

IN THE HIGH COURT OF LESOTHO

In the matter of:

REX

VS

- 1. CHERE MOSOLA**
- 2. THABO MOIKETSI**
- 3. THABANG MASUPHA LEFUMA**

JUDGMENT

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

22nd day of June, 2001

This is a summary trial in which the accused are charged with the crime of murder, it being alleged that on or about 8th November 1998, and at or

near ha Tlali in the district of Mohale's Hoek, they each or other or all unlawfully and intentionally killed Lerato Molise. When it was put to them the accused persons pleaded not guilty to the charge. The plea of "*not guilty*" was accordingly entered in respect of each of the three accused persons.

In support of the crown case, seven (7) witnesses were called to testify in this trial. The defence called no witnesses to testify on its behalf. However, No.1 accused and No. 3 accused themselves went into the witness box and gave evidence on oath, in their defence. No.2 accused elected to remain silent and adduced no evidence in his defence.

It was common cause that, on 26th November 1998, a medical doctor conducted a post-mortem examination on a dead body of a male African adult at the mortuary of Mohale's Hoek government hospital. However, the medical doctor, who was an ex-patriate, had since left Lesotho and was not available to testify as a witness, in this trial. His post-mortem examination report was, by consent, handed in, from the bar, as Exh. "C" and part of the evidence, in terms of the provisions of the **Criminal Procedure and**

Evidence Act, 1981 of which S. 223 (7) reads:

“223 (7) In any criminal proceedings in which any facts ascertained by a duly qualified medical practitioner in regard to any injury or state of mind or condition of body of a person or his opinion as to the cause of death of a person, or any facts ascertained by a veterinary practitioner as to any injury or his opinion as to the cause of death to any animal may be proved by a written report signed and dated by such medical or veterinary practitioner and that report shall be prima facie evidence of the facts recorded in it.”

According to exh. “C”, the dead body was identified, before the medical doctor, as that of 18 years old Lerato Molise (deceased) by Chabasethabile and Sepepane of ha Khitsane and ha Senkatana, respectively.

It may, perhaps, be mentioned that Chabasethabile Mpatsia testified as P.W.6, in this trial, and confirmed that he was one of the two people who identified the body of the deceased before the medical doctor. According to P.W.6, the deceased was the son of his own sister. He was, therefore, his nephew and had no difficulty in identifying him before the medical doctor who performed the autopsy on his dead body. I shall return to his evidence later, in this judgment.

The external examination of his dead body revealed that the deceased

had been whipped all over the body; both his hands had been tied with a rope; he had ecchymosis on the right side of the chest and burn lesion on both buttocks; the foreskin of his penis had recently been retracted; his abdomen was very very depressed and the general condition poor. On opening the body, the medical doctor detected nothing abnormal except that the deceased's stomach was quite empty. On these findings, the medical doctor formed the opinion that the deceased had died as a result of starvation after he had been severely beaten and abandoned.

I can think of no good reasons why the opinion of the medical doctor that the cause of the deceased's death was starvation should be doubted. The salient question that immediately arises for the determination of the court is whether or not the accused are the persons who starved the deceased and, therefore, brought about his death.

In this regard the court heard the evidence of P.W.3, Papi Setona, (aged about 20 years old) who told the court that he had never attended school and was, therefore, illiterate. He lived at the village of Kubake, in the district of Mohale's Hoek. He knew the deceased in his life time as the latter

According to P.W.4, on 24th May, 1999, he and the deceased went to the circumcision school where they found amongst others A1, A2 and A3. It is, however, significant to remember that according to P.W.3, P.W.6 and, indeed, exh "C" the deceased died in November 1998. That being so, P.W.4 could not be correct in his evidence that it was in 1999 when he and the deceased went to the circumcision school.

Be that as it may, P.W.4 went on to testify that on the evening of the day in which he and the deceased arrived at the circumcision school they were not given food. It was only in the morning of the following day that they were given food at the school. He himself did eat the food. The deceased did not. Although P.W.4 initially told the court that the reason why the deceased did not eat the food was because he had been fastened up, he somersaulted and said the reason the deceased gave for not eating the food was because he did not feel like eating it.

P.W.4 told the court that, on the afternoon of the day following the one they had arrived at the circumcision school he heard one of the students by the name of Lehlomelo, alias Lisema, raising an alarm that the deceased was

running away from the school. Following that alarm A1, who was present at the circumcision school, left saying he was going to look for the deceased at his home, Kubake. He was accompanied by some men who usually came from home to visit the circumcision school. On the afternoon of the day following the one he had run away, the deceased was brought back to the circumcision school by A1 and those other men.

In his evidence P.W.4 told the court that at the time the deceased arrived back at the circumcision school he and the other students had gone to gather wood. He did not, therefore, actually see the deceased arriving back at the school. It was only when he and the other students returned from gathering wood that A1 called them together and informed them that the deceased had been captured and returned to the school, the deceased himself was, at that time seated next to a rock where he was handcuffed and fastened with a rope. The deceased appeared to have been assaulted because he had weals all over the body. Notwithstanding that when he was brought back to the school the deceased appeared to have been assaulted, P.W.4 saw the three accused beating him up. Besides the three accused, he did not see any other person assaulting the deceased at the circumcision school. P.W.4

denied the evidence of P.W.3 that the deceased had escaped from the circumcision school on two occasions.

Assuming the correctness of the evidence of P.W.4 that at the time the deceased was brought back to the circumcision school he himself was not present as he had gone with other students to gather wood, I find it incredible that he can be so positive that A1 was amongst the people who brought the deceased back to the school. In my view, it is clear that P.W.4 was not being honest with the court, on this point.

In his evidence P.W.4 further told the court that there were two huts at the circumcision school. One was used to store the food staff at the school. The other was used as bedroom for the students and the instructors. In the evening when the students and the instructors retired into one of the huts for the night the deceased remained outside where he was handcuffed and fastened with a rope, next to a rock. As it was during the summer and the weather was, therefore, hot, P.W.4 believed that the deceased did not suffer cold where he remained handcuffed and fastened next to the rock outside the circumcision school hut.

There were times when P.W.4 noticed A1 taking food to the deceased where he was handcuffed and fastened next to the rock. He, however, did not observe whether or not the deceased actually ate the food. He never saw anyone offering the deceased water to drink. According to P.W.4, the deceased remained where he was handcuffed and fastened with the rope, next to the rock, for about a week before he passed away. He (P.W.4) and the other students were returning from the mountain where they had been gathering wood when A1 called them together and announced that the deceased had passed away. He actually took them to a donger where he showed them the dead body of the deceased. A week later the dead body of the deceased was carried home from the circumcision school. P.W.4 did not, however, see the people who actually carried home the dead body of the deceased.

It is worth noting that P.W.4 is the only witness who told the court that the dead body of the deceased spent a week at the circumcision school before it was carried home. According to all other witnesses who testified on this point the body of the deceased was carried away from the circumcision school in the evening of the day on which he passed away. In the

circumstances, I find it difficult to believe the evidence of P.W.4 on this point.

23 years old Chabaseoele Mohale testified as P.W.2 and told the court that he lived at Kubake in the district of Mohale's Hoek and was illiterate. He knew the three accused who lived in a neighbouring village to his own village. He also knew the deceased in his life time.

According to P.W.2, one morning, in November 1998, a certain young man by the name of Mafunyane came to his home and asked him to accompany him to the deceased's home where he was to report to his (deceased's) father, Mpolokoane, that the deceased had run away from the circumcision school. P.W.2 agreed. However, on arrival at his home they found the deceased's father not in. Mafunyane then proceeded to another village called ha Sechele while P.W.2 returned to his home at Kubake. On the way P.W.2 met one Chapi with whom he returned home.

After P.W.2 had returned home, Mpolokoane, the father of the deceased, came to him. He (P.W.2) was then in the company of one

Rabonne. Mpolokoane asked P.W.2 and Rabonne to accompany him to the circumcision school where his son (deceased) had allegedly disappeared. According to P.W.2, he and Rabonne did accompany Mpolokoane to the circumcision school. However, on the way to the circumcision school they met A1 who told them that the deceased was not at the school. They should, therefore, return and look for the deceased at home. P.W.2, Rabonne, A1 and Mpolokoane then proceeded to the village of Kubake where they looked for the deceased at his home i.e Mpolokoane's house. They did not find him. On the suggestion of Mpolokoane they then proceeded to the house where his (Mpolokoane's) wife was staying in the neighbouring village of Motsemocha. Before they actually reached the house A1 and Rabonne remained behind whilst only P.W.2 and Mpolokoane went and entered into the house where they found the deceased. After they had found him, P.W.2 and Mpolokoane left the deceased in the house and returned to A1 and Rabonne where they were waiting, some distance away from the house. Mpolokoane explained to them that the deceased was present in the house. Thereafter, A1 and Mpolokoane instructed P.W.2 and Rabonne to go to the circumcision school and report to the instructors, *viz.* A2 and A3, that the deceased had been found. They complied. It was then approximately 10:00a.m.

After reporting to them that the deceased had been found, A2 and A3 also instructed P.W.2 and Rabonne to go to the village of ha Tlali and report to the doctor of the school, one Matlanyane, that the deceased had been found at home. They again complied. After reporting to him, Matlanyane, the circumcision school doctor, also instructed P.W.2 and Rabonne to go and tell A1 that the deceased should be taken back to the circumcision school in the evening and not during day time. He (the doctor) told P.W.2 and Rabonne to assure A1 that he himself would be at the circumcision school in the evening of that day.

Thereafter, P.W.2 and Rabonne returned to where they had left A1 and Mpolokoane waiting at a hillock some distance away from the house in which the deceased had been found in the village of Motse-Mocha. According to P.W.2, a group of other men whose names he did not know had then joined A1 and Mpolokoane at the hillock. After P.W.2 had reported to him what the circumcision school doctor had said, A1 left saying he was going to his home in the village of ha Sankatana. Mpolokoane, Rabonne and the group of men, whose names P.W.2 did not know, remained guarding the house in which the deceased was. Shortly thereafter, P.W.2 himself returned to his

home in the village of Kubake to do his washing.

It is, perhaps, significant to mention that Mpolokoane and Matlanyane, the circumcision school doctor, were not called as witnesses in this trial. What they are alleged to have said, in this trial, falls to be hearsay evidence and, therefore, of no assistance to the court.

At about 4:30p.m. P.W.2 went back to Motse-Mocha. However, on the way he met two men by the names of Tsukutla and Rejeleng. They informed him that the deceased had escaped from the house in which he was at Motse-Mocha. P.W.2 actually went to that house and found that the deceased had, indeed, escaped and was no longer in the house. With the exception of one Phakiso, from the village of ha 'Mapotsane, all the men who had remained guarding the house in which the deceased was, in the village of Motse-Mocha, were no longer there.

When he asked him how the deceased had managed to escape from the house, Phakiso told P.W.2 that he had been sleeping in the shade next to the house, when he was awoken and told, by Tsukutla and Rejeleng, that the

deceased had run away and was, therefore, no longer in the house. Whilst he was talking to Phakiso, P.W.2 noticed a group of people chasing a person from a donger some distance lower down from the house where the deceased had been found. According to P.W.2, Phakiso identified the deceased by the clothes he had been wearing as the person who was being chased after by the group of people. As he was being chased after, the deceased was running towards the village of ha Sechele. In the evidence of P.W.2, he and Phakiso eventually left the hillock to join the people who were chasing after the deceased. When they joined them, they found that those people had already captured the deceased in one of the houses, in the village of ha Sechele. The deceased was then escorted back to the circumcision school by P.W.2, Phakiso and the group of people who had chased and captured him, in the village of ha Sechele. However, when they came to the village of Litšoeneng, on their way to the circumcision school, they were stopped by A1 who came from a whitish vehicle. When he came to them, A1 handcuffed the deceased's hands behind before instructing them to quickly take him back to the circumcision school. He promised that he himself would join them at the school before long.

Again, Phakiso was not called as a witness in this trial. What he is alleged to have said falls to be hearsay evidence and, therefore, of no assistance to the court.

P.W.5, Keketso Panyane, testified that he never attended school and was, therefore, illiterate. He lived at Kubake in the district of Mohale's Hoek. He knew the deceased in his life time. The deceased lived in the same village as he did.

According to him, one day at about 3:00p.m., P.W.5 was at his home when P.W.2 came and reported that the deceased had run away from the circumcision school. That was, presumably, after P.W.2 had finished to do his washing, at home. However, P.W.5 told the court that P.W.2 asked him to accompany him to deceased's home, at Motse-Mocha, to look for, and return, the deceased to the circumcision school. P.W.5 then accompanied P.W.2 to the village of Motse-Mocha.

It will be remembered that in his evidence P.W.2 told the court that after he had gone home to do his washing, he returned to the house in which

the deceased had been found, in the village of Motse-Mocha. He never told the court that he was then in the company of P.W.5.

Regard being had to the fact that when he went home to do his washing P.W.2 already knew that the deceased had been found in his house at Motse-Mocha, I find the evidence of P.W.5 that P.W.2 had come to his house and asked him to help in the search for the deceased who had allegedly run away from the circumcision school rather incredible. The least that P.W.2 could have requested P.W.5 to do, at that stage, could have been to assist to escort the deceased from his house at Motse-Mocha back to the circumcision school, in compliance with the instructions of Matlanyane, the circumcision school doctor.

Be that as it may, P.W.5 went on and told the court that on arrival at the home of the deceased, in the village of Motse-Mocha, he and P.W.2 found A1 and a group of school boys. They joined and stood with them outside, waiting for the deceased to come out of the house. It would appear that, whilst they were waiting in front of the house, the deceased escaped from the house through the back window because he (P.W.5) noticed him running

away some distance lower down from the house. According to P.W.5, he, P.W.2 and the school boys were instructed by A1 to chase, capture and return the deceased to the circumcision school. They complied. However, during the chase and even before the deceased could be captured, the school boys stopped the chase and returned to their school. Only P.W.5 and P.W.2 continued the chase.

It is to be observed that in his evidence P.W.2 told the court that when he arrived at Motse-Mocha, after doing his washing, he found that only Phakiso remained outside the house in which he had found the deceased. A1 and all the other people who had been guarding the house were no longer there. Indeed, P.W.2 never mentioned the presence of school boys anywhere in the vicinity of that house. As it will be seen later, in this judgment, there is ample evidence that after it had been found that the deceased was in his house at Motse-mocha, A1 left saying he was going to his home at ha Sankatana. When he later returned from home, A1 met the deceased at Litšoeneng where he was already being escorted back to the school. It cannot be correct, therefore, that A1 instructed P.W.5 and others to chase after the deceased from Motse-mocha as the latter wanted the court to believe.

However, P.W.5 confirmed that he and P.W.2 were amongst the people who joined in the chase after the deceased. He confirmed that the deceased ran into one of the houses in the village of ha Sechele. According to P.W.5 the owner of that house chased the deceased out of the house and threatened to assault him. However, P.W.5 and the other people who were chasing after the deceased pleaded with the owner of the house not to assault the deceased as they were returning him to the circumcision school. The owner of the house did not, therefore, assault the deceased. P.W.5 and his group then escorted the deceased from the village of ha Sechele back to the circumcision school. Indeed, P.W.5 confirmed that, on the way, they met A1 who handcuffed the deceased.

P.W.1 Mojalefa Thulo, told the court that he was 24 years old and lived in the village of Kubake in Mohale's Hoek district. He never attended school and was, therefore, illiterate. He knew the deceased in his life time. He also knew the three accused persons before court.

P.W.1 remembered that one day, during November 1998, he was returning from Mohale's Hoek town to his home at Kubake when he was

called by P.W.2. According to him, P.W.1 went to P.W.2 who was then in the company of P.W.5 and a certain Phakiso. The three were next to the deceased's house in the village of Motse-Mocha. When he came to them, P.W.2, P.W.5 and Phakiso told P.W.1 that the deceased had escaped from the circumcision school and was in the house. Whilst they were waiting outside Phakiso went into the house. When he returned from the house he reported to them that the deceased was no longer in the house. Shortly, thereafter, Phakiso drew their attention to a certain Fusi who appeared to be looking for something in the donger. The name of the donger was "*lengope-la-litšoene*". They shortly, thereafter, noticed that Fusi was chasing after the deceased from that donger. P.W.1 and his party then went and joined in the chase after the deceased, who ran into one of the houses in the village of ha Sechele.

It is to be observed that the evidence of P.W.1 confirms the evidence of P.W.5 that he (P.W.5) was with P.W.2 when the later returned, presumably after doing his washing, to deceased's house at Motse-Mocha where he found Phakiso outside the house. P.W.1's evidence does not, however, confirm P.W.5's evidence that when he and P.W.2 came to deceased's house at Motse-Mocha they found A1 and some school boys guarding the house from

which the deceased escaped through the back window.

Be that as it may, P.W.1 confirmed the evidence that after he had run into one of the houses in the village of ha Sechele, the deceased was captured and escorted back to the circumcision school. When they were at a place called Litšoeneng, A1, who had been travelling in a vehicle, came to them and handcuffed the deceased. According to P.W.1, after handcuffing the deceased A1 instructed him and the other people who had been escorting the deceased to take him back to the circumcision school and beat him up on the way to the school. After giving those instructions, A1 himself left and was not one of the people who escorted the deceased from Litšoeneng back to the circumcision school.

P.W.1 told the court that as he and others continued escorting the deceased from Litšoeneng back to the circumcision school they picked up twigs with which they beat him up in compliance with the instructions of A1. When they came to the top of Mohale's Hoek mountain, on their way to the circumcision school, a certain Rejeleng hit the deceased with a stick on the chest. The deceased fell to the ground as a result of that blow. Asked why

he assaulted the deceased so viciously with the stick Rejeleng did not respond.

However, another young man, by the name of Itšokoleng, replied and told P.W.1 and others that they had just recently graduated from the circumcision school and, therefore, knew nothing about what should be done with a boy who had run away from the circumcision school. After he had got up from where he had fallen, the deceased staggered as he tried to walk but one Tsukutla kept on tripping him. As he was being tripped the deceased was falling to the ground and Itšokoleng would then force him to stand up by beating him with a twig. Eventually P.W.1 and his party arrived at the circumcision school with the deceased who had then sustained multiple weals or injuries on his body as a result of the assault that had been perpetrated on him whilst he was being escorted back to the school.

The evidence of P.W.1 as to what happened to the deceased whilst he was being escorted from Litšoeneng to the circumcision school was, in material respect, corroborated by the evidence of P.W.2 and P.W.5. According to P.W.1 when he and his party arrived at the circumcision school

with the deceased, they found A2 and A3, together with many other men. A1 was not there. P.W.1 and his party handed the deceased to A2 and A3 because they were two of the instructors at the school. In his evidence, P.W.1 did not hear either A2 or A3 say anything to the deceased when he was handed to them. Nor did he see them do anything to him. In particular P.W.1 denied that A2 and A3 or any other person assaulted the deceased when he arrived back at the circumcision school. However, P.W.1 told the court that, some time after he and his party had arrived with the deceased at the circumcision school, A1 did come to the school. On his arrival, A1 asked for a rope with which he fastened the deceased to a rock. Thereafter, P.W.1 and his party left the circumcision school and returned to their respected homes. He was not sure what day of the week it was when the deceased was returned to the circumcision school. It could have been either Monday or Tuesday. According to him, on Friday of that week P.W.1 had the occasion to pay a visit at the circumcision school. On arrival he found the deceased still fastened at the same rock where A1 had fastened him on the day he (deceased) was returned to the circumcision school. When he spoke to him the deceased told P.W.1 that he had not been able to eat anything since the day he was returned to the circumcision school. He said although food was

placed in front of him, he was unable to eat it because both his hands were handcuffed behind. In trying to use his mouth to eat, the dish would overturn thus spilling the food which would be eaten by dogs. According to him P.W.1 approached A2 and enquired why the deceased could not be unfastened from the place where he was fastened at the rock. In reply A2 said he was not the one who had fastened the deceased. It was A1 who had fastened him. P.W.1 should, therefore, go and find out from A1 why the deceased could not be unfastened from the rock. P.W.1 then went to A1 and asked him the same question. A1 did not answer that question. He simply kept quiet and P.W.1 had to leave him alone. Thereafter, P.W.1 left the circumcision school and returned home.

On Sunday following the Friday on which he had visited the circumcision school, P.W.1 was on his way to A1's place when he met a certain young man who told him that the deceased had passed away at the circumcision school. On his return from A1's place, P.W.1 went via the circumcision school. It was confirmed that the deceased had, indeed, passed away and his dead body was amongst some bushes which were pointed out to him. He did not, however, go to the bushes and actually see the dead body

of the deceased.

It may be mentioned that the evidence of P.W.1 as to what happened when he and the other young men who had been escorting the deceased from the village of ha Sechele arrived at the circumcision school is slightly different from that of P.W.2. According to P.W.2, on arrival at the circumcision school they found A1, A2, A3 and many other men whose names he did not know. P.W.2 denied, therefore, the evidence of P.W.1 that A1 was not there. He told the court that after they had handed him to them the three accused and those other men surrounded and questioned the deceased as to why he had run away from the circumcision school. He did not, however, see any of them assaulting the deceased. P.W.2 confirmed the evidence that after handing over the deceased, at the circumcision school, he and his party returned to their respective homes. A week after the deceased had been returned to the circumcision school, P.W.2 learned, from a certain Boy-Boy, that he had passed away and his dead body taken to the mortuary.

In his evidence P.W.5 confirmed the evidence of P.W.1 that when he and others arrived with the deceased back at the circumcision school they

found A2 and A3 at the school. A1 was not there. P.W.5 denied, therefore, the evidence of P.W.2 that A1 was also at the circumcision school when they arrived at the school with the deceased. However, P.W.5 added that Matlanyane, the circumcision school doctor, was also there. The deceased was, according to P.W.5, handed to A2, A3 and Matlanyane. Thereafter, P.W.5 and his party left the circumcision school for their respective homes. Only Matlanyane, the circumcision school doctor, was at that time still talking to the deceased.

P.W.5 told the court that, after leaving the deceased at the circumcision school, he visited the school on three occasions. On the first occasion he was in the company of a boy by the name of Sechaba. On their arrival at the school P.W.5 noticed that the deceased was still handcuffed with his hands behind. He was then fastened with a rope to a rock. In the observation of P.W.5 the deceased appeared to be uncomfortable where he was fastened to the rock. He, therefore, asked the deceased how he was feeling. In reply the deceased told him that he was not feeling well as he was too tightly fastened and no food was given to him to eat. P.W.5 then left the deceased and did not do anything about his complaint. He spent the night at the circumcision

school teaching the students how to sing. At dawn P.W.5 left the circumcision school for his home. However, before leaving for home, P.W.5 noticed that the deceased was still tied at the rock. He went to the deceased and asked him whether his father, had been to the circumcision school and noticed how he was tied up at the rock. In reply the deceased told him that his father had not visited the circumcision school since he was brought back to the school and fastened in the manner he was at the rock.

On the evening of the following day, P.W.5 again visited the circumcision school for the second occasion. He was then in the company of another boy by the name of Letsekang. On arrival at the school, P.W.5 noticed that the deceased was still fastened at the same rock, in the manner he had already described to the court. He went to the deceased, asked him whether he was ever unfastened from the rock or given any food to eat or water to drink. The deceased replied that there was no time when he was unfastened from the rock or given food to eat or water to drink. After talking to the deceased, P.W.5 again spent the night at the circumcision school teaching songs to the students. P.W.5 assured the court that, whilst he was at the circumcision school on that night, he did not see any of the instructors,

or any other person, for that matter, offering food or water to the deceased. When P.W.5 and his companion were leaving the circumcision school for home, at dawn, the deceased called and requested them to tell his father to come to the circumcision school. According to him, P.W.5 told the deceased that from the circumcision school he was going straight to his place of work. He would not, therefore, be able to go to deceased's father who lived at Ha 'Mapotsane which was far away from both his home and place of work. Letsekang who was a headboy was also going to take his animals to the veld for grazing and would, therefore, not be able to meet the deceased's father.

P.W.5 told the court that two days later he again visited the circumcision school for the third occasion. On arrival he found the deceased still fastened at the same rock in the manner he had already described to the court. He again spoke to the deceased who told him that he had not been unfastened and neither food nor water had been given to him. According to him, P.W.5 again spent the night at the circumcision school. In the morning before leaving the school for home, P.W.5 asked the deceased whether he had found a person who could take his message to his father. The deceased, who was still fastened at the rock, replied in the negative.

For obvious reasons, the deceased could not be called to testify as a witness, in this trial. There is no evidence that what he is alleged to have said to the witnesses who testified, in this trial, was a dying declaration and, therefore, an exception to the rule of hearsay evidence. The court will not, therefore, be influenced by what the deceased is alleged to have said as that, in my view, falls to be inadmissible hearsay evidence.

Be that as it may, in his evidence P.W.5 told the court that, on his way home from the circumcision school, he met the deceased's father who was crossing the river in the direction towards ha 'Mapotsane. He explained to him the condition in which the deceased was at the circumcision school and told him that the deceased would like him to go and see him at the school. After P.W.5 had talked to him, the deceased's father said he was on his way to work but promised to go to the circumcision school on Saturday. According to him, P.W.5 did not have the occasion to visit the circumcision school again. However, he later learned from P.W.1 that the deceased had died at the circumcision school. He never knew anything about the funeral of the deceased who was certainly not buried at his village of Kubake.

Now, returning to his evidence, P.W.6 told the court that on the day following the one on which he had identified the dead body of the deceased before the medical doctor who performed the post-mortem examination, he returned to the mortuary to collect the dead body of the deceased for burial. The body was buried in the veld and not at the circumcision school or the village cemetery. That was in accordance with the rules of the circumcision school. In the evidence of P.W.6 only men attended the funeral at which the father of the deceased explained the circumstances under which his son had died.

It is significant to mention that P.W.6, who is an old man of about 60 years now, told the court that he himself had been to the circumcision school before 1970. There was, in existence, a national circumcision school committee whose function was to regulate the affairs of circumcision schools in the country. He had attended many meetings where the committee explained the rules that govern the circumcision schools. According to the rules that now govern the affairs of the circumcision schools, it is permissible to refer a student, who gets seriously sick at the school, to the hospital for medical treatment. The decision to do so is taken by the instructors or the

owner of the circumcision school. Indeed, where a student dies at the circumcision school, his dead body may, nowadays, be taken to the mortuary for post-mortem examination, provided his relatives want it to be done.

P.W.7, D/Tpr. Motsamai, testified that he was a member of the Lesotho Mounted Police Service based at Mohale's Hoek Police Station in the district of Mohale's Hoek. He remembered that, on 3rd December 1998, he received information concerning this case. Following the information, he and a certain D/Tpr Mohlapisi proceeded to the home of A1, in the village of ha Sankatana. They found him in. According to P.W.7, when he and his colleague went to A1, at ha Sankatana, they already regarded him as a suspect, in this case. After introducing themselves to him as police officers, they interrogated A1 about the death of the deceased. A1 gave his explanation following which P.W.7 cautioned, arrested and gave him a charge of murder. Thereafter, the two police officers and A1 proceeded to the homes of A2 and A3 in the villages of ha Kobotšoeu and ha 'Mapotsane, respectively. They found A2 and A3 in, at their homes. Again, A2 and A3 were already regarded as suspects, in this case. However, after introducing themselves as police

officers to A2 and A3, P.W.7 and his colleague started interrogating them. Following the explanations they gave, P.W.7 cautioned, arrested and gave A2 and A3 a charge of murder.

I must say I find it rather strange that P.W.7 cautioned, arrested and charged the three accused persons, whom he regarded as suspects, after he had already interrogated and obtained their explanations. One would expect P.W.7 to have first cautioned his suspects, in terms of the Judge's Rules. In any event, P.W.7 did not disclose to the court what explanations the three suspects gave him without first being warned, in terms of the Judges' Rules.

Be that as it may, P.W.7 went on to tell the court that, after they had been arrested at their respective homes on 3rd December 1998, A1, A2 and A3 were taken to Mohale's Hoek Police Station where they told him that the handcuffs and ropes that had been used on the deceased were with A1. According to P.W.7, he then accompanied A1 to his home at ha Sankatana where the latter produced and handed to him a pair of steel handcuffs together with its key, a chain rope, a silver wire rope and a red and white rope. He took possession of all those articles and returned with A1 to the police

station. From the police station, P.W.7 took the articles to the office of the clerk of court from whom he obtained a written order to keep them in the police custody. He handed in the written order as exh. "A" and part of his evidence. From the office of the clerk of court, P.W.7 returned to the police station where the articles were entered in a register, properly labelled and kept in the police exhibit-room ever since. P.W.7 handed in the pair of steel handcuffs together with its key, the chain rope, the silver wire rope and the red and white rope as exh. "1", exh. "2", exh. "3" and exh. "4", respectively. The three accused were later, on the same day, 3rd December 1998, taken before the Magistrate court and remanded, in custody.

It is worth mentioning that when it was put to him, under cross-examination, that his evidence that on 3rd December 1998 he had arrested the three accused persons, took possession of exh. 1 - 4 and obtained, from the clerk of court, an order to keep them in police custody, could not be correct, P.W.7 denied and insisted that his evidence was correct. It is, however, to be observed that exh. "A" does not bear him out. According to exh. "A", P.W.7 seized the exhibits on 25th November, 1998 and brought them to the clerk of court only on 31st March, 1999 when he obtained the order to keep

them in police custody.

Faced with the fact that, according to exh "A", it was on 31st March 1999 and *NOT* on 3rd December 1998 when he obtained, from the clerk of the court, the order to keep exh 1 - 4 in police custody, P.W.7 somersaulted and said on 3rd December 1998 the forms on which exh. "A" was written were out of stock at Mohale's Hoek police station. They became available only on 31st March 1999 when the clerk of the court admittedly ordered him to keep the exhibits in police custody. Notwithstanding the fact that he himself had clearly written on exh. "A" that he had seized exh 1 - 4 on 25th November 1998, P.W.7 insisted that the date was wrong. The correct date was 3rd December 1998.

Asked whether either his police notebook or the police Occurrence Book register could bear him out, P.W.7 told the court that he had lost his police notebook and the police officers at Mohale's Hoek police station normally destroyed the police Occurrence Book registers to avoid detection of the crimes they had committed. He was not, therefore, in a position to produce either his police notebook or the police Occurrence Book register to

support his evidence.

Again, asked, under cross-examination, whether as the investigator of this case he ever bothered to go to the scene of crime and make a report, P.W.7 told the court that he did visit the scene of crime and make a report which was in the docket. P.W.7 was shown, from the docket, a document which he said was the report he was talking about. That document was, by consent of both counsel, handed in, from the bar, as exh "B". According to exh "B", the report had been compiled, not by P.W.7 but by a certain D/Tpr. Molorane who said on 11th November 1998 he and another D/Tpr Mokhethi went to Lesotho Funeral Service in Mohale's Hoek to examine the deceased's dead body for injuries. Exh. "B" had, therefore, nothing to do with the scene of crime.

There is no doubt, in my mind, that P.W.7 was not a very reliable witness. It will be unsafe, therefore, to accept his evidence except where it has been corroborated by that of a more reliable witness.

In his defence, 45 years old Chere Mosola testified as D.W.1 and told

the court that he lived at ha Sankatana in the district of Mohale's Hoek. He remembered that on Sunday, 1st November 1998, he was at his home with A2 when the deceased wanted to go to the circumcision school of which he (D.W.1) was the owner whilst A2 and A3 were instructors. As such A1, A2 and A3 were, therefore, the people responsible for the welfare of all the students at the school. D.W.1 told the court that after he had been scarified by the circumcision school doctors, the deceased was immediately taken to the school by A2.

At about 6:00p.m on the following day, D.W.1 himself went to the circumcision school. On arrival at the school A2 and A3 reported to him (D.W.1) that the deceased had, earlier on that day, Monday 2nd November 1998, run away from the school. They had, however, captured and returned him to the school before he could reach the village. In the evidence of D.W.1, the deceased was, at that time, present at the school although he was kept separate from the other students. He did not notice any injuries on the deceased. D.W.1 and A3 then spent the night with the deceased outside the circumcision school hut in which the other students were sleeping with A3.

At about 3:00 a.m on the following day, 3rd November 1998, D.W.1 left the circumcision school and went to report to the doctor of the school that one of the students (deceased) had run away from the school. Thereafter, D.W.1 returned to the circumcision school in the company of the doctor. When he and the doctor arrived at the school, in the morning of that day, they found that the deceased was not there. A3 and A2 reported that he had, again, run away from the circumcision school.

According to him, D.W.1 immediately left to look for the deceased at home. On the way he met a certain young man by the name of Phakiso whom he asked to accompany him to look for the deceased at his (deceased's) home. They first went to the village of Kubake where the deceased's father lived. They found the deceased's father in and reported that his son (deceased) had run away from the circumcision school. He assured them that the deceased was not at his home. He, however, suggested that the deceased might be at the place where his mother lived, in the village of Motse-Mocha. D.W.1, Phakiso and the deceased's father then proceeded to the house where the deceased's mother was staying, in the village of Motse-Mocha. On arrival they found the deceased's mother sitting outside the house. When the

deceased's father asked her whether the deceased was not there, the deceased's mother replied that he was present, in the house. D.W.1, Phakiso and the deceased's father then went into the house and found that the deceased was, indeed, seated in there. In the presence of D.W.1 the deceased was asked by his father as to why he had run away from the circumcision school. He replied that his grand mother had said he could not stay at the circumcision school because there would be nobody to accompany her when she went out at night.

Thereafter the deceased's father, Phakiso and D.W.1 went out leaving the deceased alone in the house. Outside the house they found a group of boys one of whom D.W.1 recognised as a regular visitor at his circumcision school. D.W.1 detailed him to go to the circumcision school and report to A2, A3 and the circumcision school doctor that he (D.W.1) had found the deceased at his home, in the village of Motse-Mocha. On his return from the circumcision school, the boy reported that the doctor had said the deceased should be taken back to the circumcision school in the evening and not during day time. According to him, D.W.1 left and went to his home at ha Sankatana. The group of boys who were outside the house also disappeared.

Only Phakiso and the deceased's father remained guarding the house in which the deceased was. He told them that he would return in the evening and join them in escorting the deceased back to the circumcision school, in compliance with the doctor's directives.

On the evening of the same day, D.W.1 did return from his home and proceeded to where he had left the deceased in his house at Motse-Mocha. He was travelling in a taxi. When he came to a bus stop at a place called Litšoeneng, D.W.1 disembarked the taxi and walked towards the village of Motse-Mocha. However, as he left the bus stop, D.W.1 noticed some people running some distance away. At that time he met two young men and asked them what was happening. The two young men replied that those people were chasing after the deceased who had, again, escaped and was running away. D.W.1 then went to those people and found that they had already captured the deceased. One of the people who had captured the deceased was Phakiso who had been guarding the house in which the deceased was, at Motse-mocha. He did not know the other people but some of them testified as witnesses in this trial, presumably, P.W.1, P.W.2 and P.W.5. According to D.W.1, when he asked him how the deceased had managed to escape from the house at Motse-

mocha, Phakiso replied that he did not know. He only saw the deceased already running outside the house.

Be that as it may, D.W.1 told the court that after he had come to the deceased and the people who had captured him, he handcuffed both his hands behind and gave instructions that he should be escorted back to the circumcisions school. It was then about 5:30p.m. He assured the court that the deceased had not sustained any injuries at that time. He denied the evidence that he had given instructions that the deceased should be assaulted on the way back to the circumcision school.

After he had handcuffed the deceased and given instructions that he should be taken back to the circumcision school, D.W.1 himself went to report to the deceased's father that his son had been found and sent back to the school. He did find, and reported to, the deceased's father who undertook to come to the circumcision school in the morning of the following day. According to him, D.W.1 then returned to the circumcision school. On arrival at the school he found the deceased already there. The deceased then had multiple injuries on the back and a laceration above his right ear. When

D.W.1 inquired from them as to who had assaulted the deceased and caused him those injuries the two instructors, namely A2 and A3, told him that the deceased already had those injuries when he arrived back at the school. They had tried to ask the people who brought the deceased back to the school but, those people simply left and did not answer the question put to them by A2 and A3. In the circumstances, D.W.1 asked the circumcision school doctor, who was also present, at the school as to what should be done with deceased. In reply the doctor told him (D.W.1) that the deceased should remain tied up and kept separated from the other students until he had discussed the matter with his father when he came to the circumcision school, in the morning of the following day.

D.W.1 told the court that he then removed the handcuffs from one of the deceased's hand so that only one of his hands remained handcuffed. He took the chain rope (exh. "2") which was used to tether one of his goats at the circumcision school. He fastened one end of the rope to the handcuffs and tied the other end to the bush which was growing next to a rock. According to D.W.1, the deceased spent the night where he was fastened next to the rock.

In the morning of the following day which was Wednesday (4th November 1998) the deceased's father did come to the circumcision school and met the doctor of the school who told him that because his son had run away from the circumcision school three times, a goat had to be slaughtered so that the deceased could be treated before he was allowed to mix with the other students. Thereafter the deceased's father left to look for a goat. On the following day which was a Thursday, 5th November 1998, the deceased's father returned to the circumcision school and reported that he was still looking for the goat which he had not been able to find. On Friday, 6th November 1998 the deceased's father did not come to the circumcision school. However, D.W.1 himself went to him at his home and suggested that since he was unable to find the goat he (D.W.1) would have to give him one of his (D.W.1's) own goats. The deceased's father agreed to the suggestion and undertook to refund D.W.1's goat when he would have found one. He further promised to be present at the circumcision school in the morning of the following day which was Saturday, 7th November 1998, when the goat would be slaughtered and the deceased treated by the school doctor. However, the deceased's father failed to come to the school on Saturday, 7th November 1998.

According to him, early on Sunday morning, 8th November 1998, D.W.1 again went to the home of the deceased's father. He found him in and inquired as to why on Saturday he did not come to the school, as he had promised. The reply was that he (deceased's father) was waiting for the school doctor to come to him so that they could go to the circumcision school together. In his evidence D.W.1 told the deceased's father that the doctor had been waiting for him at the circumcision school on Saturday. They then agreed that the deceased's father would go to the circumcision school early in the morning on Monday, 9th November 1998. D.W.1 should, therefore, advise the school doctor accordingly.

From the deceased's father, D.W.1 went to his home in the village of Sankatana where he informed his wife that he was going to give one of his goats, at the circumcision school, to the deceased's father so that it could be slaughtered and used for the treatment of the deceased. From his home, D.W.1 returned to the circumcision school. It was then in the evening before sun set. On arrival at the circumcision school, D.W.1 found A2, A3 and a group of other men gathered at the spot where the deceased was usually fastened to the bush next to a rock. A2 and A3 reported to him that the

deceased had died.

According to A2, he had accompanied the deceased to a place where he would relieve nature. On their return, and before they could reach the spot where he was usually fastened to the bush next to the rock, the deceased set down saying he was feeling tired. The deceased then passed away. He (A2) was assisted by other men who were present at the school, at the time, to carry the dead body of the deceased from the spot where the deceased had died to the spot where he was usually tied to the bush next to the rock. In his evidence, D.W.1 told the court that after A2 had given the explanation about his death he looked at the deceased and saw that he was, indeed, dead.

D.W.1 told the court that the students at his circumcision school were given meals twice a day i.e in the morning and in the evening. When the deceased first arrived at the school on Sunday, 1st November 1998, he was not there. He had, therefore, no personal knowledge as to whether or not the deceased ate his food on the evening of that day. Again, D.W.1 had not yet arrived at the circumcision school when the students were served with their meals on Monday, 2nd November 1998. He was, however, told by A2 that the

deceased did eat his food on that Monday. On Tuesday evening, 3rd November 1998, D.W.1 himself tried to give food to the deceased but he refused to eat. In the morning of the following day, Wednesday 4th November 1998, D.W.1 again tried to give food to the deceased who ate only one spoonful of that food. He spilled out the second spoonful of the food which D.W.1, tried to give him. Later in his evidence in chief D.W.1 somersaulted and said it was on Thursday when he gave the deceased food which he spilled out. D.W.1 thought the reason why the deceased did not eat the food could be either because he did not like to be at the school or he had been injured. On Friday D.W.1 prepared soft porridge for the deceased who ate it a little. The same thing happened on Saturday and Sunday.

If the evidence of D.W.1 were to be believed that, after he had returned to the circumcision school and found the deceased already there, he removed the handcuffs from one of his hands so that his other hand was un-handcuffed and, therefore, free whilst he was being tied to the bush next to the rock, there would have been no need for D.W.1 to feed the deceased with the spoon, as he wished the court to believe. The deceased would have been able to use his un-handcuffed hand to eat the food given to him. In my view, D.W.1 was not

being honest with the court and the truth was in the crown evidence that he had handcuffed the deceased's hands behind during all the time the latter remained tied to the bush next to the rock, at the circumcision school.

It is to be borne in mind that in his own words on Sunday, 8th November 1998, D.W.1 left the circumcision school for the home of the deceased's father very early in the morning. When he returned to the school, the deceased had already passed away. He could not, in my view, have been testifying to the truth when he told the court that he served the deceased with soft porridge on that day.

Be that as it may, D.W.1 went on to testify that after he had seen, and satisfied himself, that the deceased had died at the spot where he was usually tied to the bush next to the rock, he asked A2 to go home with him so that they could report to the deceased's father. On arrival at his home they found the deceased's father in and informed him about the death of his son, the deceased. Thereafter, the deceased's father told them that he would come to the circumcision school early in the morning of the following day, Monday, 9th November 1998, to see for himself that the deceased had, indeed, passed

away. D.W.1 and A2 then proceeded to the home of the school doctor and reported to him that the deceased had passed away. The doctor immediately accompanied D.W.1 and A2 to the circumcision school. They all remained at the school until early in the morning of Monday, 9th November 1998, when the doctor instructed D.W.1 to go and tell the father of the deceased to quickly come to the circumcision school.

According to him, D.W.1 did oblige. On arrival at his home, D.W.1 found the deceased's father already preparing to proceed to the school. He accordingly returned with the deceased's father to the school where A2, again, explained how the deceased had died.

Having heard the explanation of A2 about how the deceased had died, the deceased's father said since his child had injuries he wanted his dead body to be taken to the mortuary for post-mortem examination. D.W.1 left the circumcision school to find a vehicle by which the dead body of the deceased was transported to the mortuary at Mohale's Hoek government hospital at about 7:00p.m. on the same day, 9th November 1998. According to D.W.1, he, the school doctor, the father of the deceased, A2, A3 and some other men

who were, at the time, present at the circumcision school, carried the body of the deceased from the school to the spot where the vehicle had stopped some distance away from the circumcision school. After the body of the deceased had been placed in the vehicle, only he (D.W.1), the school doctor and the father of the deceased accompanied it to the mortuary. The rest of the people who had assisted to carry the body of the deceased, from the circumcision school to the spot where the vehicle had been waiting, returned to the school and did not, therefore, accompany the body to the mortuary.

After the body of deceased had been placed in the mortuary, the father of the deceased told him (D.W.1) that in the morning of the following day, Tuesday, 10th November 1998, they should go to the police station and report the death of the deceased. At about 8:00a.m on Tuesday, 10th November 1998, D.W.1 and the father of the deceased did go to Mohale's Hoek police station where the latter reported that his child (deceased) had died at the circumcision school of which the former was the owner. He further reported that the body of the deceased had injuries. Thereafter, D.W.1 was asked by the police whether it was correct that the body of the deceased had injuries and he replied in the affirmative.

According to D.W.1, the police then put him into a cell where they assaulted him saying he would have to tell the truth. After the assault in the cell, he was taken into an office where he was told to make a statement about the death of the deceased. He did make the statement and told the police what he had already said before this court. As he was giving his statement D.W.1 was further assaulted by the police who said he was not telling them the truth.

After he had given his statement at the police station D.W.1 was told by the police to return home and tell A2 and A3 to report themselves at the police station on the following day, Wednesday 11th November 1998. He complied and A2 and A3 did go to the police station on the following day. He himself did not return to the police station. On their return from the police station on 11th November 1998, A2 and A3 told him that they were all required to take to the police station the instruments that had been used to fasten the deceased at the circumcision school. On the following day, Thursday 12th November 1998, D.W.1, A2 and A3 accordingly took exh. "1" and exh. "2" to the police station.

According to him, D.W.1 knew nothing about exh. "3" and exh. "4".

He saw them for the first time when P.W.7 handed them in as exhibits in this trial.

After handing exh. "1" and exh. "2" at the police station D.W.1, A2 and A3 were taken into a cell where they were again assaulted by the police. After the assault, the police released them but told them to report themselves at Mohale's Hoek police station from time to time.

D.W.1 told the court that, on 30th March 1999, he and A2 were arrested at their respective homes. A3 could not be found at his home where only a message was left that, on his arrival, he should immediately report himself at Mohale's Hoek police station. According to D.W.1, on arrival at the police station, he and A2 were locked up in a cell. On the following day, 31st March 1999, A3 did report himself at the police station. He was locked up in the same cell in which D.W.1 and A2 were locked. Later on that day, the three were taken before the Magistrate court where they were remanded in custody immediately after the Magistrate had read a charge to them. As the charge was read to them in the English Language, D.W.1 did not follow what was said.

In his evidence, D.W.1 told the court that when he appeared before the Magistrate who remanded them in custody he still had weals and a swollen face as a result of the assault on him by the police. He, however, did not tell the Magistrate or any of the senior police officers, at Mohale's Hoek police station, that the police had assaulted and injured him. He did not have a chance to tell the Magistrate because, as soon as he was remanded, the police escorted him to prison. He did not tell the senior police officers because he was afraid that they too would assault him. When he came to prison he was asked, by the prison warder who received him, whether he had any injuries on him. He replied in the negative. In his own words D.W.1 told the court that he was not telling the truth to the prison warder. He told the court that after six (6) days he was released from prison, on bail. According to him, D.W.1 never went to a medical doctor, for treatment of the injuries he had sustained as a result of the assault on him, by the police.

It is significant to observe that, in his evidence, D.W.1 was assaulted by the police on 10th and 12th November 1998. It was only on 31st March 1999 i.e a little over four(4) months later, when he appeared before the Magistrate court and was sent to prison, on remand. I find it incredible that four months

later D.W.1 still had weals and swollen face as a result of the assault on him by the police at Mohale's Hoek police station.

In his defence, No. 3 accused testified as D.W.2. He confirmed the evidence that he and A2 were instructors at the circumcisions school of which D.W.1 was the owner. The deceased was first brought to the school by A2 on 1st November 1998. According to D.W.2, D.W.1 was present at the school when the deceased arrived on 1st November 1998. D.W.2 denied, therefore the evidence of D.W.1 that he remained at home when the deceased was taken to the circumcision school by A2 on Sunday, 1st November 1998.

Be that as it may, D.W.2 went on to testify that in the evening of that day, 1st November 1998, the deceased and other students were served with meals as usual. The deceased did eat his food although not satisfactorily. According to D.W.2, that was because the deceased had, perhaps, taken his meal before leaving home for the circumcision school. In the morning of the following day, Monday, 2nd November 1998, D.W.1 returned home. At about 11:00 a.m D.W.2 and A2 served meals to all the students at the school. After taking their meals the students asked, and were allowed, to go and relieve

nature. D.W.2 and A2 remained at the circumcision school.

Shortly after the students had left, D.W.2 heard an alarm that one of the students was running away from the school. As a result of the alarm, D.W.2 and A2 rushed to the top of a nearby hillock from where they could see one of the students running at a lower place, towards a village called Thaba-Linoha. Before he could reach that village, the student went amongst some bushes. D.W.2 and A2 then went to those bushes and found the student. He was the deceased. They captured and returned him to the circumcision school. D.W.2 assured the court that, because he and A2 had captured him before he could enter into the village, they did not assault the deceased. However, back at the circumcision school, they did not allow the deceased to mix with the other students. They sat with him separate from the other boys. When they questioned him as to why he was running away from the school, the deceased replied that one old woman, by the name of 'Malebekere, was asking him with whom he was leaving her at home when he went to the circumcision school.

At about 5:00p.m, D.W.1 returned to the circumcision school from home. D.W.2 and A2 reported to him what had happened to the deceased.

D.W.1 also asked the deceased why he had run away from the school. The deceased gave him the same answer that he had given to D.W.2 and A2. D.W.1 decided that since the deceased had already run away from the school, he (D.W.1) would have to go and fetch the school doctor early in the morning of the following day, 3rd November 1998. D.W.2 and some other men who were at the circumcision school remained with the deceased outside the circumcision school hut in which the other students were sleeping. He assured the court that D.W.1 did not assault the deceased after he had been told that he had run away from the school. Nor did he order anybody to assault the deceased who was not fastened at all as he sat outside the circumcision school hut, on that night.

At about 2:00a.m, D.W.1 did leave the circumcision school to fetch the school doctor. After D.W.1 had left, D.W.2 himself went to a nearby donga to relieve nature, leaving the deceased with the other men who had been sitting with him outside the circumcision school hut in which the rest of the students were sleeping. When he returned from the donga, D.W.2 was told by the men who had remained with him that the deceased had disappeared. D.W.2 went to report to A2, who had been sleeping with the students in the

circumcision school hut, that the deceased had, again, run away from the school. They decided to wait for D.W.1 when he returned to the circumcision school.

According to D.W.2, on the evening of the day he was captured outside the village of Thaba-Linoha and returned to the circumcision school, the deceased was given food which he ate. The deceased could not, therefore, have run away from the school on the early morning of 3rd November 1998 because he was hungry.

In any event, D.W.2 testified that, when he returned to the circumcision school, D.W.1 was in the company of the school doctor. D.W.2 and A2 explained to them that the deceased had, again, escaped from the school. D.W.1 immediately left and went to the home of the deceased, leaving the school doctor at the circumcision school. D.W.2 confirmed that at about 11:00a.m on 3rd November 1998, P.W.2 came to the circumcision school and said he had been sent by D.W.1 to report that he (D.W.1) had found the deceased. D.W.2 and A2 should not, therefore, leave the circumcision school, presumably, to look for the deceased. According to D.W.2, P.W.2 then left

with the school doctor who said he was going to scarify other boys who were waiting to come to the school.

It will be remembered that P.W.2 himself gave evidence and told the court that after he had reported to A2 and D.W.2 at the circumcision school that the deceased had been found, he then proceeded to the home of the school doctor who instructed him to go and tell D.W.1 that the deceased should be brought back to the circumcision school in the evening and not during the day. D.W.2 cannot, therefore, be correct in his evidence that P.W.2 found the school doctor still at the circumcision school.

D.W.2 further testified that on the afternoon of the same day, Tuesday 3rd November 1998, he noticed a group of people coming to the circumcision school. He did not know them. On arrival at the school he realised that those people were escorting the deceased who had both his hands handcuffed behind. The deceased had clearly been assaulted because he had injuries on him. Asked why the deceased had been assaulted those people did not reply. They simply left the deceased at the school and went away. However, before they went away, D.W.2 had recognised some of those people as P.W.1, P.W.2,

P.W.5, Rejeleng, Rabonne and Tsukutla.

Eventually, D.W.1 arrived at the circumcision school and noticed the injuries on the deceased. It was explained to him that the deceased had already sustained those injuries when he arrived back at the school with the people who were escorting him. According to D.W.2, the school doctor, who was already at the school, instructed D.W.1 to go home and fetch the father of the deceased. D.W.2 told the court that if he were not mistaken it was on the following day that D.W.1 removed the handcuffs on one of the deceased's hands, tied the chain rope (exh. "2") on the handcuffs and fastened the other end of exh. "2" to a bush next to a rock.

When the students at the school were given their food in the morning of that Wednesday, 4th November 1998, D.W.2 noticed that the deceased did not finish the food that was given to him. In the evening of that day, D.W.1 again tried to give porridge to the deceased who however ate only one spoonful of the porridge. He spilled out the second spoonful of the porridge that D.W.1 tried to give him. In the morning of the following day, Thursday 5th November 1998, the deceased was again given porridge which he could not

eat. When it was realised that the deceased could not eat the porridge then soft porridge was prepared for him. He ate a little bit of that. D.W.2 told the court that the same thing happened on Friday, 6th November 1998 and Saturday, 7th November 1998. In the morning of Sunday 8th November 1998 the students were given their meals as usual. The deceased again took just a little bit of his soft porridge.

At about 10:00 a.m on that Sunday, 8th November 1998, the father of the deceased arrived at the circumcision school. He had brought a "Letlama" blanket for the deceased. That was the second time the deceased's father came to the circumcision school. The first time was on Wednesday 4th November 1998 when the school doctor told him to bring a goat which would be slaughtered to treat the deceased before he could be allowed to mix with the other students at the circumcision school. Shortly after his father had left the circumcision school, the deceased asked to go and relieve nature. He was accompanied by A2 to the donga. Whilst A2 was taking the deceased to the donga, D.W.2 remained with the other students at the school. He was in the company of three other men namely Tšokolo, Tsietsi and Mosehle. Shortly after the deceased and A2 had returned from the donga, D.W.2 was called out

of the circumcision school hut. He went to where the deceased was normally fastened to the bush next to the rock. On arrival he found that the deceased had died there.

According to D.W.2, thereafter A2 left the circumcision school saying he was going to look for D.W.1. When he, later on that Sunday, returned to the school, A2 said he had not been able to find D.W.1 at home. It was only after sunset that D.W.1 arrived back at the school. D.W.2 and A2 then reported to him that after he had gone to relieve nature at the donga, the deceased returned to the spot where he was usually fastened to the bush next to the rock. He sat down and died there.

Assuming the correctness of D.W.2's evidence that the deceased died at the spot where he was usually tied to the bush next to the rock, it must be accepted that D.W.1 was wrong in his evidence that the deceased died at some distance away from the spot where he was normally fastened to a bush next to a rock and his dead body had to be carried to the place where D.W.1 found him dead next to the rock.

Be that as it may, D.W.2 confirmed, in material respects, the evidence of D.W.1 as to what happened after the later had returned to the circumcision school and found the deceased dead on that Sunday, 8th November 1998. He confirmed that on the evening of Monday, 9th November 1998, he was one of the people who carried the dead body of the deceased from the circumcision school to a spot next to the village of ha Tlali, where it was transported in a vehicle to the mortuary. He assured the court that the body did not sustained additional injuries whilst it was being carried from the circumcision school to the spot where it was transported in a vehicle to the mortuary. After he had assisted in carrying the body of the deceased from the circumcision school to where it was transported in a vehicle D.W.2 and A2 returned to the school. They did not, therefore, accompany the deceased's body from ha Tlali to the mortuary. Only D.W.1, the school doctor, the father of the deceased and some other people did.

According to D.W.2, after he had accompanied the body of the deceased to the mortuary, D.W.1 returned to the circumcision school. He told him and A2 that the police had said he and others, presumably, the other people who had accompanied the dead body of the deceased to the mortuary, should return

to the police station on the following morning, Tuesday 10th November 1998. D.W.1 further told D.W.2 and A2 that the police also required them to report at the police station on Wednesday, 11th November 1998. Accordingly, on Wednesday, 11th November 1998, D.W.2 and A2 went to Mohale's Hoek police station. They were taken into one of the offices where the police questioned them as to what had happened to the deceased at the circumcision school. D.W.2 explained to the police what he had already told the court.

According to him, D.W.2 was then asked to wait outside whilst A2 remained in the office. After a short time he was called into the office. He did not find A2 in the office. However, the police, again, questioned him about what had happened to the deceased, at the circumcision school. Whilst he was giving the explanation to them the police started assaulting him in the office. After the assault, D.W.2 was taken to a cell where he found A2.

At about 5:00p.m on the same day, 11th November 1998, one of the senior police officers came to the cell and told D.W.2 and A2 to come with him to the office where he questioned them as to who remained with the students, at the circumcision school, whilst they were at the police station.

After they had replied that the students remained with D.W.1, who was the owner of the school, the senior police officer then told D.W.2 and A2 that, if they were sure that they had done nothing wrong to the deceased, he was releasing them to go back to the circumcision school on condition that they reported at the police station on every Wednesday of the week. According to D.W.2, he and A2 agreed to comply with the condition. They were released and, therefore, returned to the circumcision school. However, two weeks before the school closed, D.W.1 went to the police station and requested, on their behalf, that D.W.2 and A2 should not report to the police because the school was about to close. His request was granted by the police at Mohale's Hoek police station.

After the school had closed, on 8th January 1999, D.W.2 and A2 continued not to report at the police station. Eventually D.W.2 received a message from his father that he was wanted at the police station. Following that message, D.W.2 went to the police station where he was arrested and taken straight to the Magistrate court. It was on 30th March 1999. The Magistrate told him, in the Sesotho Language, that he was being charged with the murder of the deceased and she was, therefore, remanding him in custody.

D.W.2 was then taken to prison where he found D.W.1 and A2. They had arrived there on the previous day. D.W.2 denied, therefore, the evidence of D.W.1 that it was on 31st March 1999, when the three accused were taken before the Magistrate who explained the charge to them in the English language before remanding them into custody.

I must concede that there are many discrepancies in both the crown and the defence evidence, in this trial. However, considering the evidence as a whole, it is not in dispute that, on the way back to the circumcision school in the afternoon of Tuesday, 3rd November 1998, the deceased was severely beaten up by the people who re-captured and escorted him back to the school. There is, however, not an iota of evidence indicating that any of the three accused persons took part in the assault that was perpetrated on the deceased, at the time. I say this fully alive to the fact that in his evidence P.W.1 testified that after he had handcuffed the deceased at Litšoeneng No. 1 accused instructed him (P.W.1) and the people who were with him, to beat him up as they escorted the deceased back to the circumcision school. That was specifically denied by No. 1 accused, in his evidence before this court. Indeed, of all the other people who appeared as witnesses before the court, in this trial,

P.W.1 was the only one who said so. The possibility that he may have been mistaken cannot be totally ruled out. In the circumstances, I entertain a serious doubt that, on Tuesday, 3rd November 1998, No. 1 accused did, in fact, instruct P.W.1 and the people who were with him to beat up the deceased as they escorted him back to the circumcision school. The benefit of that doubt must, in our law, be given to No. 1 accused.

In his evidence, P.W.4 told the court that when the deceased arrived back at the circumcision school, on the evening of Tuesday, 3rd November 1998, he actually saw all the three instructors *viz.* accused numbers 1, 2 and 3 assaulting him. Again, that was denied by accused numbers 1 and 3, in their evidence before this court. Indeed, the evidence of P.W.4 was in this regard not corroborated by any of the witnesses who appeared and testified before the court, in this trial. Moreover, with the exception of P.W.4, all the witnesses who were present at the circumcision school, at the time the deceased arrived back at the school, told the court that No. 1 accused was not present when he (deceased) was handed over to No. 2 and No.3 accused on the evening of the day in question.

It is significant to mention that I have observed all the witnesses as they testified before this court. There was not the slightest doubt in my mind that P.W.4 was the most deceitful witness. I am not prepared, therefore, to accept his evidence, save where it has been corroborated by the evidence of a more reliable witness.

It is common cause that after he had been captured in the village of ha Sechele, the deceased was escorted back to the circumcision school by his captors. When they were at Litšoeneng, on the way back to the school, they met No. 1 accused who handcuffed the deceased and gave instructions that his captors should continue escorting him back to the school. No.1 accused himself did not accompany them. When he arrived at the circumcision school, later in the evening of that day, Tuesday, 3rd November 1998, No. 1 accused found the deceased who had clearly been severely assaulted. He had multiple injuries all over his body. The deceased still had both his hands handcuffed and was kept separate from the rest of the students, at the circumcision school.

According to No.1 accused, he removed the handcuffs from one of the

deceased's hands. He took a chain rope (exh. "2") and fastened it to the handcuffs. With the other end of the rope he fastened the deceased to a bush next to a rock. The deceased remained in that position from Tuesday, 3rd November 1998, until Sunday, 8th November 1998, when he died. Although he was given food the deceased was not eating satisfactorily. The evidence of No. 1 accused was corroborated, in material respects, by that of No.3 accused.

It will be remembered that in his evidence P.W.1 told the court that on Friday, 6th November 1998, he had the occasion to visit the circumcision school. On arrival at the school P.W.1 found the deceased still handcuffed with his hands behind and tied to the rock in the same manner as No. 1 accused had fastened him on Tuesday, 3rd November 1998. His evidence was corroborated, in this regard, by the evidence of P.W.5 who told the court that after the deceased had been returned to the circumcision school on Tuesday 3rd November 1998 he, too, visited the school on three occasions. On those occasions he spent the night at the circumcision school. He assured the court that, on each of the three occasions, the deceased was still handcuffed with his hands behind and fastened to the bush next to the rock. P.W.5 did not see anybody offering food to the deceased during the occasions when he was at

the circumcision school.

I am convinced that P.W.1 and P.W.5 were testifying to the truth, before this court, when they said on all the occasions they visited the circumcision school the deceased was handcuffed with his hands behind, fastened to the bush next to the rock, kept separate from the rest of the students at the school and given no food to eat. I am fortified in this conviction by the post-mortem report (exh. "C") according to which the external examination, **inter alia**, revealed that the deceased's abdomen was "**very very depressed**" and on opening his body it was found that the stomach was "**empty**" thus implying that the deceased had had no food to eat for quite some time before meeting his death. Under additional observation exh. "C" revealed that there were signs that both hands of the deceased had been tied with a rope. We know, however, from the evidence which, indeed, No. 1 accused and No.3 accused admitted, that a pair of steel handcuffs and not a rope was used to tie the deceased's hands. According to accused numbers 1 and 3 the handcuffs were not tight on the hands of the deceased and on Wednesday, 4th November 1998 they were, in fact, removed from one of his hands. That being so, the question that arises is how did it come that on examining the body of the

deceased the medical doctor observed signs that both of the deceased's hands had been tied up? In my view, accused numbers 1 and 3 were not honest with the court in their evidence that the handcuffs were removed from one of the deceased's hands on Wednesday, 4th November 1998. The truth is in the evidence of P.W.5 corroborated by that of P.W.1 and, indeed, the other crown witnesses who saw the deceased and observed that he was handcuffed with both his hands behind and fastened to a bush next to the rock from Tuesday, 3rd November 1998, until Sunday, 8th November 1998, when he passed away.

On behalf of the accused persons, it was argued that the post-mortem examination report (exh. "C") had been conducted by just a medical doctor who was not a Pathologist. The court should not, therefore, rely upon its contents. It is to be observed, however, that S.223 (7) of the **Criminal Procedure and Evidence Act, 1981**, cited earlier in this judgment, provides that a qualified medical practitioner is competent to perform a post-mortem examination. The section makes no provision that only Pathologists are competent to perform post-mortem examinations. In my view, all medical doctors in government hospitals in this Kingdom are qualified Medical Practitioners and, therefore, qualified to conduct post-mortem examinations.

Indeed, this court is entitled to take judicial notice that the majority of post-mortem examination reports, that are used as **Prima facie** evidence in the courts of this Kingdom, have been compiled by medical doctors who are qualified medical practitioners in government hospital. In the premises, there is no substance in the argument. I am unable to uphold it.

It was not rely in dispute that as the instructors, at the circumcision school, No. 1 accused, No.2 accused and No.3 accused had the welfare of all the students at the school, including the deceased, as their special responsibility. However, on the evidence I have accepted, the accused persons did not give food to the deceased from Tuesday, 3rd November 1998, until Sunday, 8th November 1998. By failing to give food to the deceased, as they did, the accused persons starved him, with the resultant neglect of their special responsibility. The answer to the question I have, earlier in this judgment, posed **viz.** whether or not the accused are the persons who starved the deceased and, therefore, brought about his death, must be in the affirmative.

The next question that arises for the determination of the court is

whether or not in starving the deceased to death, as they did, the accused persons had the requisite subjective intention to kill. Intention is not something we can reach with any of our senses. It is something to be inferred from the words or acts of the accused persons. In the instant case, there is no evidence that the accused uttered words from which it can be inferred that they intended to kill the deceased. On the evidence, it seems to me, the truth of the matter is that after he had run away from the circumcision school, the deceased had to be treated with a goat before he could be allowed to mix with the other boys at the school. The court was not told of any rule, governing the circumcision schools, that required the deceased, in his circumstances, to be given no food or starved for several days.

I, however, doubt that, from the accused's action of not giving food to the deceased while waiting for the school doctor to treat him, the requisite subjective intention to kill can be inferred. In failing to give food to the deceased, as they did, the accused persons, in my finding, neglected the welfare responsibility which they owed to the deceased, as a student, at the circumcision school, where they were the tutors.

In the result, the view that I take, is that the accused are guilty of culpable homicide. They are accordingly convicted.

- Both my assessors agree with this finding.

SENTENCE:

Having convicted the accused persons of Culpable Homicide, it now remains for the court to determine what punishment will be appropriate for them, in the circumstances. In this regard the court has been told that there is no record of previous convictions against the accused persons. They are, therefore, first offenders. The court has also been invited to consider a number of factors, in mitigation of the accused's sentence. The factors have been eloquently stated by the defence counsel. There is no need, therefore, to go over them again. Suffice it to say, they have all been taken into account in assessing the sentence that is to be imposed on the accused persons.

The court has also considered the fact that, according to our Sesotho custom, the relatives of the deceased will, in all probabilities, institute a civil

action against the accused persons for compensation. In punishing the accused persons, the court had not lost sight of the fact that it may be only the first court to do so. There may be a civil court which will also punish the accused persons. The courts of law should not, therefore, be accused of punishing the accused persons twice for the same wrong.

Notwithstanding all the factors that have been taken into consideration, in mitigation of the sentence, the court is not prepared to turn a blind eye to the seriousness of the offence with which the accused persons have been convicted. They have deprived another human being of his life. The life of a human being is God-given and for that reason sacred. Our law does not allow people to unlawfully kill others. There is nothing wrong in that law. It derives from the Divine Command which decrees: **“Thou shall not kill”**.

The courts of law in this Kingdom have, in numerous decisions, warned that they will take a diem view of people who kill others for the flimsiest of reasons. However, these warnings seem to be going unheeded. In the present case, the accused persons were instructors at a circumcision school of which a young boy (deceased) was a student and, therefore, their

special responsibility. They tethered the deceased, as if he were an animal, and gave him no food to eat, from 3rd November 1998 until 8th November 1998 when he died of starvation, simply because they were waiting for his father to bring a goat with which to treat him, following his escaped from the circumcision school. Yet, No. 1 accused, who was the owner of the school and, therefore, responsible for the welfare of all the students, including the deceased, admittedly had a number of goats available at the circumcision school.

It must be emphasised that there are many parents, in this Kingdom, who still believe in the practice of sending their children to circumcision schools. If people, like the accused persons, are allowed to kill them, as they did with the deceased, the parents will be afraid to send their children to the circumcision schools. This should not be encouraged. There is a need, therefore, to bring home to the accused persons that what they have done to the deceased must be brought to a halt. They must be given a punishment that will serve as a real deterrent. A sentence that will remind the accused persons and people of their mind that the courts of law will not tolerate a repetition of the kind of behaviour against which the accused persons have been convicted.

In the circumstances, I have come to the conclusion that the sentence that is appropriate for No. 1 accused, who was not only the instructor at the circumcision school but also the owner thereof, is that he must serve a term of eight (8) years imprisonment, half of which is suspended for three (3) years on conditions that he is not convicted of a similar offence and for which conviction he is sentenced to serve a term of imprisonment, without an option of a fine, during the period of suspension.

No. 2 accused, who was just an instructor at the circumcision school and not the owner thereof, must serve a term of six (6) years imprisonment, half of which is suspended for three (3) years on conditions that he is not convicted of a similar offence and for which conviction he is sentenced to serve a term of imprisonment, without an option of a fine, during the period of suspension.

Likewise, No.3 accused, who was only an instructor at the circumcision school and not the owner thereof, must serve a term of six (6) years imprisonment of which half is suspended for three (3) years on conditions that he is not convicted of a similar offence and for which conviction he is sentenced to serve a term of imprisonment, without an option of a fine, during

the period of suspension.

The accused are, accordingly, sentenced.



B.K. MOLAI

JUDGE

For Crown: Mr. Hoeane

For Defence: Mr. Molapo