

CRI/T/44/2000

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

VS

1. REFILOE MOKALANYANE
4. ANDREAS Van der MERWE
5. MOKHERANE TSATSANYANE

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla on 27<sup>th</sup> April, 2<sup>nd</sup> May, 2001

.....

For convenience the above accused who were formerly charged jointly with three others who for some reason or other are not before Court, shall be referred to as accused 1, 4 and 5 respectively thus retaining the numbers given to them while jointly charged with the other accused who are not before Court but who were given

the numbers 2, 3 and 6.

Accused numbers 1, 4 and 5 pleaded not guilty to charges of murder in Count I, murder in Count II and robbery in Count III.

In Count I the charge preferred against the accused specified that

“.....upon or about the 21<sup>st</sup> day of June, 1995 and at or near Ha-Lumisi in the district of Mafeteng, the accused, one, or the others, or all of them, did unlawfully and intentionally kill Sekoli Armstrong Moeketsi”.

In Count II the specific terms are to the effect that

“..... upon or about the 21<sup>st</sup> day of June, 1995, and at or near Ha-Lumisi in the district of Mafeteng, the said accused, one or the others or all of them, did unlawfully and intentionally kill ‘Mamolulela Mofolo”.

In Count III the charge specifies that :

“.....upon or about the 21<sup>st</sup> day of June, 1995, and at or near Ha-Lumisi in the district of Mafeteng, the said accused, one or the others or all of them, did unlawfully and with intention of inducing submission by the deceased, Sekoli A. Moeketsi and Refiloe ‘M. Mofolo to the taking by the accused of certain items of property to wit :

- (i) a motor vehicle Jetta (VW) GLX, silver grey in colour
- (ii) a pair of black shoes(men’s)
- (iii) a grey jacket

- (iv) a black leather jacket
- (v) a diary book

threaten the deceased persons herein that, unless they consented to the taking by the accused persons of the said property or refrained from offering any resistance to them taking the said property, they would then and there shoot and or kill them; and did then and thereupon take and steal from the persons of the said deceased the said property, which was the property of the deceased herein or in their lawful possession, and did rob them of the same”.

Needless to say at the end of the Crown case the applications for the discharge of accused 1, 4 and 5 were refused in terms of a ruling delivered on 4<sup>th</sup> December, 2000, whereupon only accused 1 and 5 gave evidence in their defence while accused 4 on, no doubt, advice from his counsel *Mr Lesuthu* opted to exercise his right to remain silent.

At this stage of the proceeding the Court is called upon to determine if the Crown has succeeded in discharging the onus placed on it to prove the individual accused’s guilt beyond a reasonable doubt in respect of one, more or all counts. This is the test to be applied even in respect of accused 4 who remained silent even although the Court’s finding had indicated that there was a case to answer. If in any of the charges preferred the determination is that there is proof of guilt beyond doubt then it would mean that in respect of an accused person who remained silent the

*prima facie* case became conclusive in the absence of the explanation the tenor of evidence tendered required him to give in the sense that it called for an answer.

In an endeavour to prove its case the Crown called eighteen (18) witnesses.

The defence on its part relied on five witnesses consisting of

DW1 Moeketsi Sello

DW2 Moeletsi Challa

DW3 Rethabile Mathetse

who testified for DW4 No.1 accused Refiloe Mokalanyane.

The last defence witness is DW5 No.5 accused Mokherane Tsatsanyane.

Significantly accused 1's witnesses testified before him. More of that later.

PW1 Litseko Julius Mosoeu having been given a warning pertaining to accomplice witnesses testified on oath that he resides at Lithoteng Ha Seleso and has been living there even in 1995. He is aged 38 and for the last 15 years he has been employed as a soldier in the Lesotho Defence Force - LDF - where he is still an employee to date.

PW1 recalls that on 21-06-195 between 8 pm and 9 pm his children drew his

attention to the lights of a vehicle outside the home. He went outside and found that the vehicle was actually inside his yard. He told the Court that he saw two people alighting from this vehicle. He approached them and inquired who they were. One of them answered and said "it is me Mr Mosoeu" and indicated to PW1 that he was ACE. The name Ace was a nick-name of a fellow familiar to PW1 surviving under the name Moeketsi Mofihli.

PW1 didn't know Ace's companion who remained silent and didn't say anything. Because PW1 knew Ace's parents' vehicle and because this particular one was unfamiliar to PW1 he asked where they got this vehicle from.

The explanation given while on face value appeared plausible it later turned out to have been a mere ruse. This is the discovery PW1 came to make after his own arrest when the story put to him by interrogators revealed to him that he had been given hold of the wrong end of the stick.

The fanciful story that was related by "Ace" Moeketsi Mofihli in the presence of accused 1 was that the duo obtained the car from Mohale's Hoek. Asked how they managed to obtain it, Moeketsi Mofihli stated that while he and accused 1 whom

PW1 got to learn was Refiloe on asking Mofihli who his companion was, had been drinking at a restaurant in Mohale's Hoek and they saw a drunken man from whom car keys imperceptibly fell. Mofihli collected the keys and went to the parking area outside and kept on reactivating the remote activator till the car to which the key belonged gave the positive reaction. This is how the duo were able to find the Jetta car among many cars.

It is important to note from Pw1's evidence that he testified to being told by Mofihli that the fallen keys were picked up from the floor by Mofihli from the drunken man and that Mofihli's companion didn't say anything to gainsay what Moeketsi Mofihli was saying. See page 3 of Court's notes.

Having secured themselves the possession of this Jetta car they travelled in it from Mohale's Hoek to Lithoteng at PW1's house where this conversation took place.

It is during the course of PW1's evidence relating to what Mofihli was telling him that he asked Mofihli who his companion was and Mofihli said the companion is Refiloe. PW1 learnt from Mofihli during the course of this conversation that Refiloe's home is next to Pita's shop.

Then PW1 addressed the question to the duo as to what they said “about this car. The reply was that they wanted to leave it at my(PW1's) home while they were going to look for a place to hide it”.

It appears patent that PW1 was prepared to go along with the scheme that involved the “hiding” of this car. He thus asked that it be driven closer till it reached the front door of his home which is where PW1 indicated it should be parked.

It is at this stage that on noticing that this car is new PW1 asked the duo to open it so that he could see it more closely. As they obliged he sat in the front passenger seat of the car, opened the cubby hole and found a small note book in there with names of people written in it but forgets what these names were. He also found a log-book in there whereupon he asked where the number plates of this car were for it had none. He was motivated to this question by his experience that if a vehicle carries a log-book then it must be a government vehicle. There upon he was told that the vehicle had no number plates but a “temporary”. By “temporary” he understood to be meant a piece of paper reflecting [registration] numbers of that vehicle. In his experience a “temporary” is usually fixed on the windscreen and back window.

PW1 told the Court that he pointed out that this is a government vehicle and asked the duo what they intended doing with it. The response he got was”.....this vehicle should remain *in our hands* and that it be altered so that we can use it. They said it be changed from being a government possession into something else”. I have italicised the phrase above to indicate the fact that Pw1 does not seem to exclude his participation in and facilitation of the plan being hatched to convert the government’s possession in the car into some collective possession of individuals by means instantly proposed.

So willing Pw1 was to be part of this enterprise that no doubt enticed by prospects of being an instant shareholder in the car or proceeds of its sale he made suggestion that the log book be burnt; and it was. He tore the incriminating pages of the note book referred to earlier or diary where names of persons appeared.

PW1 testified further that Moeketsi Mofihli asked if PW1 had a sail for purposes of covering the car. However PW1 had none and decided that they could make do with his own mackintosh in reference to which his actual words are “I took it from inside the house and *we* covered the vehicle with it. *The three of us* (did)”. Emphasis supplied. He later indicated that the mackintosh managed to cover the



windscreen and back window of the car.

PW1 indicated that although he was unable under unnatural light to identify the exact colour of this car it was nonetheless dark in colour; either green or blue. We know now that the colour is a dark silver grey sometimes referred to by counsel who were present at the inspection *in loco* as charred grey. PW1 noticed a defect on the window or door on the passenger side of this car. The fault he referred to consisted of a hole at the bottom of the door. The hole seemed to him to have been of a punched type.

At the close of the events of that evening Mofihli and his companion named Refiloe left taking the car keys with them as they did so. PW1 was quick to add that he didn't know who between the two had been driving for when he reached them they were already down on their feet outside the car.

The following day Pw1 recalls that he was off duty. Thus he went to Naledi to see friends and drink. When he arrived back home at small dusk he found the car still there. A short time afterwards Moeketsi Mofihli and Refiloe arrived. The time of their arrival is roughly estimated at 7 pm. PW1 says on asking where this vehicle

was to be taken to whereupon Moeketsi suggested a place at his uncle's at Ha Tšosane, some vehicular lights shone above a hill some short distance away from PW1's house. Shortly afterwards a priest called Moeletsi (now known as Moeletsi Challa) i.e. DW2 arrived at PW1's place. It seemed to PW1 that DW2 came from that vehicle that was at the top of the hill. DW2 was at the time known to PW1 as a priest with whom they previously discussed church matters at DW2's home. Pw1 and DW2 went some distance away from Refiloe and Mofihli to talk about church matters once again.

When the private conversation had come to a conclusion DW2 asked whose car this was parked in PW1's yard. He replied that it was brought by the two people standing next to it. PW1 told DW2 that the two are used to him and that they had stolen it from somewhere. Asked by DW2 what they intended doing with the car PW1 told him "we are still uncertain what to do with it". PW1 hastened to ask DW2 if he could be of any help in finding a place where to hide this car. This in my view marked a vast departure from church business for which DW2 had come there. DW2 said he couldn't make any promise but suggested that he had left a white man at the hill lying over and across perhaps he could be of some help as he is a motor-repairer. DW2 invited PW1 to go and see the white man. Meantime Refiloe and Moeketsi

Mofihli had remained at PW1's place.

On reaching the white man the discussion went on in English between DW2 and the white man. However though PW1 does not understand English very well he was able to gather that the vehicle could be taken to 'Mamokhutsoane's place where the white man stayed. Anyway DW2 told PW1 that the white man said they could go and place the car there. The white man PW1 was referring to was later identified before Court as accused 4.

DW2 and accused 4 joined the driver of a white Honda while PW1 repaired to his house to inform his earlier visitors of the good news.

Thereafter the Jetta joined and followed the Honda which had waited some 150 metres away from PW1's home. PW1 says he was with Moeketsi Mofihli and Refiloe in the Jetta. They followed the Honda till they reached 'Mamokhutsoane's place lying some 1½ to 2 km away.

The garage was opened and Moeketsi Mofihli drove the Jetta inside there. Thereafter Moeketsi Mofihli, Refiloe and the driver of the Honda drove till reaching

the earlier spot lying some 150 metres away from PW1's home and the driver dropped his passengers there. Each passenger repaired on foot to his home from that spot.

The following day PW1 reported on duty and had done so for the next day or so when after knocking off he met the driver of the Honda who was on foot this time at Ha Pita. The man asked PW1 to stop. As PW1 did the man said to PW1 "Hey man that vehicle is being announced all over". PW1 took fright and asked "where is it being announced". The man said "all over, over the radios it is being announced".

PW1 testified that he understood his informer to be referring to the Jetta car that PW1 and accused 1, and Moeketsi Mofihli and indeed accused 4 had left at 'Mamokhutsoane's place.

PW1 and the man parted. The following day amidst great worries about the encounter with the previous driver of the white Honda PW1 felt he didn't know "how to carry this weight that was on me". See pg 10 of court's notes. He was perplexed as he didn't have time to meet with the priest DW2 for he had to go to work in the mornings and come back home late in the short winter days. His anxiety was not made any easier when the Honda driver told him also that he had been trying to reach

him on several occasions earlier.

When PW1 came to work he learnt from one of his colleagues who is senior that if the vehicle that was at his house is the one in the hands of a white man PW1 should know it is being looked for; moreover it might well be that the white man has already been arrested.

Later PW1 got a message that he was required at the National Security Services NSS. He was questioned about the car and he indicated that he knew about it.

He was referred to the CID where he gave his explanations concerning his involvement in this unsavoury episode. However the CID appeared not satisfied with PW1's narration when it made no mention of the use of the gun in the robbery and murderous enterprise. The CID police rejected his version that the vehicle had been obtained from Mohale's Hoek. It was when PW1's story appeared to have a ring of truth in it that the CID accepted his story, namely, that he didn't know for a fact if the car was obtained from Mohale's Hoek but "according to people who brought it to my home I had learnt that it came from Mohale's Hoek". If PW1's story is true that he had been so told then it is clear that he had been deceived by those people who had

brought the car to his home. That the truth emerged as I have indicated at this stage of the inquiry was thanks to the diligent inquiry of the CID.

PW1 indicated that after some days he, accused 1, Moeketsi Mofihli and accused 4 were driven to Mafeteng by the CID. Before then PW1 had been taken out of his cell to go and identify the car that had come to his home on the night of the events and he did so.

It was when PW1 and the above had been detained to attend remands at Mafeteng prison that he had occasion to ask Moeketsi and accused 1 what had exactly happened that they got to acquire the car they brought to his house. He told the Court that they informed him that they had not in fact taken the car from Mohale's Hoek but from Mafeteng. Asked how they did that they told him that they had asked for a lift from the driver/owner of the car intending to come to Maseru. When the duo had secured themselves the lift thus they shot and killed the driver and his female passenger; and drove in the deceased's car till reaching PW1's home. PW1 didn't ask where they did the shooting. He learnt however that Moeketsi Mofihli and accused 1 had dumped the two deceased somewhere along the way from Mafeteng to Maseru.

Under cross-examination by *Mr Mosito* for accused 1 PW1 was referred to the statement he had made before the police. PW1 reiterated that he didn't know accused 1 before he arrived with Moeketsi Mofihli at PW1's place.

He conceded that when told a vehicle had lit up his house by his children he came out with a galil gun measuring about a metre long. He denied pointing it at the car coming to his house.

PW1 was taxed on the point whether his daughter said the vehicle had come to the home or that there was light of car outside. I quite frankly don't think much should turn on this rather petty-fogging form of cross-examination which could be indeed legitimate except when as in this occasion it was unnecessarily indulged in at length.

It turned out also that the name of the person that PW1 gave to the police as the one who was accompanied by accused 1 when they drove into his yard was one Rantantu or Rantau. The fact that the man Ace is the same person as Rantantu comes out in answer to a question put as shown at page 97 of the Court's notes as follows:

“You remember in your evidence-in-chief you said the person who came to you that evening was one Ace.....? I said so.

Yet in your statement before the police you don't mention this Ace. You talk of different names. Rantau (for instance).....? Yes Rantau. Ace is his nickname which I called him by when bringing him up as a child. His real name is Rantantu.”

PW1 conceded he no longer remembers what name this Ace alias Rantantu alias Moeketsi Mofihli identified himself by. But regard being had to the length of time that has passed between when PW1 gave his statement to the police about this issue of the name and when he gave his evidence before this Court one can scarcely take him to task for that. Moreso because one more factor of added impetus to the equation is that his true surname is Mahula. It was thus unfair to suggest that PW1 was fabricating when he used the names which in any case appear in the charge sheet in reference to Moeketsi Mahula who it could correctly be suspected was responsible for the supply of the names appearing in the charge sheet. If there was anything wrong then it should have been cured by simple amendment to the charge sheet had objection to the name been raised at that appropriate stage.

While there may be a point that the first time when PW1 saw Mofihli's companion he could well not have been able to identify him because he had never seen him before, it was dark and the man did not speak; it seems to me that if in fact



he came again the following day as PW1 said and PW1 met him again and thereafter a couple of days when they lived together and conversed in the Mafeteng prison, by that time accused 1 was fairly familiar to PW1 and therefore no question of mistaken identity can arise in such circumstances as to who had accompanied Mofihli to PW1's premises on the number of occasions this is said to have taken place.

Of importance under cross-examination which elicited the information that PW1 was tortured while at the police detention is that he told the court that the torture did not make him lie before the police or before this Court.

It was put to PW1 that nohow could Ace Moeketsi have said he was with accused 1, when the key to the car was taken for accused 1 was not there. PW1 countered by indicating that actually accused 1 himself told him (PW1) this aspect of the matter at the time when accused 1 and PW1 were in detention and were enjoying some moments of leisure to speak to each other.

*Mr Lesuthu* for accused 4 briefly asked if it was PW1 or some other witness who had said to the Court that the vehicle was involved in some crime. PW1 replied "Not me". Apparently *Mr Lesuthu's* confusion was generated by the fact that PW1

was ordered to stand down and let his evidence be interrupted by no less than seven witnesses before he could be recalled.

*Mr Mahlakeng* appearing for accused 5 Mokherane Tsatsanyane asked whether simply because PW1 was expecting visitors on 21-06-95 he should have been in the high state of alert that he seemed to have been in. Accordingly he wished to know what was so special about the evening of that day. The witness answered that there was nothing special and seemed to be puzzled how it could be said he was in a state of alert. Thereupon a legitimate question was put to him drawing attention to the fact that once it was reported by his children that a vehicle had come to his premises he came out with a big gun to confront the occupants of the car. PW1 conceded that he is not used to being visited by people driving cars.

PW1 further indicated that even military vehicles never go to his house. As a matter of fact he has never been escorted in any military vehicle to his house in the 15 years he had hitherto spent in the army. None ever did so in 1995.

Asked if he leads a scared life he answered yes. Further that in 1995 he was already leading a scared life. The reason for this mode of life he said had nothing to

do with his being in court where he was giving evidence.

PW1's attention was brought to the discrepancy in his statement wherein he indicated at page 4 he arrived home from Naledi between 6 and 7 pm; in contrast with his testimony before this Court that he arrived home between 7 pm and 8 pm. The witness indicated that in both occasions he was only giving his estimation of the time. I accept the point that it having been in the middle of winter it was, as the witness conceded, already dark. PW1 does not remember what day of the week this was though.

In answer to the question put by one of my assessors why PW1 did not report the matter to the police on noticing it was a government vehicle his disarming answer was that this sort of stupefied him. As I said earlier because he associated himself with acts of criminality pertaining to this car to the extent that he destroyed one of the means that identified it as a government vehicle he was in fact a participant in trying to foil means of establishing its identity. To that extent it would be inconsistent with the attitude he had adopted towards this car for him to report the incident that a car belonging to government had just been stolen and kept at his house by others.

However in credit to PW1 he was agreeable to the suggestion that 1995 was marked by lawlessness in the history of this country. The military were virtually untouchable in respect of breaches of the law they were committing in this country. Indeed just a year before the Deputy Prime Minister had been killed in circumstances pointing to the involvement of the military yet nothing happened to the culprits. So when a government vehicle subsequently got stolen and kept in the safe custody of a man belonging to the military the enormity of the callousness that accompanied the act of stealing a mere government vehicle paled into insignificance when compared to events of the previous year. The Court takes judicial notice of the fact that the prevailing atmosphere at the time spanning the years 1994 and 1995 was characterised by mutinies in the army, illegal police strikes and teachers' strikes including indeed illegal strikes by the prisons staff.

Sheer opportunism in the occurrence of the instant crime could easily be regarded as a factor in the series of events that characterised the ugly mood of the time. Be that as it may.

PW2 Dr Mcpherson who performed post-mortem examination on the bodies of the two deceased on 23-06-95 stated that he went through the examination of each

body and reduced his findings to writing afterwards. He formed the opinion that injuries on both deceased were caused by bullets discharged from fire-arm. The details of his findings are contained in Exhibits A and B handed in by this witness in respect of the deceased Sekoli Armstrong Moeketsi and Refiloe 'Mamolulela Mofolo respectively. Respective sketches with accompanying illustrations are attached to Exhibits A and B.

PW2 determined that the cause of death in respect of Sekoli Moeketsi was haemothorax whereas that in respect of 'Mamolulela Mofolo was a ruptured liver.

With respect to Armstrong Moeketsi's body PW2 indicated that he found a wound on the right supra-clavicular region measuring 1 cm in diameter. He also found a superficial wound on left mid-axillary region 2½ cm long.

In respect of 'Mamolulela PW2 found a wound 2½ cm in diameter on the right upper arm anterior aspect. Next to it was another wound of the same dimensions. There was another wound on left anterior axillary line.

Cross-examination revealed that only one bullet entered the body of the

deceased Armstrong. The witness did not find any exit wound; yet he couldn't say any bullet remained in this particular deceased's body.

Asked by Court if he would have found it if there was any; he said it is not always possible to trace a foreign body in the body of a dead person.

I however am constrained to say what appears to be the real reason for this unsatisfactory answer and state of affairs is the attitude conveyed in this witness's reply that "sometimes we don't feel the need to trace these things.

Ct: So in brief what you are saying is that you didn't find the need.....?

Yes, but also taking into account the state of our hospital.....".

I must confess to my perplexity and bewilderment that because of the attitude revealed in the testimony of this witness criminal justice runs the risk of frustration due to inadequate presentation of evidence before court while abundant amount of vital evidence which was readily available to medical practitioners who performed post-mortems remains entombed along with the deceased in their graves. This is unacceptable. Proper sanctions should be in place immediately to curb this surest

descent to the destruction of what criminal justice system stands for namely to prevent and eradicate crime by thwarting any attempts to frustrate detection of crime.

In answer to *Mr Mosito* PW2 said the wound on Armstrong was not caused by dumping but by a bullet. With respect to 'Mamolulela he said he was positive there were two entry wounds and one exit wound. He was not sure if there still was another bullet imbedded in the body of 'Mamolulela.

Given that PW2 said the wounds on the arms of the deceased 'Mamolulela had nothing to do with the liver; it could safely be concluded that the rupture of the liver given as the cause of death was caused by dumping.

I was puzzled though that the doctor said both the entry and exit wounds on 'Mamolulela measured the same. This defies all experience which is to the effect that exit wounds are usually larger than entry ones in missiles fired from fire-arms. But again I formed the view that the doctor's mind was not totally focussed on what was required of him to do. No attention was given by him to requirements to be fulfilled in terms of notes 7 and 8 of Exhibits A and B.

Note 7 says “give cause or causes of death as evidenced solely by objective appearances. If more than one cause, state primary first....”.

No opinion has been expressed by Pw2 as to what could have been responsibly for the rupture of the liver.

Note 8 respecting which no attempt has been made to fill reads :

“These [REMARKS(8)] should always include a brief statement of the circumstances in which death is reported to have taken place.

Appearance which raise (sic) a presumption of criminality or of culpable neglect, should also be briefly referred to here. See also Note (J)”

PW3 Mookameli Mantule testified that he works at the Ministry of Education; and was already doing so in 1995. He is known to both deceased. Both of them also worked for the Ministry of Education. ‘Mamolulela was PW3's immediate superior. On an unspecified day in 1995 ‘Mamolulela told PW3 about a trip she was to undertake. It seemed that ‘Mamolulela on this trip was to give a lift to another employee of the Ministry bound for Mohale’s Hoek.

PW3 parted company with ‘Mamolulela at around 12.50 pm when each went



for lunch. That was the last time PW3 saw 'Mamolulela alive. A day or two afterwards PW3 recalls the deceased's husband coming to inquire about his wife's whereabouts as she hadn't spent the night at home on the day she had intimated to PW3 that she was going on a trip connected with duty.

During the course of this inquiry another Education Ministry employee from Mohale's Hoek broke the sad news that she had seen dead bodies of both deceased near Ha Likupa - a little distance after passing Mafeteng town en-route to Maseru.

PW3 went to the scene described and afterwards went and saw the two bodies at the Mafeteng Mortuary.

PW4 Dt Tpr Chonelanka testified on oath that he had been a detective since 1993. In 1995 he was stationed at Mafeteng. On the morning of 22<sup>nd</sup> June 1995 a Sgt Ntlama, policeman Tseloa and PW4 left in a police vehicle intending to go to Mathebe. Along the way and at a place called Santeng at Ha Lumisi this posse of police saw a group of people gathered along side the road. The police went to the group to find out what was happening.

On the right hand side of the road leading from Mafeteng to Maseru, some 20 paces from the shoulder of the road in a shallow furrow were lying two dead bodies. One was male the other female. The male one was lying face down while the female was lying on her back. There were traces of blood on some spot along the road. These traces of blood drops led to where the bodies were found. More blood drops were observed where the bodies were resting.

PW4 having been satisfied that the bodies were in fact dead and that foul play was involved in the deaths , immediately radioed his office to report. The trip to Mathebe was thus abandoned in favour of attending to this new and unexpected discovery of blood-curdling deaths.

An order was issued to go and fetch Dt Lt. Mothibeli from the office. Only part of the posse went while trooper Tseloa remained at the scene. On Dt Lt. Mothibeli's arrival the bodies were undressed and examined by the police.

Before the bodies were undressed PW4 had in fact examined them. It was PW4's evidence that the male deceased had a brown sleeveless jersey, a white shirt and a grey pair of trousers on. Of significance even at this early stage of adducing

evidence is that this deceased was not wearing shoes. (See page 24 of the Court's notes). The witness indicated though that this deceased had socks on though he can't say what colour. The deceased was also wearing a tie. This deceased's clothes were soaked in blood.

PW4 testified that having undressed this deceased he observed an open wound on the right side of the neck. The witness indicated this spot by pointing at the right side of his own neck just on the side of the ridge of his shirt collar.

This witness indicated also that this deceased had an open wound at the back of his right shoulder and another under the right arm-pit. It was his satisfactory testimony as far as the Court was able to assess it that opposite all areas where this deceased had these wounds his clothes had holes. He indicated that the wounds appeared to have been effected with a piercing instrument or a fired gun.

He proceeded to testify in relation to the female deceased concerning whom PW4 said this deceased had a cream white jersey on with navy blue stripes around the wrists and buttons. She also had a multicoloured floral brown blouse, a pair of black boots, a navy blue skirt, a lady's fawn vest and a white bra on. PW4 testified that the

female deceased's clothes had blood on them too.

On undressing this deceased PW4 observed two open wounds on the right upper arm. The witness said that these wounds were located at the back of the upper arm.

This witness indicated that he also observed on the right breast the female deceased had an open wound. He showed further that there was an open wound under the right arm-pit.

This witness was so thorough in his observations backed up by holes on clothes the deceased is said to have been wearing, corresponding with the locations where the deceased sustained the injuries that the Court accepted it as credible. For instance PW4 referred to an open wound which he observed on the left hand side of the deceased's rib cage. The Court observed corresponding holes on this deceased's clothes. The doctor said nothing about this particular injury in his evidence. But in fairness to him his sketch has it well-mapped out in the fourth diagram though it is again not labelled. It is merely represented by a broad dot. To compound his laxity about the way the doctor went about his work one observes in his schedule of

observations relating to this deceased that he indicates that in right lung he observed “haemothorax” yet as far as his sketch goes wounds on the right are those on the upper arm only. One is left wondering what became of the bullet that his sketch indicates entered the left rib cage.

The male deceased’s clothes were handed in marked Ex “1” collectively. See page 25 of the Court’s notes.

With regard to the female deceased’s clothes the Court observed that of the three holes on the jersey two were on the sleeve while the other was on the arm-pit. The Court observed three holes on the floral blouse. The fawn vest too had three holes. Two on the right sleeve and one on the arm-pit area. The bra had a hole on the right breast. The female deceased’s clothes were handed in marked Exh “2” collectively.

I may just indicate at this stage that the Court feels more comfortable with the location of the wounds as described by the police officer whose description is supported by the deceased’s clothing than by the doctor who, as I said earlier, doesn’t seem to have devoted sufficient attention to the serious duty he was required to

perform on the flimsiest of reasons that he didn't see the need.

After examining the bodies PW4 and others conveyed them to Mafeteng Government Mortuary. It was his testimony that the bodies didn't sustain any further injuries during their conveyance till the autopsy was performed on them.

PW4 further testified that on 9<sup>th</sup> July 1995 a team of policemen from Maseru led by police officer Raleaka came in company of two men who it was maintained could help throw some light on how the deceased met their fate.

Indeed according to PW4 the Maseru team of police, accompanied by the two men joined the Mafeteng police who drove to Santeng near Ha Lumisi. Along the way towards there the two men gave explanations about what happened at various points along the way on the fateful night. Indeed a few paces away from the left shoulder of the road following an explanation given by the two men a 9 mm shell was found. This is shown in the album Exh "E" at page 2 "B". On the opposite side of the road some hundred metres away was a donga a waist deep into which it was learnt the deceaseds' bodies had previously been discovered dumped therein.

PW4 said he couldn't remember if any of the two men he talked about were before Court.

He indicated that he collected the deceaseds' clothes and sent them for forensic tests at the Police Laboratory at Makoanyane Barracks.

Under cross-examination by *Mr Mosito* he indicated that since he was unable to remember the two men who were pointing out various spots likewise he wouldn't be able to remember which one of them was making explanations. *Mr Mosito's* question in this regard chose to confine the question of explanations to one man whereas the witness had indicated that the two men were both making the explanations and pointing out though he can't remember who these were.

PW5 Thabang Mofolo is the husband of the deceased 'Mamolulela. Having not had the company of his wife the previous evening he went about making inquiries about her whereabouts at her place of work. He sadly learnt that his wife had died. He there and then made for Mafeteng government mortuary where he identified the dead body of his wife. He went to the police Charge Office Maseru where he identified his wife's clothes. Notably among these was his wife's black leather

jacket.

The Court was to learn later that along with other goods belonging to both deceased this leather jacket was found at the home of accused 1.

PW6 Andres Makoebu Andreas having been sworn testified that he resides at the stadium Area and had been doing so even in 1995.

Of the accused before Court he knows accused 5 who is his nephew and accused 4 who used to stay at his home between 1995 and 1966 if his memory serves well.

PW6 had occasion in 1995 to drive to DW2's place. PW6 was in the company of friends namely Moeketsi Tjamela and Bafokeng Ramoseme when they left in PW6's white Honda Ballade car for DW2's place. DW2 stated that he could help PW6 and his party secure a place that could be run as a Tavern. Thereupon PW6 and his party were led by DW2 to Ha Pita where PW6 was told by DW2 that they would find accused 4 who knows of someone who could be of help.



It was suggested to accused 4 that the place for use as a Tavern was urgently needed. At the place where accused 4 was staying a grey Jetta car was found. It was at night but PW6 was able to see that it had a dent and a hole in it. One of the things PW6 observed was either that the window was missing or not closing.

Accused 4 and Moeketsi Tjamela were driven in the Honda car while PW6 and the owner of the Jetta car and the driver thereof were driven in the Jetta car to 'Mamothutšoane's place where accused 4 stayed at Lithoteng around Ha Abia area. PW6's car was being driven by Tjamela.

PW6 testified that accused 4 asked of 'Mamokhutšoane to have the Jetta parked at her garage for the night while assuring her that it would be removed soon thereafter because it had to be repaired. 'Mamokhutšoane was agreeable.

PW6 and some of his party drove the owner of the Jetta car who he believed was PW1 to his place. Everyone went his way after being dropped.

Days afterwards PW6 heard an announcement over the radio that the Jetta car which coincided in general description with the one he had seen was being sought

after.

PW6 said he immediately went to accused 4 to tell him about what he had heard concerning the Jetta car. PW6 also says he advised accused 4 to return that car to the people who had brought it to him.

Under cross-examination by *Mr Lesuthu* PW6 indicated he was not the one who had made the deal with accused 4 for the repairs of the Jetta car. PW6 said he didn't know why this car was driven to accused 4's place.

It was suggested to PW6 all that accused 4 needed for the repairs of the car was M3500 not M9000; but PW6's response was that if that is what accused 4 is going to say it so happens that that was not what he said at the time.

PW7 Tankiso Mokhobatau is a thirty year old who at the time was staying and working at the home of PW8 'Makabi Kabi at Maseru West.

She testified that one day in June accused 5 Mokherane Tsatsanyane arrived at dusk at this residence in the absence of PW8 who had gone away on a trip to

Durban.

Accused 5 was someone well-known to Pw7 because he was a frequent visitor to this home. When accused 5 knocked at the door PW7 opened for him to enter but he didn't. Instead he pointed out to PW7 that he had only come to leave his car there. PW7 noticed that accused 5 had already driven this car because the garage door had been lifted.

PW7 saw accused 5 close the garage door and head for another car apparently that had escorted him to the home. This other car had remained parked on a tarred road that has been cut off by a fence and thus stopping it being used as a thoroughfare any longer.

PW7 told the Court that the car that was parked in her employer's garage that night was a grey Jetta car.

On the day PW8 arrived from Durban, and when she made for the garage to open it intending to park her own car in it PW7 informed her that there is another car in there parked by accused 5. PW8 let that be. PW7 helped her unload the luggage

and haul it into the house.

The following day PW8 went early to work. At day time when PW7 came from fetching a child from school she observed a car parked near the drive way leading to PW8's premises. This she recalls was a station waggon cream white in colour.

On the back seats of this car were loaded car doors. PW7 doesn't remember how many though. But certainly they were, she said, more than one. She went past it and made for the door to the house. But before she could open it she could hear voices of people in the garage though the garage was closed.

On opening the garage door PW7 found 3 people in there consisting of accused 5, a boy called Khosi and accused 4.

PW7 noticed that a car door was leaning against the garage wall inside there.

PW7 having seen that it was people she knew inside there except accused 4 went back to her household chores. This was around lunch time.

In the late afternoon when PW7 was going to collect wood for building the evening fire she recalls that this car was still there. There is an element of astonishment in the way this struck her though strictly speaking it was none of her business for what purpose this car was there: she said relating to conclusion of events surrounding the lunch hour -

“That’s all for that Friday. But in the afternoon when I went to the garage to collect fire wood the vehicle was still there....”

It is PW7's testimony that this car remained there throughout Saturday and Sunday.

On Monday morning which was a holiday and PW8 was not going to work but instead was still enjoying her sleep, people came knocking at the door. These were police according as they identified themselves. PW7 reported to PW8 that police had come.

PW8 came to open for them. They spent a long time speaking with PW8 in PW7's absence. She had remained outside during all the time that PW8 was being interrogated. PW7 had told them at the door step when they asked when the Jetta car

had arrived there that it had done so on the previous Wednesday night. She told them further that it had been brought there by accused 5 who had said it was his and had come to ask that he be allowed to leave it there.

The next thing that PW7 recalled is that the police asked Pw8 to go and show them accused 5's home as well as his parents' home. Thus PW8 left in the company of two or so police. One of the police who had come there remained on the premises while Pw7 continued doing her normal chores.

After a long time PW8 arrived. PW7 recalls that though she didn't know with whom accused 5 came there but at the same time that she saw him, she also saw accused 4 arrive with police as well as Khosi. More and more civilians came as well as police who kept flocking to that place.

Among things PW7 saw happening was the Jetta car being driven out of the garage and being inspected. She also heard one of the police addressing himself to accused 4 and saying "Andrè did you do this?" Saying so the policeman was pointing at the seat of the car on which appeared to have been poured some dark substance. PW7 also heard the policeman ask if that was beet-root or not. In reply accused 4

said he didn't know. PW7 had learnt for the first time that moment that accused 4 to whom she had been referring as the white man, was called André.

PW7 noticed that the door on upper side of the garage which is on the same side as driver's door had been removed.

Under cross-examination by *Mr Lesuthu*, PW7 was adamant that what she saw on the seat in question was dark and appeared as if it had been poured there. She didn't recall though what colour the seats were. She further stated that she was not sure if one wouldn't have seen the dark spot unless pointed out to one. She conceded that it was possible she might have thought of it as dirt.

*Mr Mahlakeng* closely cross-examined this witness. It was in the course of this cross-examination that it was revealed that PW7 had been staying at PW8's home for two years prior to the incident. She testified that accused 5 was no stranger to her and that he had been visiting PW8's home frequently. She conceded that she herself was much used to accused 5. She however rejected the invitation to say this was not the 1<sup>st</sup> time accused 5 had left a car there.

It however turned out that PW7 remembered times when PW8 would use some of the vehicles brought to the premises by accused 5 save that she was quick to say these would be done with PW8 being present though she wouldn't know under what terms.

PW7 said she does not remember accused 5 leaving a vehicle in June 1995 in PW8's premises with instructions that a friend would come and collect it the following day.

Though she stated that she never came to know that accused 5 was related to PW8 she nonetheless thought their relationship was a family one because Pw8 used to visit accused 5's parental home.

On her part PW8 denied that accused 5 or his parents are related to her. She only regarded accused 5's parents as friends who shared her political interests.

When referred to her statement to the police PW7 readily conceded that she made a mistake when in this court she failed to show that after going past the station waggon with nobody in it she saw Mokherane nearby and outside the garage.



She again stated that she could no longer be sure if the day she referred to as Friday was the day when PW8 went to work early.

She conceded that she got confused by the question of dates as the matter occurred a long time ago.

However in my view the substance of this witness's evidence as opposed to fine details is quite satisfactory and has the merit of being from a person who is not bent on misleading the Court or showing positive bias towards any of the parties to whom she made reference.

I also find that without appearing to be alive to the implication of her testimony before this Court the picture she has been shown to paint of accused 5 is of a sinister nature when she suggested that accused 5 was in the closed garage when she arrived from fetching a child from school. However the overall picture supplied by PW15 Thabang Lentjeka who was assigned the task of removing the doors from the Jetta car by accused 5 quickly sets at naught what accused 5 would stand to gain from the removal of the adverse effect of PW7's evidence towards him.

PW7 conceded that the vehicle had been brought to the premises and driven into PW8's garage by Khosi at accused 5's instructions.

PW8 'Makabi Kabi testified that in 1995 she used to stay at Maseru West at the British High Commissioner's flats owned by Allied Chemistry. She is a Lecturer at the National University of Lesotho.

In June 1995 she went to Durban to collect Industrial Cleaning Products that she sold.

She thinks that she returned at night on a Thursday. When she arrived at her flat she wanted to park her van in the garage but was told by PW7 that accused 5 had parked a car in there. She shrugged off the information and took her products into the house, leaving the van where she had been unloading her stuff.

She told the Court that she was surprised that there was a car parked in her garage. The following morning she went to work to carry on with the unfinished field-work.

She knew accused 5 as the son of her political colleagues. She explained that her surprise that the car was parked in her garage stemmed from the fact that there hadn't been any prior agreement that it should. She vehemently asserted that before then accused 5 had never parked any vehicle in her garage except when his parents had borrowed her brand new van in exchange for something that his parents would leave for PW8 to use. The van it was said was bought in January (presumably of the year in question).

The witness sought to make the Court to understand that while this would be the case between her and accused 5's parents at no stage was there an arrangement between her and accused 5 to leave his vehicle on her premises.

PW8 says that on her way back from work she went via accused 5's father's home. She found accused 5 and told him to go and remove his vehicle from her garage as she needed to use it for her own vehicle.

Meantime PW8 had to send her van for a minor repair to accused 5's father. Notwithstanding that PW8 had told accused 5 to remove his car from her garage she discovered even as late as on Sunday that this car was still in there. All this while she

couldn't have access to her garage. Nor did she care to look what kind of car was reputed to be in her garage.

Then on Monday morning she was woken up by what she described as a hard knock at her door. It turned out that police had come to her home that morning and sought to have some talk with her. They told her their mission and she explained to them that she had been told there was a car in her garage. The police went with her to check. As they opened the garage she saw a car bearing Botswana Registration numbers.

She says this was the first time that she had seen this car since it was left in her garage. The car was a Jetta car which PW8 says she doesn't remember if it was grey or bluish.

Police asked her to take them to accused 5 and she obliged. They came back together to PW8's home in the company of accused 5 whom PW8 had identified to the police.

Accused 5 was asked to produce the key for the car to have it driven out of the

garage but because he had none the car had to be pushed out.

An inspection of the car was thus done by police under day light. The driver's door was not in place.

The police called PW8 closer to the car and informed her that this was the car which was used by Mr Moeketsi and Mrs Mofolo who were killed in it. PW8 observed dark maroonish stains on passenger door of this car. These stains were on greyish black back ground. PW8 found the stains easily discernible. She saw these on the floor behind the front seat. There was debris of broken glass. Police also picked up a spent bullet from the floor. The debris of broken glass was lying under the driver's seat.

Accused 5 was present throughout police activity that took place there consisting of photographing the car and video-taping it. PW8 says accused 5 was asked by police whose this car was and he said it was his.

PW8 said accused 5 when asked why the vehicle came there, said that he had tried to leave it at his grandmother's home at Maseru East but for some reason or

other he failed and thus brought it to PW8's place because he recalled PW8 had a garage; and thus decided to park it in it.

Of course the Court recalls that when giving evidence in his own words accused 5 said he had intended leaving this car at his mother's elder sister Mrs Mosala in Maseru East but found that the garage was full and couldn't leave the car in the premises outside a garage in case it rained bearing in mind that it was without a window.

Among people who kept being brought to the premises of PW8 was a white man accused 4 according to PW8. If this is true one wonders why when it was proposed that an inspection *in loco* be held on those premises it was stated on his behalf that accused 4 would not find the place as he had never been there before. In fact PW15 who testified that accused 4 was one of the persons who were in the closed garage in which he had been ordered to remove the Jetta car doors, was told that this could not be so, moreso that accused 4 would come and deny it.

Needless to say accused 5 himself testified that accused 4 has previously been to the premises and was puzzled at the suggestion that he had never been there.

I can only surmise that this suggestion was made on accused 4's behalf because PW8's premises, especially the interior of her closed garage where work was being done on the Jetta car was felt to be not a comfortable place to be nor one which anybody would wish to be associated with. But why? That's the question.

PW8 also was closely cross-examined by *Mr Mahlakeng* for accused 5.

PW8 denied that she is related to accused 5's mother. She admitted knowing Matsobane Putsoa and told the Court that he is her cousin. Told that Matsobane Putsoa is related to the mother of accused 5 she replied "Him not me".

But closer cross-examination indicated that before the police PW8 had said she had grown up at Quthing with accused 5's mother and her sisters and that she is related to them. The Court gained a distinct impression that she was trying to somersault and wiggle vainly out of an awkward situation when she started saying the statement was not written by her yet she signed it after it had been read back to her. Not only that, but she gave as her reason for failing to correct her statement the fact that she was shocked and that this happened a long time ago. I don't see though how one can be so shocked as to claim that one is related to another with whom they grew

together if no such things are true. It cannot be true therefore that PW8 got to know accused 5's mother in 1992 when PW8's attention was drawn to her and her sisters. These vain and unwholesome attempts to distance herself from people she has known for long compounded by her belief that she could be allowed to ride off on such implausible statement detract from her station as a Lecturer at a place of Higher Learning.

*Mr Mahlakeng* further succeeded in highlighting the facile manner in which PW8 would improvise and give what on the face of it could pass for a plausible story on her part only to be shown later to be without substance.

For instance learned counsel was able to elicit from this witness an admission that she did not spend a week-end in Durban a factor which she facilely sought to persuade the Court to accept that it occurred because she had to go and hold some discussion with her sister during that time which being a week-end was just about most propitious.

I thus think the admonition by learned Counsel was most appropriate, namely “when you forget things you shouldn’t just invent. .... when you didn’t



remember you shouldn't have said you spent the week-end in Durban but just say you don't remember".

The upshot of this then is that the true position is PW8 left for Durban on Monday and returned on Thursday.

PW8 insisted that at no time during the month of June 1995 did accused 5 park and leave a van belonging to Archie on PW8's premises on account of the fact that this vehicle had a broken window. After ducking and twisting and indeed fencing with a simple question whether she doesn't know because she can't remember or because this didn't happen she ultimately said that she knew of no such occasion.

*Mr Mahlakeng* referred her to an occasion during 1995 Easter when accused 5 left a motor car at PW8's place and she said she didn't remember.

Prodded further, when prudence dictated she should have been let be at that point, by suggesting that this was when accused 5 left for school at Thaba 'Nchu thus leaving the Hi-Lux for PW8's use she suddenly remembered with clarity and answered, in my view truthfully, "I am sorry. This carries many years. What could

have happened to my van which was bought on 20-01-1995 which was still new and had low milage. How could have I been using somebody else's (vehicle)?"

This in my view demolished what good inroads *Mr Mahlakeng* was making into PW8's evidence.

Learned Counsel deftly left that point in favour of the well-harped theme of PW8 trying to shy away from being a relative of accused 5. But unfortunately a serpent instead of haddock had been caught in the learned Counsel's net. One other thing is that although PW8's evidence remained unchallenged regarding the fact that the vehicle in her garage was wearing Botswana Registration numbers when she and the police saw it, in the absence of any corroborating evidence, regard being had to that facile manner in which she fills gaps in her evidence, it would be unsafe to accept that aspect of her evidence.

PW5 Thabang Mofolo was recalled for purposes of identifying his wife's jacket. The Court at a later stage when it was handed in observed the bullet holes which were on it but were not easily discernible because of the colour and texture of this garment. For the moment it was marked "ID I" for identification only. See page

130 of the Court's notes.

PW9 Philip Masoabi presently an inmate in the Central Prison but otherwise till then a lance seargent who in 1995 was attached to Robbery and Car Theft squad of Lesotho Mounted Police/Lesotho Police Services, testified that he was stationed in Maseru in 1995.

On 21-06-1995 while on duty he read a message from Mafeteng police referring to two dead bodies of a man and a woman discovered along the way leading from Mafeteng to Maseru at a place called Ha Lumisi.

He was appointed an investigating officer into this incident. He operated as a team consisting of major Raleaka who was the team leader, W/O Makhetha, Sgnt Mpopo, Trooper Pitso and some three or four others.

PW9's investigation led him to PW8's garage where he found parked therein a Jetta saloon or sedan car of the description: Engine No. HV082705 Chassis No. AVZZZ 16ZJKU036941.

Shed of the details and elaborate background accorded previous witnesses' evidence in this Judgment, PW9's evidence shows that accused 5 handed to him a wheel, three keys of a Jetta car with an immobiliser, a right front door with side mirror still attached to it and another door with a hole in it plus a car radio. The Court had occasion to see all these items.

It was PW9's further evidence that there were glass fragments on the mat below the driver's seat. The car was devoid of the right front door. He observed that there was a dead bullet on the mat next to the driver's seat. There were blood stains on both front seats as well as on the seat behind the front passenger's seat. There was another bullet on the mat on the driver's side. Two other dead bullets were found on the floor of the garage next to where the Jetta had been parked.

This witness said that PW1 handed to him green diary which I referred to earlier i.e. the one that had the pages bearing names of some persons ripped off by PW1.

On going to the home of accused 1 and upon conducting a search there this witness says he and his companions found one pair of men's shoes coloured black,

a grey jacket and a black leather jacket with holes on the right hand side in accused 1's possession.

The Court recalls as earlier intimated that the black leather jacket was identified by PW5 as belonging to his wife the deceased 'Mamolulela Mofolo. It was handed in by PW9 and marked "Exh 3". See page 144 of Court's notes.

PW9 indicated that at one occasion PW12 Mabokang Moeketsi identified the green diary, the grey jacket and black shoes as having belonged to her husband the deceased Sekoli Armstrong Moeketsi. Unfortunately the grey jacket was mislaid before being produced before Court as an exhibit.

Pw9 also testified that accused 1 and Moeketsi Mofihli took him along with the Mafeteng police to a place near Ha Lumisi. At a certain spot along the road at that place accused 1 explained that he had pointed a gun at the two deceased who were still in the Jetta, ordered them to get out of the car and shot them when he saw them hesitating. Accused 1 and Mofihli showed PW9 the furrow where they said they had dumped the bodies of the two deceased.

PW9 further said that Mofihli and accused 1 said they had afterwards stripped the two bodies of the leather jacket belonging to the female deceased and a jacket and shoes belonging to the male deceased. The fact that the items of property referred to were found in possession of accused 1 is a matter that this court is unable to take lightly. It in fact corroborates PW9 in very material respect that also appears to incriminate accused 1. PW9 also said accused 1 identified the Jetta in question as it remained parked at Police Headquarters as one that he and Mofihli had taken and driven away after shooting the two deceased who had been in it.

PW9 showed the photographs contained in Exh "E" collectively being albums compiled by W/O Selebalo who had taken photographs of the scene both at Maseru and at Mafeteng at Ha Lumisi. The photos were handed in by PW10 Sub.Insp Hlaahla because W/O Selebalo had since died.

However PW9 told the Court that the photographs depict the likeness of what he himself saw while attending the respective scenes at Ha Lumisi Mafeteng and Maseru West. The Court was able to see gory scenes of blood in the Jetta car, on the seats, door frame inside the car and outside.

PW9 further told the Court that accused 4 told him that he had seen the blood in the car and had said to him that DW2 and a soldier had come to him and asked him to keep the Jetta car which he had learnt had forcefully been taken from some people. PW9 said that accused 4 had been asked to try and sell it for them.

The Court is keenly aware that though the soldier referred to here can mean no one but PW1 the latter none the less did not in giving his evidence say direct that accused 4 was to find immediate means of selling the car for him and the two visitors who came in the car at his place at the occasion when he first clapped his eyes on it. For that reason the Court would be very wary of hastily concluding that because PW9 said accused 4 is alleged to have known that the car was taken forcefully from some people then he must be guilty as an accessory to the crime of robbery where forceful taking is an essential element.

PW9 was subjected to lengthy cross-examination. His replies indicated that he had given the accused warning that is necessary against self-incrimination. In the ruling made after the application for discharge at the close of the Crown case I dealt with the more serious aspects of challenges which are liable to be raised as inadmissible evidence against the accused but which were satisfactorily answered by

Milne J.A. in *David Petlane vs Rex* 1971-75 LLR 85. The learned Judge of Appeal in that case had crisply dispelled any myths regarding so-called inadmissible confessions before police officers by saying -

“Although the surrounding circumstances may be taken into account in deciding whether a statement amounts to a confession, the fact that the appellant knew when he made his statement that the police were looking for him in connection with the killing of the deceased could not have the effect of making his statement a confession of the offence with which he was subsequently charged, as the statement did not exclude the possible defences of self-defence or accident. Further, the fact that it transpired at the trial that if such defences had been raised they would not have been admissible could not operate to turn the appellant’s statement to the police into an unequivocal confession of murder”.

PW9 denied ever torturing any of the accused. He stated that at no stage did he witness any use of third degree methods being applied on any of the accused. However the Court is not unmindful of PW1's statement that he had been tortured while in police custody; though he didn't say how. He indeed said the torture did not dissuade him from telling the truth as he knew it.

PW10 Sub/Insp Hlaahla as stated earlier handed in the photo albums with the photographs collectively marked Exh “E”.



PW11 Bulara Khomohaka is a forensic biologist whose testimony showed that he examined the Jetta car and swabbed up several brownish stains on various parts of this car both inside and outside. He took nine samples which turned out to be of human origin of blood group 'O'.

Following from the tests which he conducted on specimens collected from the car and items of clothing which were blood-stained he concluded that the deceased 'Mamolulela Mofolo could be the source of blood V8 while Sekoli Armstrong Moeketsi could be the source of blood V9. It is once more unsatisfactory that given the fact that when this witness conducted his tests the bodies of the deceased were available and could even be exhumed if need be he should content himself with what appears to be possible sources of the blood type instead of striving for positive identification which could only be obtained by extracting blood from the respective deceased.

PW12 'Mabokang Moeketsi testified that on the morning of the fateful day she had seen her husband putting on the black Watson shoes Exhibit "4" which she indicated were worn-out. Apparently she and her deceased husband cared very much about how the husband appeared in public. I say this because the shoes as far as I

could see were practically new except for appearing to be slightly scuffed on the outside edges of the heels. The Court had also learnt from PW9 that the grey jacket looked very nice with leather patches on the elbow areas.

PW12 indicated that before testifying in this Court she had identified the above items of property as her husband's including the green diary when the police had brought them to her.

Seeing that the Jetta car leaves no doubt that it is the one in which the deceased had been travelling in and of which they were deprived, only to be found later at PW8's garage, it is sufficient at this stage to indicate that the Court accepts as a whole PW13 Mary Masupha's evidence as to the identity of this car.

PW14 Asst/Compol John Telukhunoana is an experienced firearms examiner responsible for examination of firearms and items suspected of having been used in commission of crime. He dealt with this type of examination since 1985 doing an average of 100 firearms examinations per annum.

He examined the items consisting of a cartridge case and a dead bullet and gave

them identification marks.

He handed in 2 dead bullets, a bullet jacket, one core of a bullet and two cartridge cases making a total of 6 items collectively marked Exhibit "10". These were handed in but ordered to be retained by the witness for his further use.

PW14 told the Court he was not able to say how far the shooting was effected from because of what to me appeared to be thoughtless and unnecessary bickering in the police force where, as PW14 stated regretfully, it is not deemed necessary that expert witnesses should, even when circumstances allow attend the scene. He appealed to the Court to exercise what power it has to disabuse his colleagues of this unsavoury attitude. He was of the opinion that the bullets and shells were of 9 mm calibre firearm.

PW15 Thabang Lentjeka testified that accused 4 and 5 took him to a residence in Maseru West in a white Corolla Station Wagon. They arrived at a garage which was opened by accused 5. In the garage was the charcoal Jetta car.

Accused 5 told PW15 to take out and fix the doors on the right hand side of this

car. PW15 had noticed that the right front door had a damaged lock. There was a tear measuring about five centimetres in length on this lock. The window was broken and there were glass fragments inside the car. The rear door had a hole in it that appeared to have been made by a sharp piercing instrument.

PW15 indicated that he detected a pungent smell in the vehicle. He said this smelled like old blood. He was taken to task by *Mr Mahlakeng* on how old blood smelled and he said it smelled like a body which had been in the sun for three or four days.

PW15 said that despite this smell accused 5 would not allow him to open the garage door for fresh air while he worked. Indeed he painted a picture of accused 5 manifesting feverish urgency and pressurising him to get the job done and completed in no time.

PW15 says he managed to take out the two doors on the right hand side of the car. Meanwhile accused 4 is said to have been sitting with his back towards the wall on which the garage door is hung reading a newspaper by aid of some natural light coming in through the chink allowed by the slightly opened garage door which

otherwise appeared to be virtually closed. The Court tested the degree of opening the witness said the door had remained open and was satisfied that even though the garage door appeared closed the light it allowed in was enough to enable the reading of a newspaper print.

PW15 said accused 4 took out a number plate from the front of the Jetta car. He indicated to the Court where he brazed the tear on the door lock which he had repaired.

This witness was also taken to task in cross-examination but the tenor of his testimony had a ring of truth in it from which he was not shaken. Indeed there were discrepancies in his evidence including that he was able to work in the garage by aid of light coming from the window.

It turned out that this garage had no windows. For this disparity he was taken to task and held up as someone who had come to mislead the Court. However if it turned out that the garage had windows but PW15 created the impression that it had none and by virtue of the absence of the windows the culprits had secured themselves an ideal hideout in which to work without detection of the crime they were continuing

to commit in there, I have no doubt in such circumstances PW15 would deserve the condemnation that he had come to court to mislead it to the detriment of the accused. But in the opposite circumstances obtaining now the same cannot be said. It would be reckless to paint him in the same brush regardless of the alteration of circumstances. I am thus prepared to accept his explanation that he made this mistake because the occurrence when he found himself in that garage took place long time ago and furthermore he hardly had an opportunity to take in his surroundings in the environment where he was being pushed to the limit of his ability to finish the job at hand within the minimum length of time.

PW17 Ngoajane Mohapi's evidence was to the effect that the duplicate original registration certificate of the Jetta car reflected its Chassis number as Chassis No. AAZZZ 16ZKUO36941 and the Engine number as Engine No. HV 082705 while its make is a 1990 vehicle.

PW18 Senior Inspector Thibeli was called to identify his signature on Exh "D" constituting Submission of Articles for Examination Form. He duly identified the signature on Exh "D" as his and said he had signed his name at the time to acknowledge receipt by him of items therein mentioned. He identified Ex 10

collectively as the items he had received.

The Crown closed its case and DW1 Moeketsi Tsehlana gave his evidence.

I should from the outset at this stage indicate that the Court warned that if accused 1 was going to give evidence after his witness or witnesses then his evidence would run the risk of not having sufficient weight attached to it in view of the natural tendency discouraged by Courts that a party to litigation in such circumstances would tailor his or her evidence according to the evidence that he or she listened to and heard when being adduced while he or she is sitting in Court. Indeed it is deemed a salutary practice that even where there are two or more parties jointly charged or jointly laying charges then if they are to give evidence they should do so before any of the co-defendants' or co-accused's or co-plaintiffs' witnesses can give their evidence for the same reason that it is highly undesirable that any of the co-accused should tailor their evidence according to the witnesses of their preceding joint parties.

However DW1 gave evidence the first day but had to stop because he appeared not fit due to insobriety. The Court had felt that he might just unwittingly prejudice the serious case facing accused 1. He was in brief a perfect spectacle who should have been committed for contempt.

The next day when he truly testified to having taken proper food he told the Court that he knew accused 1 and his father (accused 6 in the charge sheet).

He testified that on 21-06-1995 he was at Ha Mantsebo where he lives. He said he was with Thabo Lefalatsa and Hareteke Mapeshoane drinking at Ha Mantsebo Bus stop.

He testified that as the drinking was going on accused 1 arrived with a friend. The friend bought DW1 beer. He says the time was between 9 am and 10 am when this occurred.

They kept drinking till sunset. Towards sunset DW1 accompanied accused 1 to the Bus stop near by. Accused 1 wanted to go to Maseru. A vehicle approached from Mafeteng direction. Accused 1 raised his hand to stop it. The car stopped and accused 1 went on board leaving DW1 and accused 1's friend there. The colour of this car is said to have been greyish yellowish. However DW1 pointed to his jacket as approximating the colour of that car he spoke about.

Under cross-examination DW1 said that he often went to drink at that beer



place at Ha Mantsebo in 1995. He however said it was not normal to sit drinking there the whole day except that when beer is available there would be no point leaving it behind.

He pointed out that it was the first time he saw accused 1 at Ha Mantsebo. DW1 reiterated that when the car from Mafeteng approached it was at sun set and not dark. It was possible to see a person clearly 22 paces away. He could not only discern a figure but identify a person as so and so in that light and at that distance. He said the vehicle that approached did not have its lights on for it was not yet dark. He said in that light he was able to see that the colour of the vehicle was greyish, yellowish.

He further said he didn't see accused 1 after that day. Asked which day, he was clearly in a cleft stick and he settled for 21<sup>st</sup> August 1995.

Asked why he had earlier accepted 21-06-1995 as the day in question he said he was only estimating. Asked further why he didn't tell counsel he was not clear of the day he said that didn't occur to him.

DW2 Moeletsi Challa gave evidence on oath. The essence of his testimony is that accused 4 and PW6 and another arrived at his home and they all proceeded to PW1's home. He learnt from PW1 that two boys had left a Jetta car with him and that PW1 wanted some help whereby this car could be kept somewhere. He said it was explained that the car came from Mafeteng or perhaps Mohale's Hoek. There was no clear explanation given about the car. Nonetheless accused 4 who DW2 says is innocent was asked to fix the car, particularly the broken window.

DW3 Rethabile Mathetse said that PW1 told him that on 23 June 1995 a white man had been arrested. He said PW1 said he and his friend had stolen a VW vehicle in Mohale's Hoek after its owner had dropped his car keys.

Under cross-examination he said that when PW1 returned from detention the latter explained to him that the vehicle had been brought to him by two boys. He said unlike in the previous occasion this time when PW1 said this he was not confused but seemed relaxed. DW3 admits that if the white man had not been arrested on 23<sup>rd</sup> June 1995 neither he nor PW1 would have heard of his arrest being announced over the radio that day.

DW4 Refiloe Mokalanyane who is accused 1 gave evidence on oath and said he is illiterate. He said his mother told him in 1999 that he was then 25 years old. He told the Court that he met DW1 one day in 1995 and drank with him until just after sunset. They were drinking at Ha Mantsebo.

The evidence of DW1 and accused 1 on just this point deserves comment.

PW1 indicated that the car that came to his house on 21-06-95 arrived there between 8 pm and 9 pm. Given that Ha Lumisi is just about 6 km shy of Mafeteng which is about 80 km from Maseru, it would mean that this car left Mafeteng between 7 pm and 8 pm assuming it was travelling at 80 km per hour which is normal high speed on that road. But if on the other hand this car reached Ha Mantsebo - 10 km from Maseru - just after sunset and given that on that day according to my Hortor's Diary the sun set at about 17 - 25 pm it would mean that this car that accused 1 claims he went on board at about sun set at Ha Mantsebo had left Mafeteng and Ha Lumisi long before sunset. This in turn would mean that the two deceased that it conveyed were shot in broad day light at the spot where the empty shell was found lying some 100 paces away from where the bodies were dumped. The empty shell provides an objective fact from which this inference can be made.

On this aspect of the matter alone and given that Ha Lumisi village is not far from where the incident of shooting and conveying two bodies a distance of 100 metres from the road and thereby travelling a distance of no less than 400 metres in total to dispose of the bodies it would be underrating the intelligence even of criminals to think that they could risk arrest by brazenly doing two things which would immediately draw attention to them and their sordid act. i.e. cause repeated explosive sound of gun fire near a village in broad day light and go to and fro not less than twice huffing and puffing to dispose of two dead bodies 100 metres away each time next to a high way carrying busy traffic at such time of day. I boggle to be made to think that darkness is no longer a trusted ally to mischievous breakers of the law bent on avoiding detection of their wicked acts.

I have no hesitation therefore in rejecting as not only false but false beyond reasonable doubt any evidence that hinges on the allegation that the Jetta car came to collect accused 1 from Ha Mantsebo where he and Dw1 had been drinking.

. It is indeed fundamental in our law that an accused person wishing to have his story accepted by the court has to demonstrate that it is reasonably possibly true. If his story is not reasonably possibly true then it is false beyond doubt and the Court

is not obliged to accept it. See *R vs Difford* 1937 AD 370 at 373 saying if the court is satisfied not only that the explanation by the accused is improbable but beyond any reasonable doubt false the court is entitled to convict.

Accused 1 said that having got into this vehicle which was driven by Mofihli he felt cold and Mofihli lent him a jacket which was greyish brown in colour with leather patches on the elbows. He observed that Mofihli was wearing a black leather jacket similar to one that PW5 said belonged to his wife. He denies that the jacket that belonged to the deceased Mamofolo was retrieved during the search from his possession. Asked why PW9 could falsely say he obtained from him that jacket and the black shoes belonging to the deceased Armstrong he proffered the explanation that PW9 was capable of doing so because he had tortured him while in detention.

But most significantly this explanation appears to have been mulled for sometime because when cross-examination was going on briskly it seemed to have eluded accused 1.

At page 371 learned Counsel for the Crown referring to PW1's version said to accused 1

“He says he did talk to you and says you told him that you asked for a lift from occupants of the vehicle and that you had taken this vehicle from its occupants and that after shooting them you dumped these people somewhere and proceeded with the vehicle to Maseru. What do you say to that.....? He is committing me(falsely) I never discussed such a thing with him in prison.

PW9 Sgnt Masoabi also says you related a similar story to him. He says you told him you had asked for a lift from people who were riding in a vehicle. That on the way to Maseru you asked that the vehicle be stopped. That you shot the occupants of the vehicle, dumped their bodies and proceeded to Maseru. What do you say to that.....? He committed me for he didn't want to accept the report I gave him. I don't know that one.

Here are two people PW1 and PW9 with whom you had had no previous quarrel. They tell the Court the same story about what you told them.....? Eh!

Ct: Didn't you find this that they say strange.....? No. I didn't find it strange.

Because it is normal and true .....? No it is not true.

Do you know what is meant by something being strange. Here are two people telling the same thing about you learnt from two different places.....? With PW9 I am not surprised for he had hit me and assaulted me.

PW1.....? He is the one who I am surprised with”.

I need go no further in expressing my satisfaction with PW1's story which surprises accused 1 for supported as it is by PW9's version it illustrates beyond doubt that any protestations to or denials of its veracity cannot be true. I reject therefore those denials and protestations in favour of the credible story narrated by PW1 who enjoys the support of PW9 in this very crucial respect.

It is accused 1's further testimony that the vehicle that Mofihli was driving on the day in question looked like the one that the Court went to inspect at the inspection *in loco* i.e. the Jetta car Mofihli and he went to PW1's home in. When they arrived accused 1 stood some distance away from PW1 and Moeketsi Mofihli and thus could not hear what the two were saying. He eventually left without any further ado seeing that the two had gone into the house and he didn't know how long they were going to go on further.

Under cross-examination he indicated that he didn't bother to thank Mofihli for the lift or tell him that he was leaving. He told the Court that only Moeketsi Mofihli gave explanations at the scene in Mafeteng.

I have already indicated that PW9's story and I should add taken along with that of

Chonelanka which indicated that the two men who arrived with police from Maseru kept on indicating what happened at various places along the way from Mafeteng to Ha Lumisi, though Chonelanka couldn't say if any of the two men is in Court, yet by simple deduction and given that other evidence including that of accused 1 himself indicates that on a particular day when police from Maseru joined with those from Mafeteng as photographs amply illustrate, went together to the scene at Ha Lumisi and the two men gave explanations at the scene, such men can be none other than accused 1 and Mofihli. Thus although Chonelanka is unable to identify the two men his evidence against them is indeed damning beyond redemption for it cannot even be said why Chonelanka should lie about people he cannot even identify. Thus on this aspect of the matter where accused 1 wants the Court to believe that he kept mum and said nothing in the face of credible evidence to the contrary deserves rejection as false beyond doubt.

It is his further story that he didn't hear the explanations that Mofihli gave to the police. But in this regard accused 1 is treading what by now appears to be his familiar path and singing his pat theme. It should be recalled that at PW1's he said he did not participate in the discussion that he said was going on between PW1 and Mofihli yet credible evidence pointed to the contrary as I earlier indicated.



Furthermore he said he never talked with PW1 while in prison about how he and Mofihli had come by the vehicle they came driving in to PW1's home. One more strange thing that he expects the Court to believe is that when he left Mofihli, as he claims he did, at PW1's place he never bothered to bid him farewell or alert him to the fact that the car that remained outside PW1's place had remained without him keeping an eye on it in case something happened to it while the duo inside basked in the false hope that the man outside would raise an alarm should any such mishap threaten to happen.

He said he didn't bother to ask Mofihli what happened when he obtained this car at Mafeteng. It is strange that he should expect that the blood seen on photographs taken days after the incident could have escaped him entering the car while such blood was still fresh and while it was still bright not necessitating the lighting of motor vehicles travelling on the high-ways.

It indeed strains credulity to expect that the court should even remotely regard it as reasonably possibly true that Mofihli could give a lift to anyone so soon after he had killed two people in that blood-splattered vehicle with bullet holes including spent bullets and shattered window all of which factors would have been enough to

arouse the curiosity of an innocent hitch-hiker as to what the matter could have been that this car was in this condition. Innocent curiosity moved PW6 to indicate that the cold draught coming in through the window of this car made him feel that he missed his white Honda greatly. PW1's impression had been that this car was new and he wondered why its window wouldn't close. Yet well accused 1 is different.

I accept *Miss Maqutu's* submission that accused 1 after being given a lift by Mofihli, would not have simply left without saying good-bye or thanking the man who had done him all the favour that one could expect from a friend. For instance he kept the warm jacket for days on end without any thought about the need or use that "the owner" Mofihli would wish to put it to. On leaving the least he could have done according as common sense dictates would be to alert Mofihli that he was then leaving.

I accept *Miss Maqutu's* further submission that there is no evidence to suggest that PW1 would lie about what happened and what he was subsequently told by accused 1 and Mofihli whilst in jail. It is also significant that PW9 found the items of clothing belonging to the two deceased in accused 1's possession before the latter's arrest.

I have paid particular attention regarding accused 1's evidence that it came after his own witnesses had given evidence and that it would therefore not be surprising if his evidence is stream-lined to fit in with that of his witnesses. I have formed an opinion that the evidence revolving around the two murders insofar as it relates to accused 1 is purely circumstantial. The commission of those crimes including indeed robbery involved no eye-witnesses. To that extent I don't think the authority of *Tšeliso Lempe vs Rex* C. of A. (CRI) No.7 of 1996 (unreported) which relates to the defence of alibi is of much use. I would rather rely on CRI/T/10/91 *Rex vs Veddie Sello Nkosi* which like the instant matter was based on circumstantial evidence where like in the instant matter property belonging to or under the control of the deceased was traced to the accused thereby connecting him inseparably from accountability for the crime committed. I have no doubt that robbery was the motive for the murders committed.

With regard to accused 5 Mokherane Tsatsanyane the evidence tendered by this accused is that accused 4 came to him and asked him to fix a car for him but not at the workshop belonging to accused 5's father because accused 4 owed him moneys he was unable to pay and thus feared that accused 5's father might impound this car on learning that it belonged to his debtor.

Accused 5 pointed out that on the following day in the evening they went to Lithoteng where the car was to be parked. The car was fetched from there in another evening and eventually parked in PW8's garage. Accused 5 says he saw no blood on this vehicle. He only saw blood when the police pushed the car outside the garage. Indeed even PW15 who had been working on the vehicle didn't see the blood until this was pointed out to him by a fellow-worker.

Accused 5 indicated that even if he saw blood he would not think of anything untoward because the work of a panel beater entails working with blood-sodden vehicles. This appears to me to be fairly reasonable.

Accused 5 further indicated that he detected no fetid odour issuing from this vehicle.

He further stated that he had been on a wrong trail looking for a 4 x 4 vehicle he thought 'Mamolulela Mofolo was riding in when she met her ill-fate. He testified that 'Mamolulela is his relative against whom he could not mean any harm.

As a matter of fact he was present during funeral arrangements for 'Mamolulela

and he eventually attended the funeral. He laboured under the false belief that what was being looked for was a 4 x 4 and not the Jetta that was in his possession. He didn't bother to inquire from the Ministry of Education what progress was being made towards finding the 4 x 4. He never asked his father about the circumstances leading to 'Mamolulela's death. He never heard people at the funeral or in casual conversations during arrangements leading to the funeral or afterwards remarking about the fact that this time 'Mamolulela had travelled in a different vehicle. Although in looking for 'Mamolulela's vehicle he maintains he was assisting with police investigations it didn't occur to him to alert them in that regard nor did he feel the need to exchange notes with them.

He said he didn't work on this vehicle at Lithoteng because there was no electricity. But he acknowledged that at the place where he was working on it electrical work was not required nor indeed needed doing on the vehicle.

Seeing that electricity could not have been the reason the car was removed from Lithoteng where it had been kept, he quickly indicated that accused 4 had rented the premises where he lived at Lithoteng therefore the car could not have easily stayed there. It is to be wondered whether he was certain PW8 was not paying rent at the

British High Commissioner's flats. It should also be borne in mind that he had earlier intimated that the Jetta had been removed from Lithoteng because of lack of electricity at that place. Strangely it was taken to PW8's garage where there was no electricity also.

He further indicated that accused 4 was having some business to do at Quthing and it was feared it might be inconvenient to come to his rented premises in his absence. But indeed accused 4 on credible evidence has been observed sitting behind the Jetta car in the semi-closed garage at Maseru West scores of kilometres away from Quthing. PW15 testified to this that he was even reading a newspaper when so observed. This seems to give a lie to the urgency pressing on his time at Quthing for the reading of a newspaper on any account is a leisurely form of pass-time. So nothing in truth seems to me to have been pressing accused 4 at Quthing such that the car could not be repaired where he stayed at Lithoteng.

One significant thing which cuts a wide swath on accused 5's innocence regarding his connection with this car is that at no time has it been shown that this car, since arriving in Maseru at night, ever moved from place to place in daylight. It has been moving under cover of darkness from point to point. Furthermore accused 5 had

not asked for permission to keep this car in PW8's garage.

It is not denied that PW8 asked accused 5 to remove this car from her garage. Even though it turned out that the date PW8 said she made this demand could be wrong the fact remains accused 5 never obliged till police came and moved it out of that garage. This suggests that accused 5 felt that this was the best place this car could be kept in from prying eyes which might raise eye-brows concerning its similarity to the car being sought after. No reason - palpable reason is given why the car was not worked on in the open but still relatively secure and fenced in space opposite PW8's gate now that she was in dire need of using her garage.

But why the inability on accused 5's part to readily comply with the demand to remove this car from PW8's garage?? The Court is not unmindful of the observations it made about the locality of PW8's home. It is in an obscure area, accessed by a round about road which leads into a cluster of houses butting on a narrow path giving an impression to a casual stranger chancing along that path that he is encroaching. As if that is not enough at the far end to this avenue-like setting is a gate that leads to even more secluded area consisting of some five or six flats hemmed in by trees on the other side of the path. Entry through this gate imposes an even greater awe to a

stranger that he is encroaching on private property. Along side the road-way serving these flats are gates leading to each of the individual flats. Going past that gate one gets into a high-walled unroofed car-port further opposite whose entrance is a garage without windows. The only light getting in there being when the garage door is tipped. This is indeed a secretive mind's haven.

Thus it is an ideal destination for the type of car which travels under cover of darkness.

Accused 5 told the Court that when accused 4 arrived asking that he should fix this car for him his father was not there and would be away for a whole week. He and accused 4 agreed that the vehicle should be finished in two days. Once more given that accused 5 knew that his father would be away for a whole week the work that needed to be completed in two days could have easily been effected at accused 5's father's workshop with upwards of three days to spare. Indeed accused 5 agrees that he could have fixed this car there instead of parking it at PW8's place.

He further said they took this car to PW8's garage at night and only told PW7 that he was parking it there.



Given the above factors I find that the submission is well-founded that the only reason this car was not taken to Lower Thamae workshop was that accused 5 and 4 were intent on hiding it. The axiom constituting an element of dishonesty prevalent in their dealing with this car is unanswerable that they removed it from Lithoteng under cover of darkness and hid it at PW8's garage without her knowledge. Accused 5 indeed made much of the fact that he was a relative of the deceased 'Mamolulela and could mean her no harm. But I take it that in hiding the car she had been travelling in he was not doing his relative any harm but disobliging the Government which is the owner.

I am not unmindful of the explanation given why the vehicle ended up going to Lithoteng in darkness. Indeed it was stated that accused 5 had to go to Ladybrand to fetch a gear box and this took a long time. One nonetheless wonders why every other vehicle driven by or at accused 5's behest travels at any other time while the Jetta car is confined to movement at night always.

Accused 5 maintains that PW15 is changing his story when he says the garage door was closed while they were working on the car. He buttresses this contention by intimating fairly late in the day when PW15 can no longer be cross-examined that

just before the trial PW15 was approached by certain persons and told to lie. This contention is in sharp contrast with the rule laid down in *Small vs Smith* 1954(3) SA 434 that :

“.....It is grossly unfair and improper to let a witness’s evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved”

See also *Phaloane vs Rex* 1981(2) LLR at 246 where Maisels P endorsed the principle enshrined in the above authority.

But apart from the fact that PW15 was steadfast in his contention that the garage door was closed, he even placed this in his statement made to the police dated 7<sup>th</sup> July 1995 - long before the trial and hardly two weeks after the incident. The Court puts a premium on the fact that there is no ill-blood between PW15 and accused 5. Why then would PW15 lie about him. With regard to accused 4 it would suffice to indicate that in the face of whelming evidence against him he preferred to remain silent. But it is not the position in law that silence is equal to guilt. The Crown has to bear the onus to prove the case against every accused beyond a reasonable doubt. In going about this it is important to bear in mind the import of the discussion by learned authors Hoffmann and Zeffertt in **The South African Law of Evidence** at 598 that :

“If a witness has given evidence directly implicating the accused, he can seldom afford to leave such testimony unanswered. Although evidence does not have to be accepted merely because it is uncontradicted, the court is unlikely to reject evidence which the accused himself has chosen not to deny. In such cases the accused’s failure to testify is almost bound to strengthen the case for the prosecution”.

PW15, PW6 and PW1 gave evidence implicating accused 4 but he chose not to give an explanation regarding his role in the offences charged.

As a starting point I think in order to determine what offences accused 4 and 5 have committed it should be the proper yard-stick to use to find out what PW1 the accomplice could be said to be guilty of.

Credible evidence indicated that when he got involved in the crimes charged PW1 had been duped into believing that what he was readily getting himself embroiled in was theft simpliciter. It had not been disclosed to him that the car had been forcefully taken from its lawful custodian. In fact he was deceived into believing that keys belonging to this car had dropped imperceptibly from a driver who was worse for drink.

It was not disclosed to him that the occupants of the car had given a lift to two rogues who shot and killed those occupants. In short it was not suggested to PW1 that violence was an element in the taking away of this car.

The highest water-mark of accused 4's knowledge i.e. guilty knowledge or *mens rea* was what was supplied to him by Pw1 who is an essential Bench-mark if the situation being dealt with here is to be seen in proper perspective. The acknowledgement of this fact takes the instant case outside the purlieus of *R vs Jongani* 1937 AD 400 where the facts were :

*Jongani* was the leader of a criminal gang. He could have been charged with theft or receiving stolen property knowing it to be stolen. The gang killed the deceased in *Jongani's* absence and without his knowledge. After the murder the gang told him what they had done. He took possession of the deceased's personal belongings. He was convicted by the Appeal Court as an accessory after the fact in respect of the murder”

C/F *R vs Nkau Majara* 1954 HCTLR pg 38.

In the instant case guilty knowledge seems to be confined to a lesser crime of theft only.

Under such circumstances it would seem PW1 would be guilty only of Theft. But the charges here are of two murders and robbery; and not theft. To my

understanding of the law one can only be convicted as an accessory to crimes charged. But in the instant case Theft has not been preferred as a charge therefore it would seem in such circumstances and following this logic PW1 would have to be acquitted. But can he really. I think not.

A careful consideration of sections 140(1), 182(2), 197, 198, 185 and 345 of our Criminal Procedure and Evidence Act No.7 of 1981 seem to fortify me in the view that I entertain.

Section 140 provides that -

- “(1) Any number of persons charged with -
  - (a) committing or with procuring the commission of the same offence, although at different times, or with having after the commission of the offence harboured or assisted the offence; or
  - (b) .....  
may be charged with substantive offences in the same charge and may be tried together, notwithstanding that the principal offender or the person who obtained the property is not included in the same charge or is not amenable to justice”.

Section 182(2) provides that -

“Any person charged with an offence may be found guilty as an

accessory after the fact in respect of that offence if such be the facts proved, and shall, in the absence of any penalty expressly provided by law, be liable to punishment to which the principal offender would under any Law be subject”.

Section 197 provides that -

“If in any other case not mentioned in this Act the commission of the offence with which the accused is charged as defined in the law creating or as set forth in the charge, includes the commission of any other offence, the accused person may be convicted of any offence so included which is proved, although the whole offence charged is not proved”.

If one can pause here a moment it would seem plain that -

if by the whole offence charged one could take robbery for an example and that robbery is not proved then it would further seem that the interpretation does no violence to this section if theft is nonetheless proved, for in the scheme of things it is in fact included because in its commission an element of dishonesty is included just as well as it is defined as an essential element in the commission and charge of robbery.

Section 198 rams the point home by neatly providing even in more clear terms than the preceding section, that -

“If the evidence on a charge for any offence does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be guilty of the offence so proved”.

Thus if the accused is charged with robbery, and it is shown that only the element of dishonesty is proved while that of violence is not then it seems conviction

for theft would be a proper verdict according to the spirit if not letter of this section read with the above cited ones.

Section 185(1) is also worthy of consideration insofar as *subsection(d) thereof relates to the exercise I am presently engaged in.*

Subsection (1) provides that -

“If upon the trial of any person on a charge for robbery it appears upon the evidence that the accused did not commit the offence of robbery but that he did commit -

- (a) an assault with intent to rob; or
- (b) an assault with intent to do grievous bodily harm, or public violence
- (c) A common assault; or
- (d) *theft forming part of the offence of robbery charge; or*
- (e) an offence under section 343,

the accused may be found guilty of an assault with intent to rob, or of an assault with intent to do grievous bodily harm, or of a common assault, or *of theft* or of an offence under section 343 as the case may be”. Emphasis supplied by me.

Clearly the invisible offence is created here that if Robbery is not proved but theft is proved then it is fitting that a verdict for theft be returned.

See also section 343 which talks of failure to give satisfactory explanation for possession. Such could have either been given to the police or to this Court. In my view accused 4 and 5 failed to meet the minimum requirement needed of them by this section.

This in my opinion is the offence PW1 would stand to be convicted of in terms of the sections set out above read with each other; and of nothing else.

In the light of the fact that PW1 was the linchpin working vigorously to attract the desire to have on the part of accused 4 who in turn lured accused 5's greed, yet the maximum crime he is shown to have committed is theft under the sections considered, nohow can in my view accused 4 and 5 go any higher.

It should be recalled that credible evidence revealed that in his eagerness to reap where he had not sown PW1 brazenly said to DW2 "the two boys you see near



the car have stolen it we want to make it ours. Can you think of anybody who could help us hide it”.

It can be rightly presumed that the conversation that was engaged in by DW2 and accused 4 though conducted in a language that PW1 knows little of, if DW2 was faithful to what PW1 said to him then accused 4 would have been told nothing concerning the violence that accompanied the taking of the car resulting in two deaths. In fact PW1 got to learn of the true position long after he learnt that accused 4 had been laid by the heels and even if he could have learnt of it before accused 4 was arrested it appeared that PW1 had lost the opportunity to meet with him. Regarding accused 5 PW1 knew nothing of his involvement in the desire to unlawfully possess this car. What knowledge accused 5 had of the dishonour tainting this car could not have been more than accused 5 had or in turn more than PW1 had.

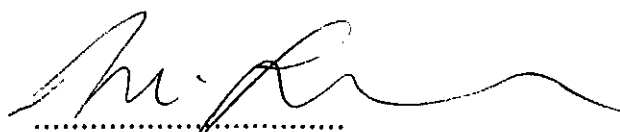
Accused 4 and accused 5 are acquitted of murder in Count I, murder in Count II and Robbery in Count III.

They are convicted of theft both of them in terms of the provisions of above quoted sections read together.

PW1 is freed from liability in respect of all charges preferred in this proceeding.

Accused 1 is found guilty of murder in Count I, murder in Count II and Robbery in Count III.

My assessors agree.



JUDGE  
27<sup>th</sup> April, 2001

For Crown : Miss Maqutu  
For Accused 1 : Mr Mosito  
For Accused 4 : Mr Lesuthu  
For Accused 5 : Mr Mahlakeng