally agreed the family was going to work together it was before she saw the remains. She says thereafter there were no further consultations until she was arrested and the period could have been five (5) months or more. She says

113

under arrest the police did not show her the remains. She says she did not bury the remains for as she was about to do so she was called to the C.I.D. where she was told to wait. She says as she had won the case to bury, she waited about 5 months down the line without burying. She agrees they had reconciled with the family and she was arrested after 4 months though something happened. She says the police stopped the court order and this is the reason she did not bury. Notwithstanding there was reconciliation and she did not return to family or bury, the witness says the court is to believe her; the witness says she told her counsel what she says. Put to her it's a lie she did not reconcile with the Senyane family, the witness says she did. She says she heard when Tšiu (P.W.7) said she came to have a form filled in to claim insurance for the death of her husband and she says she had not gone to P.W.7's office for the purpose as claimed. She agrees she went to the C.I.D. but does not know why P.W.7 says he went to his office to claim insurance for her husband. She says they met on several occasions with P.W.7 but not on account of the insurance claim of her husband. She says first she had been called about her passport; secondly, P.W.7 had gone to her home. Put to her there is a Sesotho saying that while a cow is caught by its horns, a person is caught by what he says, the witness says she knows the saying adding that she insists as counsel asks her, the remains before court are not those of her husband and she denies she had a hand in the killing of her

114

husband. She says she denies the remains are those of her husband. She says identification of the clothing is wrong; she says she did not tell the witnesses deceased was not wearing the

clothes mentioned but some other clothing. She agrees witnesses were not given an opportunity to comment on her version of the clothing deceased wore. That this is figment of her imagination she denies. She agrees in her statement she said she identified the clothing. The witness says she turns against what she said at paragraph 8 of her affidavit because what's true is what she is telling the court. Put to her when she moved the court in her application she wanted to be believed, the witness says she does not know. Asked whether she knows a chameleon she says she does not know it though she hears it changes colour. She says she is not saying the court should believe in something like a weather cork which faces wherever wind blows. She says she has seen the iron rod which when applied with force it is lethal especially when applied to an old man like Senyane. The witness denies she gave A1 the weapon for she did not give it to A1. She says she does not know whether A1 gave the police the weapon or whether P.W.4 saw the weapon. She says they are not enemies with P.W.4. She disagrees she killed Senyane or that the remains before court are Senyane's. The witness shown the remains she says she does not know what they are and does not deny they are human remains. She says she cannot say the police have falsified the clothing. Put to her herself and A1 planned deceased's death

115

and the plan succeeded, she denies.

Re-examined the witness says it is true she had an affair with Emile. She says she has not seen Senyane's skeleton before disappearing; she says prior to seeing these bones she had not seen human bones. She says when bones before court were found she was absent. She says she learned from the C.I.D. of the remains and what she deposed to in her affidavit was hearsay.

By Assessor the witness says their house is 3 -roomed. In the sitting room were a 2 x lounge suits. In the kitchen a stove, wall unit, entertainment unit, sideboard. There is a radio and heaters in the lounge; a bed, 2 x wardrobes. She says she has six children and a domestic helper; boys slept with their father; the shack was used for the gardener. She says deceased chose to sleep in the kitchen mainly because it was warm in there. In warm season he slept in the bedroom. She says heaters are electric. She says it was no good for deceased to sleep in the kitchen but then deceased had chosen to do so.

By Court. She says by looking for a job and leaving on an excuse P.W.5 wasted her time. She says Emile is 48 years old. She says the court is right to have said having not seen a skeleton before the witness should have said

116

she did not know whose skull it is.

Arising by Mr. Thetsane she says she could not put up in the kitchen for it would not accommodate them all.

Arising by Mr. Nathane she says the youngest child was 4 years old.

Defence case.

As for P.W.1's evidence, the witnessed testimony is important in that she does not seem to have had an axe to grind. She is closely related to A2 and deceased. That A2 was in love with Emile during deceased's lifetime, in this the witness has been vindicated in that although A2 initially denied the affair, during re-examination she admitted she was in love with Emile. A question which arises is: can the assertion that A2 got rid of deceased in favour of Emile be discounted? Has to be remembered that deceased was an old man in his winter months and Emile much younger. This court cannot but take into account the fact that deceased was made to sleep in the kitchen however much A2 denies saying deceased chose to do so for warmth's sake. Crown evidence has been that deceased slept in the kitchen because he was unwanted by A2 and Emile preferred. On the aspect of Emile's association with A2, the latter has blown hot and cold - now denying she was in love with Emile and

117

later admitting they were, afterall, in love. In this respect, P.W.1's evidence is to be preferred.

As the confusion which reigned whether or not deceased had disappeared or disappearing had surfaced, it has to be remembered that 'Mahlalele gave no evidence before this court. If the confusion was in P.W. 1 's mind, the perception is always that a person having disappeared he will somehow turn up and not turning up one has to face the reality.

Concerning P.W.2's evidence, it would appear A2 went to him as chief to report deceased's disappearance. What's strange is that according to P.W.2, A2 asked him to zip up about deceased's disappearance. Moreover, I am not aware that A2 in her evidence denied this. That the chief was asked by A2 to keep mum is more likely - he is not a member of the family, he is a typical independent witness with no reason to smear A2; afterall, A2's husband had disappeared and it was necessary to publicize his disappearance. Unless A2 had a guilty conscience, why was it necessary to make disclosure of a man who had disappeared a secret?

As to P.W.3's evidence, it was this witness's testimony that A2 had said as to deceased's disappearance, deceased had gone out and it was evening and

118

he never returned. And yet, her explanation of how or when deceased disappeared had been that, according to P.W. 1, in A2 going into the kitchen at night to take pills, she had found deceased missing. A2's evidence before this court was that deceased got missing in the kitchen where he slept this explanation differed from that given P.W.3 by A2. Inconsistent explanations are hardly reasonable. As to identity of deceased's remains, owing to passage of time, what with oxidation and weather conditions, they have depreacted to an unrecognizable degree. This was a fair witness and I have had no reason to disbelieve him. I cannot ignore the fair manner in which members of the family treated A2 notwithstanding their reasonable suspicions against her.

P.W.3 has said among other things he identified deceased's clothing because this looked like him. This does not surprise me. It is not only clothing; a person who has lived in particular surroundings takes the form of the surroundings; if he lives among monkeys, he adopts monkey ways; a civilised person living among savages becomes, a savage, vice-versa.



P.W.4 was sworn in as an accomplice before this court as was the case at the P.E. She has before me resisted the idea of being called an accomplice for she says she did not help kill Senyane what happened being that she was forced to join A1 for fear by A2 that she would tell. She has said afterall she

119

was drunk. Despite her denial that she is an accomplice and much as she claimed she was threatened (and I do not think the threat was compelling enough), P.W.4 associated herself with the crime by accompanying A1 fully aware of the reason for the mission; notwithstanding that she was drunk as she said, she condoned the conspiracy. If she was aghast at the conspiracy as she said, once the conspiracy was hatched one would have expected her to have made a report to authorities. As I have said, I am not satisfied that A2's threats were sufficient to influence P.W.4 into silence. What disowns P.W.4 of her protestation of insobriety and threats and makes her an accomplice is the fact that P.W.4 accepted blood money from A2 on behalf of A1. Not only this, she protested to A2 that the M40-00 given her was not the money promised A1. I will deal further with this evidence intra.

As for P.W.5's evidence, this is hardly surprising. People do not want to take responsibility, they prefer to pass the buck. Sesotho legend has it that instead of dispatching an old person, animals are allowed to run over him so that it may be said he was killed by animals. I cannot accept that P.W.5 for no reason decided to frame A2; on the contrary, P.W.5 established a pattern as to A2's intentions and I accept this evidence.

P.W.6's evidence is a damning account of A2's credibility. According

120

to him, A2 reported to him the disappearance of deceased on 29 May, 1990 saying deceased had disappeared the previous day being 28 May, 1990. Has to be taken note of that this is the only time A2 reported the disappearance of the deceased. A2 accepts that deceased disappeared on 28 May, 1990 or thereabout. Does it matter that P.W.4 said deceased disappeared sometime in February? It seems to me where crown evidence is confused but the confusion in material respects finds support in defence case, it is immaterial that crown evidence is confused. The witness has further testified his search for deceased was in vain and that in any event, he identified deceased's clothing and remains.

Primarily P.W.7's evidence has to do with pointing out which I intend to deal with later. Exh. 5 was also found by the witness where A1 and P.W.4 lived. In addition this is the witness to whom A2 came to have an insurance claim form filled. I have found no reason why the witness would implicate A2 falsely.

P.W.8 is a policeman who, as a result of the report he received repaired to Phuthiatsana where it was alleged human remains had been found. This court is not an expert in these matters but has no reason not to believe that alluvial deposits and sediments may not lodge themselves along the banks of

121

the river, especially where such a river has no vegetation. After the floods though, sediments may lodge themselves along the banks of the river by reason of mixed and overgrowth. The point to be made is that with a river in flood, sediment is swept down the river and is unlikely to lodge itself midstream.

The evidence of P.W.9 has made the position of deceased's remains much clearer. According to this witness deceased's remains were not found on the riverbed or as it were mainstream but in a rivulet or tributary of Phuthiatsana river. A rivulet or tributary flows briefly and only at the height of a rainstorm and as soon as rain stops it ceases to flow strongly - the reason the remains were found. According to the evidence before me, except the Senyane family, nobody has claimed clothing or human remains deposited at Phuthiatsana river or its tributary. As to police witnesses, they are witnesses like any other witnesses unless there is proof of abuse of power or nonconformity with the rules and there has been no such proof. On the contrary, their evidence has run well and I have believed it.

P.W. 10 said to be a forensic biologist with blood classification and grouping qualification, has given evidence that the remains she examined were those of a human being but as she was not so qualified, she had sent the

122

remains to a pathologist Prof. Olivier of the University of Orange Free State to determine the sex and age of the remains.

So far as Exhibits "B" and "C" are concerned, the doctor's examination of the deceased's skeleton as reflected by Exh. "C" does not reveal that there were impediments in the examination of the late Sefatsa's skeleton. It has appeared to be ordinary skeletal examination. At least the Dr. has not remarked that he was confronted with problems in the examination of the skeleton. From the evidence, there is no doubt that the skeleton which the Dr. examined per Exh. "C" is the same one which P.W.10 sent to the pathologist Dr. Olivier. Indeed it was the same one identified, amongst others, by P.W.6 as his father's remains. The court finds that the chain in the identification of deceased's remains is consistent; has not been broken and that the same bones which were found at Phuthiatsana are the same bones which landed with the police, were variously taken to Queen II hospital thence to Makoanyane for forensic testing and transferred to Prof. Olivier at Bloemfontein by P.W. 10, returned to P.W.10 and thence to this court where they were handed in as exhibits (Exh. 1 collectively) by P.W.8.

Since the bones (Exh.1) found at Phuthiatsana were found by the Dr. to be the skeleton of Edmond Sefatsa as identified to him by Nthethe

124

'an iron rod', 'serrated iron', 'cast iron', 'cutting machine' and 'farming implement' by witnesses was one of the items which P.W.10 sent to Prof. Olivier for examination. Unless the Prof, was sent the weapon and saw it, it is not understandable how he could have referred to 'a instrument such as the exhibit shown to me'. Has to be recalled that Prof. Olivier's evidence was handed in by consent.

In support of the proposition that the late Senyane's remains were positively identified A2's evidence has also to be taken into account. She has told the court that she, by a sworn statement in judicial proceedings claimed Senyane's remains as those of her late husband but had subsequently changed her mind. In changing her mind, according to her, there was already a judgment in her favour which to date prevails. As to the conflicting statements she made, her defence appears to be that she claimed her late husband's remains bona fide believing the remains to be those of her husband but on close scrutiny had changed her mind. It would appear where a claim of right is bona fide, even if mistaken, the claimant is given benefit of the doubt.

As for A2's conflicting statements, I have said that in separate judicial proceedings A2 had by affidavit claimed the remains as those of her

125

late husband Senyane and in these proceedings under oath she had disclaimed the remains as those of her late husband. When a person makes two conflicting statements and the two statements are subject-matter of judicial proceedings, it would appear this has to do with the credibility of a witness though at this juncture I am to caution that because a witness has lied in one or other respect(s), it is not the reason to reject his/her evidence in toto or as it were, outright. This court is of the view that the crown has done enough to identify the remains as those of the late Senyane. Even if I am wrong that the remains have been sufficiently identified as those of the late Senyane, there is, however, authority for the proposition that such evidence can be afforded by the accused and that this is sufficient (see *R. v. Davidson*, 25 Gr. App. R.21, CCA). It has, in addition, been decided the fact of death is also provable by circumstantial evidence notwithstanding that neither the body or any trace of the body has been found (see *R. v. Oncefrejezuk* (1955) 2 Q.B. 388. Gr. App. R.I. CCA) though, before the accused can be convicted the fact of death should be proved by such circumstances as render the commission of the crime certain and leave no ground for reasonable doubt. Moreover, the circumstantial evidence should be so cogent and compelling as to convince a jury that no rational hypothesis other than murder can the facts be accounted for, *ibid*.

126

And in *Att. Gen's Reference* (No.4 of 1980), 73 cr. App. R40, C.A., it was decided if a person was killed by one or other of two or more acts by an assailant, each of which was sufficient to establish manslaughter if it caused the death, then it is unnecessary in order to found such a conviction for the crown to prove which act caused the death and it followed that the absence of the body and/or a postmortem report revealing the cause of death is immaterial.

The cases above are extreme ones but not so the instant case for traces of the body were found, and I have found the evidence led before this court taken cumulatively left no ground for reasonable doubt in that the evidence was cogent and compelling and has convinced me that no rational hypothesis other than murder can the facts be accounted for. As I have said, there have been traces of the body and a postmortem report revealing the cause of death.

As for A1's evidence, although this was not put to P.W.4, A1 has found it convenient to label P.W.4 a half-wit. Before me P.W.4 betrayed no signs of low intelligence or amnesia for she answered questions put to her well. A1 in the box seemed to distort facts. He said P.W.4 was

moderately drunk and in the same breath claimed reaching Phuthiatsana the deceased Senyane had said because P.W.4 was drunk the deceased had asked him (A1) to return with

127

P.W.4 preferring to fetch the sheep alone. This was denied by P.W.4 who said no river had been crossed for deceased had been killed before crossing. Another oddity in A1 's evidence is it is not clear why, deceased having allowed A1 to return preferring to fetch the sheep alone, it was necessary for A1 to go to 'lefikeng' (rock) to help deceased with the sheep; moreover that deceased was at 'lefikeng' appears to have been known to A1 only. That the deceased was at 'lefikeng' is rejected by this court as false.

If I understood A1 well, he has put up a defence of alibi for he says in April, 1990 he had returned home making it impossible to kill Senyane in May, 1990. I must repeat that I have already said that irrespective of the month when Senyane was killed, P.W.4 has said that it was in winter and on the occasion of the sheep-fetching errand when deceased was killed. In support of P.W.4's evidence is the fact that Senyane did not return home on the occasion of sheep-fetching errand. I have rejected as false A1's evidence that Senyane returned home the same day he left. In support of P.W.4's evidence is the fact that the iron rod (Exh.5) was found where both A1 and P.W.4 stayed.

As to the defence of alibi on which A1 pinned his hopes, the legal position is that there is no onus on an accused to establish it for if it might

128

reasonably be true he is entitled to be acquitted. (see R.v. Biya 1952 (4) S.A. 514 (AD.) It has also been said in applying the test, the alibi does not have to be considered in isolation (R. V. Hlongwane, 1959 (3) S.A. 337 at 340) and that the correct approach 'is to consider the alibi in the light of the totality of the evidence in the case and the court's impression of the witnesses' ibid at 344.

A1 led by Mr. Putsoane in defence whether he had any quarrel with P.W.4 saying he went home in April, 1990. A1's reply had been that he had such a quarrel with P.W.4 because he had gone home during the 10th month to plough. He said he had gone home on two occasions the first occasion being the 11th month and the second occasion during the 4th month where he was going to plough wheat. He further said 'having left in April I returned on the 5th month but I did not meet Senyane' for I had found work at the station. The question was simply whether A1 had any quarrel with P.W.4 saying he went home in April and indeed if he went home then one does not see how he could have had any quarrel with P.W.4 saying so unless the denial was to mislead the court. In any event one does not see how going home in October or the 10th month was relevant to the issue unless A1 just decided to go on a campaign to cloud issues.

129

In cross-examination on behalf of A1, the sheep fetching episode was in February, 1990. A1's evidence before this court was that the sheep was fetched on the 10th month and the message from home to go to plough was the same year the sheep was slaughtered; further he went home a week after he had been to Phuthiatsana with deceased to fetch the sheep. And yet the

impression had been made that he went home 4 weeks after he had been to Phuthiatsana in February. Question is, from the point of view of A1, when was the sheep fetching episode, during the 10th or 4th month of the year?'

Crown case is that Senyane was killed in May, 1990 and if, according to A1 he was present in Maseru and not at his home then, one does not see how his defence of alibi holds taking into consideration the added conflict in - the months as shown above. I come to the conclusion that the totality of the evidence and my impression of the witnesses does not establish alibi and I reject this defence.

Also, Mr. Putsoane had put it to P.W.4: A1 says it was in February, 1990 when deceased was killed —. Although Mr. Putsoane objected saying this is not what he said, the court did point out the record would reflect this. If Mr. Putsoane's poser is to be taken seriously, since he gets his instructions from A1, it stands to reason that A1 knew when deceased was killed.

130

Accordingly, this court rejects A1's assertion that he does not know when deceased was killed.

It was P.W.7's evidence that the police asked A1 to take them to the spot where Senyane was murdered. In going to Phuthiatsana according to P.W.7, it was as a result of A1's explanation and following it A1 had been asked to go with the police to point out where he murdered deceased. In going to Phuthiatsana apart from the police A1 was in company of P.W.4 with A1 leading the contingent. While A1 agrees he went to the spot, he says that he was forced. I must say at the outset that it seems to me only reasonable where a suspect has given an explanation, the explanation has to be followed by the police. If, in following the explanation the police commit an irregularity such as forcing the suspect to point out the scene of crime or accompany this by threats or violence, the pointing out is clearly incompetent. When A1 was taken to the scene I have said the police were also in company of P.W.4 and then A1 and P.W.4 were still in love and if the police committed irregularities it is expected that A1 would have had some measure of support. As to the principle of pointing out, another defence A1 pinned his hopes on, the principle has undergone considerable metamorphosis over the years. There was time when pointing out was regarded as admissible evidence even when it was induced by force. Recent judgments basing themselves on the

131

of the Criminal Procedure and Evidence Act, have come full circle rejecting the hackneyed approach of the past. Thus in *S. v. Masilela n Ander*, 1987 (4) SA. 1 (AA) the court rejected the earlier findings that pointing out formed part of a confession and referred to *S. v. Magwanza*, 1985 (3) SA. 29 (A) which, on the ground of pointing out found to be a confession, evidence of pointing out had been excluded.

Reviewing the Criminal Procedure Act 51 of 1977 Grosskopf A.R. (As he then was) had found while the Act makes it clear that the fact that pointing out forms part of an inadmissible confession irrelevant to the admissibility of evidence concerning the pointing out, if the fact was irrelevant, it was difficult to see how a court's knowledge of the irrelevant fact could make any difference, even if the knowledge of the court is so extensive as to cover the entire contents of the inadmissible confession; the court had gone on to say that admissibility was

determined according to objective criteria and not according to whether or not a court had knowledge of the facts which are irrelevant to admissibility.

The judgment in Masilela above was followed by *S. v. Sheehama*, 1991 (2) S.A. 860 and again with Grosskopt, A.R. presiding, a number of cases including *S. v. Tsotsobe and Others*, 1983 (1) SA. 856 (A), *Shezi*, 1995 (3) SA.

132

900 (A) to the effect that a relevant pointing out does not amount to extra judicial admission, were overruled as was *S. v. Bruuve (I)* 1974 (1) S.A 206 (R); *S. v. Nyembe*, 1982 (1) SA. 835 (A) including *Tsotsobe* and *Shezi* above that evidence of a forced pointing out is admissible were also overruled.

Following *Masilela* and *Sheehama* above the law now appears to be that pointing out is part of extra-judicial admissions; secondly forced pointing out is excluded as inadmissible evidence for the reason that it was the intention of the legislature not to admit evidence of a pointing out which was otherwise inadmissible as soon as the pointing out formed part of an inadmissible confession or statement. All that this means is that forced evidence or evidence extracted compulsorily and not freely and voluntarily is inadmissible. Indeed the reason *Grosskopt, A.R.* rejected evidence of pointing out was because such pointing out had not been induced freely and voluntarily but had been proceeded by assaults and threats directed at the appellant.

Our own Criminal Procedure and Evidence Act, 1981 is no different for sec. 229(2) reads:-

'Evidence may be admitted that anything was pointed out by the person under trial or that any part or thing

133

was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement while by law is not admissible in evidence against him on such trial.'

The section clearly allows evidence of pointing out notwithstanding that, ordinarily, it would form part of a confession or statement which by law is not admissible against the accused. Sub-section (b) suggests 'against the wish or will' of the accused and if the connotation is to the effect that pointing out is admissible even against the wish or will of the accused meaning even should he have not made the statement willingly and made it against his wish, well, in that case I would agree with *Grosskopt AR.*'s finding that a pointing out is not such if made not willingly, freely and voluntarily. In the instant case I have found no evidence of assault or threats of assault to induce the pointing out and I reject A1's assertion that the pointing out was not free and voluntary

The case against A2 is based on common purpose with A2 being the principal perpetrator. I will deal with this later. Crown evidence is to the effect that A2 desiring to get rid of her husband deceased Sefatsa Senyane had recruited some crown witnesses but primarily P.W.5 to her cause to have

134

P.W.5 poison the deceased. The conspiracy having fallen through, she had again recruited A1 and P.W.4 to her cause. I am to mention it would appear when the deceased who was widower married A2 in 1967, A2 was a 19 year old girl and deceased probably 48 years old and the age discrepancy become obvious. When, in May, 1990 Senyane was killed, deceased and A2 had lived together for well-nigh 28 years! (being from 1967 - 1990). It would appear motive is important for the killing and the Crown has stressed this by ascribing the killing to a number of factors for one thing being that A2 felt deceased treated her children badly, that deceased was aged and unable to deliver conjugal right with A2 being, in consequence, interested in a much younger man, Emile who fell in love with A2 during deceased's lifetime, an affair the deceased had complained of. At this juncture I am also to say that any evidence referring to Moipone is to be ignored for Moipone did not testify in this trial.

The plot having been hatched A1 had been given a weapon (Exh. 5) by A2 with which to dispatch the deceased. Under colour of fetching a sheep for slaughter, A1, P.W.4 and deceased had gone to Phuthiatsana or thereabout where a sheep was supposed to be. No mention was made to this court of exactly where or from whom the sheep was to be fetched or whether the sheep was going to be bought or formed part of Senyane's flock.

135

As to the plot and its niceties, the only evidence against A2 is that of the accomplice, P.W.4. In favour of P.W.4 is the fact that A1, P.W.4 and deceased did get to Phuthiatsana river together and on the fateful day deceased did not return to his home. As to the time when deceased disappeared, A2 in reporting to P.W.6 on 29 May, 1990 saying deceased had disappeared the previous day (28 May, 1990), it would appear according to A2 deceased disappeared on 28 May, 1990. Account has also to be taken of P.W.6 that his search for the deceased was fruitless until the police informed him bones and clothing had been discovered at Phuthiatsana river which clothing and remains were identified by P.W.6 as those of his late father, Senyane. A2 has not told this court that since her report to P.W.6 of deceased's disappearance the deceased has surfaced and returned home nor has A2 said to me that earlier than May, 1990 her late husband did disappear. Despite the much riff-raft and denials by the defence that deceased disappeared sometime in May, 1990, I believe crown evidence that deceased disappeared sometime in May, 1990 and from then on deceased was never seen or heard of. I further believe that on the day he disappeared it was on the occasion of the so-called sheep fetching episode. Further, I reject as false A1 and A2's evidence that on this occasion i.e. sheep-fetching episode deceased returned home importantly, P.W.4's testimony has the support of the fact that as I have said on the fateful day deceased did not return home and A2

136

reported to P.W.6 that deceased had disappeared - being on the very day when he had gone to fetch a sheep. If indeed deceased arrived at some stage later, since A2 had reported his disappearance, it is to be expected that by the same token she would have reported deceased's re-surfacing and re-discovery. Has also to be recalled that clothing and remains identified as deceased's were found in the vicinity of where A1, P.W.4 and deceased had been. There was, further, no evidence before this court that remains of some person other than the late Senyane were found at Phuthiatsana river or its environs. I have also taken into account the fact that in as much as A1 did not report to A2 the circumstances under which Senyane and A1 parted company, by the same token A2 did nothing to investigate the whereabouts of Senyane. If

indeed Senyane had returned the following day as A1 and A2 would have this court believe, it would have been unnecessary for A2 to report Senyane's disappearance a day following that on which he had left his home to fetch a sheep. As this court sees things, A1 and A2 did not care whether on the sheep-fetching episode deceased returned home for they did not expect deceased to return home.

Although not quite the distance by reason of P.W.4 not knowing exactly where the sheep was to be fetched, if the sheep was to be fetched in the vicinity of where P.W.4 heard the 'cutting sound and splashing of water' or

137

around where A1 and P.W.4 returned, said by P.W.4 to have been about 2 kilometres from A2's home, the place where the so-called sheep was to be fetched was not that far and there is no reason why deceased did not return home the same day if he had gone to fetch a sheep.

That a sheep was going to be fetched is a tissue of lies; if a sheep was going to be fetched in as much as it was deceased's wish that A1 go with him to help him fetch the sheep, A1 should have returned with the deceased. Failing which, if A1 was telling the truth as to why he parted company with deceased, then he should have reported to A2 to allay A2's fears. I have said equally it was incumbent on A2 to find out from A2 as to the whereabouts of her husband. In this context, it would appear A1 and A2 were of one mind that it did not matter whether or not deceased returned from the so-called sheep-fetching adventure. I have found A2 to be a scheming, duplications, false and unreliable witness and I have rejected her evidence.

Mr, Thetsane for the crown has submitted that P.W.4 is an accomplice though not in a classical sense; he has also said the case hinges on common purpose and that deceased's clothing and remains have been positively identified. He has also complained of A2's conflicting statements. Mr. Thetsane has also referred the court to a judgment in Clement Kobeli Gof

138

Lamolineo (Appeal Case No.4/1984) a gesture for which I thank Mr. Thetsane. Unfortunately, this court has found no need for speculative or inferential deductions in this case for solid, positive evidence was made available to the court. As for A2's conflicting statements and identification of deceased's remains, these have been dealt with above. Mr. Putsoane & Mr. Nathane have raised the issue of identification of deceased's remains and clothing and identification of deceased's voice. Mr. Putsoane has also said the 'helang banna' (hey, men!) attributed to deceased by P.W.4 could have come from some source other than deceased's. He has also referred to A1's alibi.

I have above dealt with A2 's conflicting statements and the identification of deceased's clothing and remains; I have also dealt with A1's alibi above. I intend dealing with the rest though not necessarily in the order in which they were presented.

Concerning the evidence of P.W.4 declared as an accomplice before this court, evidence which was discussed above and is appraised now, despite Mr. Putsoane's submission that once a witness is declared an accomplice at the P.E. and trial such a witness is of necessity an accomplice, it has behoved this court to do sufficient research to establish whether, indeed P.W.4 is an accomplice witness especially in the light of crown counsel's submission that



P.W.4 is not an accomplice in the conventional sense. In this regard I am reminded of the illustrious judgment in *Bereng Griffith Leretholi and Others* (H.C.T.L.R. 1926-57p. 123 at 158) where Lord Reid quoting from Schreiner, J.A. in *R. v. Ncanana* (1948) 4 S.A.L.R. 399 said:-

The cautious court or jury will often properly acquit in the absence of evidence connecting accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused, but is such a witness peculiarly equipped by reason of his inside knowledge of the crime, to convince the unwary that his lies are truth. This specific danger is not met by corroboration of the accomplice in material respects not implicating accused, or by proof aliunde that the crime charged was committed by someone; so that satisfaction of the requirements of s.285 (the section in the South African Act corresponding to s.231 in Basutoland) does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although s.285 has been satisfied will be reduced, and in the most satisfactory way, if there is

corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar dangers inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible when the merits of the former as a witness and the demerits of the latter are beyond question.'

Amongst other things, what makes an accomplice, according to the judgment above, is that 'such a witness' is peculiarly equipped, by reason of his inside knowledge of the crime.' If I understand Mr. Thetsane well that P.W.4 hasn't got the inside knowledge of the conspiracy he is mistaken because from the very beginning in the conspiracy to kill deceased, P.W.4 was present and learned of the scheme first hand. Returning from where deceased was killed, P.W.4 did nothing about this and allowed the murder weapon to be kept where she lived with A1. As I have said, she also accepted the blood money protesting, at the same time, that it was not enough.

I find P.W.4 to be no different from an accomplice portrayed above and hold she is, in fact, an accomplice. I have compared P.W.4's evidence before

me and at the P.E. and have found no material differences.

This court is of the view that the defence was expecting too much for articles of clothing to have distinctive marks and that yes it was necessary if the clothing was in contention. Also regarding the clothing which P.W.4 referred to, A2's evidence in this regard was given from

the bar. P.W.4's evidence has the support of A2 that deceased slept in the kitchen. I have also found that P.W.4's evidence established a pattern and that on A1's own admission, he was prepared to go on a mission on the flimsiest of excuses. I do not see how P.W.4 could have conjured up such vivid, livid scenes however fertile her imagination.

As for Exh. 5 which P.W.4 claimed to have killed deceased, I have said that P.W.4 has support in that the weapon was found where A1 and P.W.4 lived. After Exh. 5 was used, there was considerable passage of time before it was found and it has to be recalled that when it was used on deceased the river was in flood! I am satisfied that there was enough evidence to identify Exh.5 as the one used on deceased.

P.W.4 has said when she heard the cutting thrust and splash in the water she heard deceased's voice exclaim: 'Helang banna' (hey, men!) It was

142

contended by the defence that P.W.4 was not positive about deceased's voice. P.W.4 had defended this saying although she had known or heard deceased's voice not many times, the voice she heard was that of deceased adding, 'there were only three (3) of us at the scene then' namely: P.W.4, A1 and deceased and she had deduced since the voice was not that of A1 it was necessarily that of the deceased. 'Helang' in Sesotho denotes an element of surprise. Of course P.W.4 knows A1's voice and though it may be said that she did not quite know deceased's voice, her deductive inference does not appear flawed taking into consideration that although she is an accomplice and has to be corroborated in material respects in her favour is the fact that there was no evidence before me that other than A1, P.W.4 and deceased at the particular place and time, there were other people in the vicinity. Moreover, A1 pointed out the spot where deceased was assaulted. I have said that the pointing out was free and voluntary and since A1 pointed out the spot, he knew what he was pointing out at. The cutting noise 'kettle' like a cutlass landing on a victim is clearly consistent with the noise that would be made by Exh.5 after all the forensic expert Prof. Olivier has said the wounds inflicted on the deceased were consistent with having been caused by the exhibit before him which was none other than Exh. 5. I reject the suggestion by A1 that the noise could have come from some source other than from the deceased.

143

As for the voice identification, some authorities advocate for voice identification parades; in the instant case such an exercise would be futile since the deceased is no longer alive. In any event, such parades seem to me to be a little silly as Braster J. said in *S. v. M.* 1963 (3) S.A. 183 (T). I take the view that from the time P.W.4 heard deceased's voice deceased was never seen or heard of again and I reject the suggestion by the defence that he made subsequent appearance.

The defence bombarded and regaled P.W.4 with abstract ideas which she did not comprehend. According to her, she did Std. II at school making her almost illiterate by present standards. She has protested she did not know months of the year and 'even this February I do not know what month of the of the year it is —.' Saying this, I found her firm and unshakeable in the witness box.

This court has come to the conclusion that the merits of the accomplice as a witness and the demerits of accused persons are beyond question. Moreover, the court has also warned itself of the dangers inherent in accepting accomplice evidence. P.W.4 is also indemnified from prosecution.

This court agrees with the crown that there was common purpose to

144

commit the crime for which A1 and A2 are charged. Crown evidence which this court believed has been that in furtherance of their joint effort to kill deceased A2 as the principal perpetrator provided A1 with the weapon (Exh. 5) with which he assaulted and killed deceased. While A2 did not physically assault the deceased, A2 incited A1 to kill deceased by providing the weapon Exh. 5 with which, by express instruction of A2, A1 killed deceased.

Authorities appear to agree that the essence of the doctrine is where two or more people associate in a joint unlawful enterprise, each will be responsible for any acts of his fellow which fall within their common design or object, see MacKenzie v. Van der Merwe, 1917 A.D. 41 at 46; Carnsworthy, 1923 W.D 17 at 19; Sikepe, 1946 A.D. 745 at 752 - 755; Ndlangisa, 1946 A.D. 1101 at 1106; Shaik, 1983 (4) S.A. 57 (A) 65A; Gumede, 1983 (4) S.A. 803 (Tk) 810; Sefatsa, 1988 (1) 868 (A) 894, 896, 901. According to C.R. Snyman in his Criminal Law 2nd Ed. at p.259, it also would appear the crucial requirement is that the persons must all have the intention to murder and to assist each or one another in committing the murder. This court finds the features as enunciated above to be present in the instant trial and further, that the accused persons with the intention to murder assisted each other to commit the murder. There was, in addition, in the opinion of this court, active association between A1 and A2 to commit the murder.

145

This court is satisfied that the two accused acted in concert and were together responsible for the death of Sefatsa Senyane.

The weapon used being Exh.5 described by P.W.7 as a serrated iron while P.W.10 described it as a farming implement, the Oxford Illustrated Dictionary - 2nd Ed. describes serrated as, 'Having, forming row or small projectiles like teeth of saw; notched like saw.1 The Oxford Advanced Learner's Dictionary - 4th Ed. describes serrated as: 'having notches on the edge like a saw, having a toothed edge; and in italics; a knife with a serrated blade. It is the same weapon which Prof. Olivier ascribed as causing multiple wounds on the deceased. This court saw the sawlike weapon with notches on its edge and I agree that it is a dangerous weapon if applied with force on vital parts of the body.

From the nature of the weapon described above and the part of the body where injuries were inflicted it is clear that there was an intention to kill. The two accused were aware that in assaulting the deceased as they did death was likely to occur and despite this were reckless whether or not death ensued. In the premises this court accepts that in inflicting injuries on the deceased the two accused had the requisite subjective intention to kill and the two accused persons acting in furtherance of a common purpose intentionally killed

146

Sefatsa Senyane.

I have found the evidence led before this court taken cumulatively has left no ground for reasonable doubt in that the evidence was cogent and compelling and has convinced me that no rational hypothesis other than murder can the facts be accounted for. Accordingly the crown having proved its case beyond reasonable doubt, the two accused are found guilty as charged.

My Assessor agrees. The other assessor having not attended the trial was excused on account of illness.

G.N. MOFOLO  
JUDGE  
5th October, 2001.

For the Crown: Mr. Thetsane

For the Defence:

Mr. Putsoane for Accused 1

Mr. Nathane for Accused 2

147

#### Extenuating Circumstances

There is a huge volume of work on extenuating circumstances but because many jurisdictions around the world and particularly those passing as developed are moving away from the imposition of capital punishment, are influenced by the concept of Human Rights which views capital punishment as inhuman and degrading, coupled with annihilation of dignity, arbitrariness and possibility of error in its enforcement, it would seem generally speaking capital punishment is on the wane.

With these lofty ideas in view and speaking for myself, considering that in the instant case accused 1, deceased's gardener, murdered the deceased a teacher by profession and in doing so annihilated deceased's dignity arbitrarily, one wonders who is favoured in the equation except that I do agree that revenge is a kind of wild injustice and that in taking revenge we are but equal with our enemies so that it would not be right of the state to avenge itself of capital offences by hanging its subjects.

I may be wrong but this is probably what crossed the court's mind in S.

148

v. Makwanyane (1995) (2) SACR 1 (cc) which came before the constitutional court. The two accused had been convicted in the Witwatersrand Local Division of murder and sentenced to death. On appeal the Appellate Division after hearing argument and coming to the conclusion that in the circumstances of the case death was the proper sentence had, however, postponed the further hearing of the appeals until the Constitutional Court had decided whether the death sentence in terms of s.277 (a) of the Criminal Procedure Act 51 of 1977 was in conflict with the provisions of the interim constitution, Act 200 of 1993 or not.

It is not for me to decide the above issues after all I have not been called upon to decide them save being called upon to follow precedent. In arguing in favour of capital punishment the Attorney-General in Makwanyane's case above argued, inter alia, that in countries in which capital punishment was abolished was mainly in developed countries in which other penalties might be sufficient deterrents. The Constitutional Court finding that punishments available to the state taken together make capital punishment cruel, inhuman and degrading with resulting destruction of life had found capital punishment to be unconstitutional.

In terms of s.297 of our Criminal Procedure and Evidence Act 1981 (1)

149

subject to sub-section (2) or (3), sentence of death by hanging

(a) shall be passed by the High Court upon an accused convicted before or by it of murder;

Now, subsection (2) is to the effect that in deciding whether there are extenuating circumstances, the High Court shall take into consideration 'the standards of behaviour of an ordinary person of the class of the community to which the accused belongs.; With regard to sub-section (2) above, I have found accused 2 to be superstitious with deep seated belief in witchcraft; a stepwife not held in favour by members of the family and fearful of the future of her children who come head to head in favour with the children of the first wife. A woman frustrated by marriage with disparate ages, and that as she and deceased advanced in years, she still young, vibrant and with feelings, her late husband had lost virility to the frustration of accused 2. Mr. Thetsane for the Crown has said, this case has taken too long to decide. What with the constant showing and display of bones, the parading of deceased's remains, accused 2 has become a caricature of frustration and mental distress unmitigated and unassuaged by passage of time.

The murder in *Montši Maliehe and Others v. Rex* - LLR 1997-98 p. 168 was

150

a particularly heinous and gruesome one; and yet our Appeal Court found there were extenuating circumstances. The court found there was 'great frustration among the employees of the Banks ...' There having been advocacy of people who were against the strike to 'be taken out or whipped —'. The Court had gone on to say 'while this in no way excuses the brutal killing of the deceased it to some small extent diminishes the moral blameworthiness of accused,' the reason extenuating circumstances were found in respect of other accused. Since accused were said to be socius, the court had found if extenuating circumstances existed in favour of one accused 'it would be perpetrating an injustice if having found extenuating circumstance in favour of accused 2 the principal perpetrator of the crime, such extenuating factors were not found to exist in favour of accused 1.' Clearly accused 2 in the instant case is the principal perpetrator accused 1 being her shadow, a puppet and stooge. I have also found accused 1 to be an ignorant and credulous tribesman with no mind of his own and since I have found that extenuating circumstances exist in favour of accused 2, it follows that extenuating circumstance also exist in favour of accused 1.

G.N. MOFOLO

### Mitigation

Crown counsel has said that accused persons have no previous convictions.

Mr. Putsoane for accused 1 has said the fact that accused 1 has no previous convictions has to be taken into account. Further, that accused has 3 minor children the youngest being 3 years old. Accused was the only breadwinner and sentence was to be such that minor children don't suffer with the result of resorting to crime.

Mr. Nathane has said on behalf of accused 2 he aligns himself with what Mr. Putsoane has said regarding the fact that accused has no previous convictions. Further accused has a granddaughter she looks after and interests of this minor demand that sentence on accused 2 be such that it does not make the granddaughter suffer unnecessarily. Moreover, accused was suffering from high blood pressure which required constant medical attention.

The court has taken into account factors canvassed by counsel on behalf of accused but has pointed out the offence of which accused persons have been convicted is so serious words fail the court to describe the sheer wickedness of the crime. The court also pointed out that since accused had not gone into the witness box in mitigation of sentence the court was not sure whether accused had moved from their former stand and were now sorry or remorseful for what they did and that, be this as it may, there can be no doubt that accused 2 has become a polecat to members of the Senyane family and the community at large who, on seeing her will look at her askance wagging their heads, sometimes spitting and calling her a murderer. I have already said that accused 1 is a faceless character no more than a cypher, a puppet and a stooge so that if accused 2 suffers he also suffers.

Defence counsel has pleaded that the quality of mercy is not strained and that in view of the fact that the case has taken a long time to determine this factor operate on behalf of accused persons.

I have listened to Crown Counsel Mr. Thetsane that it would appear the reason the case was delayed in the magistrate court was because accused 1 had absconded. Be this as it may, it would also seem the case was delayed in this court not necessarily by the defence however Mr. Nathane was irregular in

attendance. Mr. Nathane's non-attendance has been explained and I am satisfied that his irregular attendance was not deliberate. Defence counsel has asked for a balancing act in the imposition of sentence on accused.

With both the defence and crown to blame, this case has been hanging over the heads of accused for 10 years and more and this court is of the view that 20years imprisonment is the appropriate sentence. However, by reason of the time the case has taken to complete and

doing the balancing act I would sentence each accused to 15 years imprisonment and the accused are so sentenced.

My Assessor agrees.

G.N. MOFOLO

JUDGE

30th October, 2001.