

**IN THE HIGH COURT OF LESOTHO**

In the matter of

**REX**

VS

1. **POLELISO KHALANYANE**
2. **SEETSETSA SEKONYELA**
3. **LECHESA TSOENG**
4. **SEPOMPONYANE SEKONYELA**
5. **MOLETE KHALANYANE**

**JUDGMENT**

**Delivered by the Honourable Mr. Justice B.K. Molai on  
2<sup>nd</sup> day of October, 2002**

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The accused persons are before me on a charge of murder. The body of the charge sheet discloses that:

“Upon or about the 4<sup>th</sup> day of January, 1994 and at or near Semenanyane in the district of Thaba-Tseka, the said accused one, the other or all of them did unlawfully and intentionally kill one Phallang Mokaeane.”

When it was explained and put to them, the accused persons pleaded not guilty to the charge. Mr. Mahlakeng, who represents all the accused in this trial, informed the court that the “**plea of not guilty**” tendered by the accused persons

was in accordance with his instructions. The plea of not guilty was accordingly entered in respect of all the accused persons.

It is worth mentioning, at this stage, that at the close of the crown case an application for the discharge of the accused persons was made on the ground that the crown evidence had not proved beyond a reasonable doubt that they had committed the offence against which they stood charged. As far as I am aware, there is no law compelling a court of law to deal with the question of credibility of evidence, at this juncture, unless, of course, it can be said that, on the face of it, the crown evidence is so hopeless that to refuse the application for their discharge and require the accused persons to answer the charge against which they stand charged will amount to asking them to help build the charge which the crown itself has failed to establish.

The test to be applied, at this stage, is whether, on the face of it, the crown evidence has established a **prima facie** case for the accused persons to answer. If the reply is in the affirmative the court is entitled to refuse the application and reserve the question of credibility to the end when the defence will have closed its case. However, this does not mean that where, at the close of the crown case, the application for the discharge of the accused persons is turned down, the defence is obliged to call them into the witness box or lead any evidence at all. The defence is perfectly entitled to tell the court that it is closing its case without adducing any evidence in its defence. It is only then that the court will be bound

to deal with the question of credibility of evidence and apply the more stringent test of proof beyond a reasonable doubt to determine whether or not the accused persons have committed the offence with which they are charged.

When the application for the discharge of the accused persons was made, in the present case, I applied the less stringent test of whether or not, on the face of it, the crown evidence had established a **prima facie** case for the accused persons to answer. I found that there was evidence indicating that, acting in concert, the accused persons had brutally assaulted the deceased with plastic sjamboks/and sticks. As a result of the assault perpetrated on him by the accused persons, the deceased sustained injuries which brought about his death. I reserved the question of credibility of evidence and came to the conclusion that, on the face of it, the crown evidence did establish a **prima facie** case for the accused persons to answer. The application for the discharge of the accused persons was accordingly refused. As it was perfectly entitled to do, the defence told the court that, in that eventuality, it was closing its case.

I shall now proceed to deal with the question of credibility of evidence and apply the more stringent test of proof beyond a reasonable doubt to determine whether the crown evidence has established beyond a reasonable doubt that the accused persons have committed the offence against which they stand charged.

In this regard, it is significant to mention that, at the commencement of this

trial, Mr. Mahlakeng, on behalf of the accused persons, admitted the depositions of Tlalimothoana Khalanyane, D/Sgt. Molelle and D/Tpr. Khaba who had testified as P.W.8, P.W.6 and P.W.7, respectively, at the proceedings of the Preparatory Examination. Mr. Molokoane, counsel for the crown, accepted the admissions made by the defence counsel. The depositions made by Tlalimothoana Khalanyane, D/Sgt. Molelle and D/Tpr Khaba, at the proceedings of the Preparatory Examinations, were admitted in evidence and it was, therefore, not necessary to call them as witnesses to testify, in this trial.

In as far as it is relevant, the evidence of D/Tpr. Khaba was to the effect that he was a member of the Lesotho Mounted Police Service, attached to the C.I.D. and stationed at Thaba-Tseka Police Station. On 10<sup>th</sup> January 1994 he was on duty at his duty station when he received a certain information following which he proceeded to a place called Ha Tšoeukhala in the area of Semenanyane. He was in the company of a certain police sergeant who had since retired from the police service. He no longer remembered his name. They were travelling in a police vehicle.

On arrival in the village of ha Tšoeukhala, D/Tpr. Khaba and his companion met the headman, one Sekautu Khalanyane. Whilst they were explaining their mission to him, the headman showed them two men, viz. Chabasemona Khalanyane and Marakong Khalanyane, as two of the people who had been detained and assaulted badly. They were both approaching to where the two

police officers were talking to the headman, in the village. When they eventually came to them, the two men complained of having been assaulted badly by the accused persons. D/Tpr. Khaba directed them to proceed to the police vehicle which was waiting, some distance outside the village.

According to D/Tpr. Khaba, the headman then led him and the other police officer to the home of one Mokaeanne where they found the deceased lying in bed in a rondavel. He had allegedly been badly assaulted, together with the two who had been directed to go to where the police vehicle was waiting outside the village and was unable to speak properly. On examining him for injuries, D/Tpr. Khaba observed that the deceased had one of his fingers broken. Both his buttocks were badly swollen and he had a deep open wound on the left buttock. The deceased was immediately assisted to where the police vehicle was waiting.

Marakong and Chabasemona were not examined for injuries because it was getting dark and the police officers were in a hurry to take the deceased, who was obviously in pains, to the hospital. However, Marakong and Chabasemona told D/Tpr. Khaba and the other police officer that the accused were the persons who had assaulted them and the deceased. Thereafter, the police officers conveyed the deceased, Marakong and Chabasemona to Paray/Thaba-Tseka hospital where they were admitted. A few days later D/Tpr. Khaba learned that the deceased had passed away at the hospital.

P.W.2, Seeiso Mokaeanane, testified that he was illiterate and lived at Semenanyane, in the district of Thaba-Tseka. He knew the deceased in his life time. The deceased and a certain Tankiso Mokaeanane were his own sons. He also knew all the accused persons before court. He and the accused persons were the subjects of the same chief.

According to P.W.2, on the day they were transported to Paray hospital, he accompanied the deceased, Marakong Khalanyane and Chabasemona Khalanyane. He confirmed the evidence of D/Tpr. Khaba that, on arrival at Paray hospital, the deceased, Marakong and Chabasemona were all admitted in hospital. As it was already late, P.W.2 spent the night at Thaba-Tseka police charge office. On the following day, he returned to his home at Semenanyane.

However, about two days later, P.W.2 received a report following which he went back to Paray hospital where he found that his son, Phallang Mokaeanane (deceased) had passed away. He then proceeded to Thaba-Tseka police charge office and reported the death of the deceased. He again spent the night at the police charge office. In the morning of the following day, the dead body of the deceased was transported, in a police vehicle, from Paray hospital to another hospital, here in Maseru. He accompanied the dead body of the deceased when it was being transported from Thaba-Tseka to Maseru. It did not sustain additional injuries on the way. He was the one who identified the dead body of the deceased before the medical doctor who examined it at the hospital, here in Maseru. I shall

return to the evidence of P.W.2, later in the judgment.

It was not really disputed that, on arrival at Paray hospital, the deceased and his companions were attended to, and admitted in hospital, by a medical officer who was the medical superintendent of the hospital. Written reports were compiled in respect of the deceased and his companions by the medical officer. Like in the case of his companions, the medical report compiled in respect of the deceased was brief and I can do no better than to quote it, in full. It reads:

“Paray Hopital  
P.O. Box 2  
Thaba-Tseka 550  
31/1/94

To whom it may concern

re: Ntate Phallang Mokaeano, 25 years from Semenanyane

I certify that I treated as a M.O above mentioned patient at Paray Hospital from 10.1.94, until he died on 13.1.94, 2:30a.m. He was admitted on 10.1.94, 11:30p.m and alleged to have been assaulted on 3.1.94. He further alleged to have been kept as a prisoner by his aggressors.

His general condition was fair and he was complaining about pain on his buttocks. On 11.1.94 it turned out, that he hadn't passed urine since he got assaulted.

My findings: 2 deeply and plain wounds with severe infection and much necrotic tissue on both buttocks, small abrasions everywhere and a fracture of the 3<sup>rd</sup> finger left. I also assumed kidney failure. I treated him with painkillers, antibiotics and local disinfectants. His kidney didn't seem to recover. On 12.1.94 I did a debridement (removal of infected and dead tissues). Despite that treatment his condition got worse and he died due to kidney failure on 13.1.94. Kidney failure was caused by toxic substances from his necrotic and infected wounds and not having had enough liquid

during his captivity.

A. Siegwart. Medical Superintendent  
Paray Hospital  
(Signature)”

It is significant to mention that according to the record of Preparatory Examination proceedings, the medical officer who compiled the above cited report was an expatriate. He had since left Lesotho and returned to his country of origin. It was, therefore, not practical to call him to testify as a witness. In the circumstances, Mr. Molokoane, counsel for the crown, handed the medical report as exh. “A” and part of the evidence, in this trial.

It may also be mentioned that Mr. Mahlakeng, who represents the accused persons, told the court that he had difficulty with the term “**Superintendent**”. According to him the term might mean that the above cited report was compiled by a person who was just a hospital administrator and not necessarily a doctor or medical officer at Paray Hospital.

I do not agree. In the body of the report (exh. “A”), A. Siegwart, stated that the deceased had been treated by him, as a medical officer. It is to be observed that A. Siegwart also medically examined Chabasemona Khalanyane, one of the people who were admittedly admitted, together with the deceased, at Paray Hospital. He compiled and signed a report in which he gave his designation as a

medical officer. He gave his qualifications as “**M.D**” i.e. Medical Doctor. The dictionary meaning of the term “**Superintended**” is an official who has control in an institution. By qualifying the term superintendent with the word medical, in his designation, means that A. Siegwart could not have been anything but the doctor or medical officer in-charge of Paray Hospital.

It is further common cause that a medical doctor performed a post-mortem examination on the deceased's dead body after it had been transported from Paray Hospital to Maseru. The medical doctor compiled a report which was, by consent of the parties, handed in as exh. “B”, in terms of the provisions of s. 223 (7) of the **Criminal Procedure and Evidence Act, 1981**.

According to exh. “B”, at about 15:10 hrs on 27<sup>th</sup> January 1994, a medical practitioner examined a dead body of a male African adult at the mortuary of Queen Elizabeth II hospital, here in Maseru. The dead body was identified to him, by Seeiso Mokaeanne (P.W.2), as being that of Phallang Mokaeanne (deceased). The external examination of his dead body revealed that the deceased had sustained extensive wounds on both buttocks and bruises on the face. On opening the body, the internal examination revealed that the deceased had sustained injury on both lungs and pleurae.

On the above findings the medical doctor formed the opinion that death was due to shock resulting from the injuries inflicted upon the deceased. I can think

of no good reasons why the opinions of the medical doctors who compiled exh. “B” and exh. “A” as regard the cause of the deceased’s death should be doubted.

The salient question that arises, for the determination of the court, is whether or not the accused are the persons who inflicted the injuries on the deceased and, therefore, brought about his death. In this regard, the court heard the evidence of P.W.4, Marakong Khalanyane, who testified that he was illiterate and lived at Semenanyane under chieftainess Masefothafotha. He was a married man and had only one child. The five (5) accused persons lived in the same village as he did. He, therefore, knew them well. He also knew the deceased in his life time. The deceased was the son of P.W.2.

According to him, P.W.4 was, one day, arrested by the five (5) accused and some other men. They accused him of having stolen sheep that belonged to A1. He was fastened with a rope and taken into one of A1's huts where he was severely assaulted with plastic whips and sticks by his captives. Of the accused persons before court, A4 and his son (A2) were armed with sticks whilst A1, A3 and A5 were armed with plastic whips/sjamboks.

After some time A3 and A5 left the hut in which he (P.W.4) was being assaulted. When they later returned into the hut, A3 and A5 were escorting one Chabasemona Khalanyane who was also fastened with a rope and made to lie down next to him (P.W.4). The accused then continued assaulting P.W.4 and

Chabasemona Khalanyane with their sticks and plastic whips/sjamboks.

Shortly after Chabasemona Khalanyane had been brought into the hut, A3 and A5 again went out. When they later returned, the two accused brought the deceased into the hut. He (deceased) too was fastened with a rope and made to lie next to P.W.4 and Chabasemona Khalanyane. When he looked at him, P.W.4 noticed that the deceased already had a bleeding wound on the forehead and his fourth finger was broken. After the deceased had been made to lie next to him (P.W.4) and Chabasemona, the accused continued assaulting them.

According to P.W.4, they were kept in A1's hut and assaulted, as he had described to the court, for about a week. They were not given any food to eat or water to drink during that period. They denied the accusation that they had stolen A1's sheep but to no avail as the accused continued assaulting them. The hut in which they were detained and assaulted was very small and congested, particularly so, because it was also used to store hides. P.W.4 testified that eventually he and the other captives were escorted to the chief's place. He (P.W.4) and Chabasemona were each made to carry, a cooking pot from their respective homes as proof that after A1's sheep had been stolen and slaughtered, they (pots) had been used to cook the meat. The deceased could not carry a pot because he was ill, as a result of the assault perpetrated on him by the accused persons.

It is worth mentioning that in the evidence of P.W.4 he and his companions

were accused of stealing and slaughtering A1's sheep some time during the previous year. There was, therefore, nothing on the pots to indicate that they had been used to cook the meat of A1's sheep. All the indications on the pots were that they had been used to cook hard porridge.

Be that as it may, P.W.4 went on to tell the court that, on their way to the chief's place, the deceased became unable to walk. A1 had to put him on a horse which he pulled until they arrived at the chief's place. At the chief's place, they found chief Abdula Rantletse. Chieftainess Masefothafotha had already passed away, at that time. Chief Abdula Rantletse refused to accept P.W.4 and his companions because they clearly had been severely assaulted and injured. He instead ordered the accused persons to take them (P.W.4 and his companions) to a doctor for medical attention. However, the accused persons returned P.W.4 and his companions to A1's place where the ropes, with which they had been fastened, were removed from their hands. They were kept in A1's hut for the night.

In the morning of the following day, P.W.4 and his companions were released to go to their respective homes, in the village. According to P.W.4, when he was below A5's homestead on the way to his house, in the village, he met the police who told him to go to their vehicle which was waiting below the village. On his way to the vehicle, P.W.4 was joined by the police who were in the company of the deceased and Chabasemona Khalanyane. The police then

transported them in their vehicle to Thaba-Tseka/Paray hospital. In his evidence, P.W.4 told the court that, at the time the accused were escorting them to the chief's place and the police transporting them to the hospital, P.W.2 was, on his own accord, accompanying them.

On arrival at the hospital, P.W.4 and his companions were admitted. Whilst they were in hospital, P.W.4 learned from Chabasemona Khalanyane, who was in the same ward with the deceased, that the latter had passed away. When he was eventually discharged from the hospital, P.W.4 returned to his home at Semenanyane.

48 years old Chabasemona Khalanyane testified as P.W.3 and told the court that he lived at ha Tšocukhala in the area of Semenanyane. He was illiterate. He knew all the accused persons before court. A1, A3 and A5 were, in fact, his relatives and lived in the same village as he did. A2 and A4 lived in a neighbouring village.

According to him, P.W.3 remembered that on the forenoon of one day, in January 1994, he was on his way to the fields when A5 called him. He did go to where A5 was calling him. That was at the homestead of A1 who was his (A5's) father. On arrival at his parental home, A5 told P.W.3 that he and the people with whom he was had found a sick person outside the village and that person was inside one of his (A5's) parental huts. A5 then asked him (P.W.3) to enter into the

hut and see the sick person.

P.W.3 did enter into the hut and found a person lying on the floor. He identified that person as P.W.4 who had clearly sustained injuries. He (P.W.4) was bleeding from the head and the nostrils. Whilst he (P.W.3) was inside the hut, A5 and the other accused persons were waiting at the door. When he (P.W.3) asked them what had happened to P.W.4, two of the accused persons, namely A5 and A3, entered into the hut. The rest of the accused, together with some other men who were not before court, in this trial, remained standing at the door. A1, who was amongst those standing at the door, gave an order that he (P.W.3) should be fastened. A2 and A5 then tied both hands of P.W.3 with a rope, fastened it to the one with which P.W.4 was tied up and made him lie on the floor next to the latter.

P.W.3 confirmed the evidence of P.W.4 that as they were lying on the floor with their hands tied up, all the accused persons, together with some other men who were not before court, in this trial, assaulted them with plastic sjamboks. Eventually A2 and A5 went out of the hut. When they later returned into the hut, A2 and A5 brought Phallang (deceased) whose two hands were already fastened together with a rope. P.W.3 also noticed that, as he was brought into the hut, the deceased was bleeding from the head and one of his fingers was broken. After the deceased had been made to lie down on the floor next to P.W.3 and P.W.4, all the accused persons continued beating up the three of them, as they had earlier done

with P.W.4 and P.W.3.

In the evidence of P.W.3, he and his companions were detained in A1's hut for over a week. They were assaulted every day, by the accused persons, in the manner he had described to the court. They did not eat any food or drink any water during the period of their detention at A1's home. However, P.W.3 told the court that there was a time when his wife brought him some food. He was unable to eat the food because, in trying to do so, he vomited.

P.W.3 told the court that eventually A1 escorted their wives to his (A1's) home. The wives brought pots which they left in the hut in which he (P.W.3) and the other detainees were kept, at A1's homestead. After the wives had left, P.W.3 and P.W.4 were made to carry the pots to the chief's place. The deceased did not carry a pot. He was too sick to do so. P.W.3 further confirmed the evidence of P.W.4 that, on their way to the chief's place, A4 hit the deceased a blow with a stick on the kidney region. When he was thus assaulted with the stick, the deceased fell to the ground and was, thereafter, unable to walk. A1 had to put the deceased on his (A1's) horse which he pulled until they reached the chief's place.

At the chief's place, A1 reported that he and the other accused had arrested P.W.3 and the other detainees for stealing his sheep whose meat they had cooked with the pots they were carrying. As P.W.3 and the other detainees had clearly sustained severe injuries, the chief refused to receive them. Instead, A1 and his

party were ordered by the chief to first take the detainees to a doctor for medical treatment. However, A1 again loaded the deceased on his horse which he pulled away from the chief's place. He and his party returned P.W.3 and the other detainees to the hut in which they had been kept, at his (A1's) home. According to P.W.3, the ropes were then removed from their hands. They however, spent the night in their detention hut, at A1's home.

In the morning of the following day, A1 told P.W.3 and the other detainees to leave his place because their wives had paid for them. With some difficulty P.W.3 and the other detainees started walking to their respective homes, in the village. Before P.W.3 could reach his home, the police vehicle arrived. He and the other detainees were transported in the police vehicle to Paray Hospital where they were all admitted in hospital. P.W.3 told the court that he and the deceased were staying in the same ward and his bed was, in fact next to that of the deceased. He confirmed the evidence of P.W.4 that whilst they were admitted, in hospital, the deceased passed away. Thereafter, he (P.W.3) and P.W.4 were eventually discharged from the hospital when they returned home.

Tankiso Mokacane testified as P.W.1 and told the court that he lived at Semenanyane, in the district of Thaba-Tseka. He was illiterate. P.W.2 was his father and the deceased his own elder brother. He knew the accused persons who also lived at Semenanyane.

According to P.W.1, one day in December 1993 he was called by his headman, Sekautu. He did go to the headman's place where he found A1 already there. Shortly after P.W.1's arrival at the headman's place, his father (P.W.2) also came there. In the presence of A1 and P.W.2, the headman informed him (P.W.1) that A1 had a complaint against him. A1 then explained that he had information from his herdboys that P.W.1 had raided his cattle post from where he stole sheep. Although he (P.W.1) denied to have stolen his sheep, A1 asked the headman to release P.W.1 to him so that he could take, and confront, him (P.W.1) with his herdboys, at the cattle post. The headman did not agree with that. He, instead, instructed A1 to go with P.W.1 to the senior chief, Masefothafotha. However, A1 handcuffed P.W.1 and took him to his (A1's) home where he (P.W.1) spent the night.

In any event, in the morning of the following day, A1 did escort P.W.1 to chieftainess Masefothafotha's place. He was accompanied by P.W.2, Jeke, Hlobola and some other men whose names P.W.1 did not know. On arrival at chieftainess Masefothafotha's place, A1 explained that he had arrested P.W.1 on a suspicion that he had stolen his sheep. According to him, P.W.1 denied to have stolen the sheep, as alleged by A1. However, the chieftainess acceded to A1's request that he should be allowed to take P.W.1 to the cattle post where he would confront him with his (A1's) herdboys. The chieftainess further detailed P.W.2, Jeke, Hlobola and the other men, who had assisted A1 to escort P.W.1 to the chief's place, to accompany A1 and P.W.1 to the cattle post as her representatives.

She instructed them that if A1's herdboys confirmed that P.W.1 had, indeed, stolen the sheep, he (P.W.1) should be returned to her.

P.W.1 told the court that thereafter, they started their journey to A1's cattle post. He was still handcuffed. They spent the night at a place called Mohloling which was about 25 kilometres away (ind.), presumably because it was already late in the afternoon when they left the chieftainess' place. In the morning of the following day, they left Mohloling and continued on their journey to A1's cattle post. When they left Mohloling, A1 tightened the handcuffs by pressing them down on P.W.1's wrists with his booted foot. Shortly after leaving Mohloling, the party was joined by A5, who also tightened the handcuffs on P.W.1's wrists by placing his (P.W.1's) hands on the ground and then pressing down the handcuffs with his booted foot. P.W.1 told the court that after the handcuffs had been further tightened on his wrists, his hands became swollen. When he noticed that, P.W.2 pleaded with P.W.1 that, if he knew anything about A1's sheep, he should disclose his knowledge to A1 and his party. Again, P.W.1 denied any knowledge about A1's sheep. P.W.2 then said, that being the case, he was not satisfied with the treatment given to him (P.W.1). He was, therefore, returning home.

P.W.1 told the court that, after his father had returned home, he was made to lie down and his blanket pulled over his head. One person sat on his head whilst another person was sitting on his legs. He was then assaulted with sjamboks all over the body. Thereafter, the journey to A1's cattle post continued.

They did eventually arrive at A1's cattle post where they found A1's herdboy. The herdboy was not asked anything about P.W.1. However, P.W.1 was made to lie down. A1 and his party, again, assaulted him with sjamboks, as they had done before. P.W.1 and his assailants spent that night at A1's cattle post.

In the morning of the following day, A1 asked P.W.1 whether he knew where the cattle post of one Beile was. When he replied in the affirmative, P.W.1 was told by A1 that he (P.W.1) was going with them (A1 and his party) to Beile's cattle post because that was the place where he (P.W.1) had taken his (A1's) sheep to. Thereafter P.W.1 (still handcuffed) was escorted by A1 and his party to Beile's cattle post. However, on the way to the cattle post of Beile, P.W.1 was made to lie down when A1 and his party again sjambokked him, as they had done after his father (P.W.2) had returned home. When he got up, P.W.1 was unable to walk properly. He realised that he had sustained a deep wound on his left side buttock. It was, therefore, with some difficulty that P.W.1 managed to continue the journey to Beile's cattle post.

At the cattle post of Beile, P.W.1 and A1's party found two herdboys, viz. Hala-Hala and Mathibeli. Before he could be arrested Hala-Hala ran away and was chased by A1 and his party. In the process, Hala-Hala threw himself over the cliffs and sustained injuries. He was then arrested and brought back to the cattle post. Questioned about A1's sheep, Hala-Hala said they were at the cattle post of one Khothatso at a place called Khabele. He, Mathibeli and Khothatso's herdboys

had stolen the sheep and taken them to Khothatso's cattle post, at Khabele.

After the explanation of Hala-Hala, A1 removed the handcuffs from P.W.1's hands. They were used to handcuff Hala-Hala together with Mathibeli. A1 and his party then escorted Hala-Hala, Mathibeli and P.W.1 to Khothatso's cattle post, at Khabele. On arrival at Khothatso's cattle post they found that the sheep had already been taken to the veld for grazing. There was nobody at the cattle post hut. The party was then led by Hala-Hala, to the veld where Khothatso's sheep were grazing. A1 identified his missing sheep amongst Khothatso's flock of sheep. They were driven back to A1's cattle post.

On the way to A1's cattle post, the party was joined by Hala-Hala's maternal uncle who was travelling on horse back. He gave his horse to Hala-Hala who was walking with difficulty as a result of the injuries he had sustained when he fell over the cliffs. The journey to A1's cattle post then continued. However, before reaching A1's cattle post, Hala-Hala used the horse he had been riding to escape and run away. Eventually the party did arrive at A1's cattle post where it spent the night.

In the morning of the following day, P.W.1 was handcuffed, together with Mathibeli. A1 and his party escorted them back home. After they had left A1's cattle post, on their way back home, A5, jeke and the other man whose name P.W.1 did not know, parted company saying they were going via a place called

Traeng, P.W.1, Mathibeli, A1, Hlobola and Lingaka continued on their way back home. They were driving the sheep which A1 had identified as his missing animals, at the cattle post of Khothatso.

P.W.1 told the court that, after A5 and the other men had parted company saying they were going via Traeng, Mathibeli with whom he was handcuffed, managed to free himself and run away. When he noticed Mathibeli running away, P.W.1 also ran away with the handcuffs still on one of his wrists. He ran till he came to a certain Molisana's cattle post where he spent the night. Early in the morning of the following day, P.W.1 left Molisana's cattle post, on his way home. However, on the way he felt unable to walk. He sat down in the veld where he was found by herdboys from nearby cattle posts. By using a safety pin, the herdboys managed to unlock the handcuffs and remove them from his wrist. After removing them from his wrist, the herdboys took possession of the handcuffs and left him (P.W.1) in the veld. According to him, P.W.1 spent the night in the veld.

At about dawn, P.W.1 managed to walk, with same difficulty, till he reached a place called Mothalaneng which was the home village of his paternal aunt by the name of 'Majane. He reported to her what had happened to him. He spent that day at the home of 'Majane who was treating him by cleaning his injuries. On the following day, P.W.1 learned from 'Majane that she had received sad news about the death of Phallang, the deceased in this case. He then proceeded home. On arrival at his home village, P.W.1 found a police vehicle by

which he was transported to Paray Hospital for medical treatment. At the hospital he was not admitted. He was treated as an out-patient and released to return home. That was in early January 1994.

About a month later, A1, A5 and A3 came to P.W.1's home and tried to arrest him saying he had escaped after A1 had arrested him for the theft of his sheep. According to him, P.W.1 refused to be arrested. However, on the advice of his headman, Sekautu, P.W.1 went to Thaba-Tseka police station to report the incident to the police who then arrested him on the ground that A1 had already lodged a complaint that he suspected him of the theft of his (A1's) sheep. He (P.W.1) was subsequently taken before the court and remanded in custody. He was later released on bail. Eventually the bail was, however, cancelled and P.W.1's bail deposit refunded to him. The reason therefor, was because the case against him (P.W.1) was removed from the roll after A1 had failed to turn up on the day it was to be prosecuted.

It is to be borne in mind that the accused persons stand charged before this court with the murder of the deceased and not the assault of P.W.1 or, for that matter, any other person. On his own evidence, P.W.1 was not present when the deceased was assaulted and the injuries that brought about his death inflicted upon him. P.W.1 was, therefore, not in a position to tell the court whether or not the accused were the persons who had assaulted the deceased and inflicted upon him the injuries that brought about his death. To that extent, the evidence of P.W.1

was, in my view, not of much assistance to the court, in this trial.

Now, returning to his evidence, P.W.2 confirmed that, during December 1993, P.W.1, who was his son and the younger brother of the deceased, was told by Sekautu, the headman of his village, to report himself at the headman's place. In fact, he too was required to report at the headman's place, together with P.W.1. However, P.W.1 left for the headman's place before him and he (P.W.2) followed shortly afterwards. On arrival at the home of headman Sekautu, who had since passed away, P.W.2 found him (Sekautu) in the company of P.W.1, A1 and a few other men. A1 then reported that P.W.1 had stolen his sheep and he was, therefore, fastening him. Despite the headman's protest that P.W.1 should be fastened, A1 produced a pair of handcuffs with which he proceeded to handcuff him (P.W.1). He (A1) escorted P.W.1 away from the headman's place. As he did so, A1 was in the company of his son (A5) who had just come to the headman's place. According to him, P.W.2 followed A1 and A5 as they escorted P.W.1 away from the headman's place. They escorted P.W.1 from the headman's place to the home of A1. After A1 and A5 had taken P.W.1 to A1's home, P.W.2 himself proceeded to his own home, in the village.

In the morning of the following day, A1 took P.W.1 to the Senior Chief's place. According to P.W.2, he accompanied them. At the Senior Chief's place they found Abdula Rantletse to whom A1 reported that he had arrested P.W.1 for theft of his sheep. In the evidence of P.W.2, A1 was allowed by Abdula Rantletse

to take P.W.1 to his (A1) cattle post so that he could assist him in the search for his missing sheep. He (P.W.2) again accompanied A1 and P.W.1 to the cattle post. He denied, however, the evidence of P.W.1 that he (P.W.2) and some other men accompanied him (P.W.1) and A1 to the cattle post as representatives of the senior chief. According to P.W.2, he did so on his own simply because he wanted to verify if P.W.1 had, indeed, stolen the sheep of A1.

P.W.2 confirmed that on the way to the cattle post they were joined by A5, a certain Hlobola and another man whose name he later remembered as Jeke. P.W.1 was assaulted by A1 and those men. They assaulted him with sjamboks and tightened the handcuffs on his wrists by stepping on them with booted feet. When he noticed the ill-treatment meted out to him, P.W.2 pleaded with P.W.1 to tell A1 where his sheep were, if he knew it. In reply P.W.1 denied any knowledge of the whereabouts of the sheep. When A1 and his party continued the assault on P.W.1 despite the latter's denial that he had stolen the sheep, P.W.2 decided to part company with them and return home.

Three (3) days later, when he returned home from his place of work where he had been roofing a house, in the village of ha Matona, P.W.2 learned that the deceased had been arrested and detained at the home of A1. He then proceeded to A1's home where he found the deceased, P.W.3 and P.W.4 fastened with ropes in one of his (A1's) huts. They were being assaulted with sjamboks or plastic whips by A5, A4, A3, A2 and A1 (who, he learned, had just returned home, from

the cattle posts, on the afternoon of that same day). There was also one Thabo Sekonyela who was not a co-accused, in this trial. P.W.2 noticed that the deceased was already bleeding from the head and nostrils. When he enquired as to why those people were being arrested and assaulted, A1 told P.W.2 that they had stolen one of his sheep.

According to P.W.2, the deceased and the other detainees spent several days at A1's home where they were assaulted by all the accused persons daily. On one occasion he (P.W.2) was standing outside his house, which was just below the forecourt of A1's home, when he saw all the accused persons and Thabo Sekonyela actually assaulting the deceased and the other detainees, inside one of A1's huts whose door was left open.

It will be remembered that, in the evidence of P.W.4, the hut in which he and the other detainees were kept, at the home of A1, was very small. There were also hides kept in that hut. The inside was, therefore, so congested that P.W.2 could not, in my view, have possibly seen all the accused actually beating up the detainees. P.W.2 was, in all probabilities, exaggerating when he said, from his house he could see all the accused persons actually assaulting the detainees inside the hut in which they were kept, at A1's home.

Be that as it may, P.W.2 went on to testify that he eventually went to report the incident to the senior chief, chieftainess Masefothafotha who, however, said

she had already sent a report to the police and he (P.W.2) could return home. P.W.2 did return home. On arrival at home he again went to A1's home and found that the assault on the deceased and the other detainees, by the accused persons, was continuing. He did not say anything to them but simply went to his home, in the village.

P.W.2 told the court that one day, later on, the accused persons escorted the deceased and the other detainees to chieftainess Masefothafotha's place. He (P.W.2) accompanied them. On the way, he tried to talk to the deceased who was, however, unable to speak. At one stage, whilst they were on their way to the chief's place, A4 hit the deceased a blow with a stick on the kidney region. When he was thus hit the blow with the stick, the deceased fell to the ground. He (deceased) was thereafter unable to walk. A1 had to put him on his (A1's) horse which he pulled until they reached the chief's place. On arrival at the chief's place, chieftainess Masefothafotha refused to accept the deceased and the other detainees on the ground that they had sustained injuries. She ordered A1 and his party to take them to the hospital for medical treatment.

It may be mentioned that in his evidence P.W.4 told the court that chieftainess Masefothafotha had passed away long before the incidents of this case. He had actually attended the funeral of chieftainess Masefothafotha. The evidence of P.W.4 that, at the time the accused persons escorted the deceased and the other detainees, chieftainess Masefothafotha had already passed away, was, in

a way, corroborated by P.W.3 who testified that when they arrived at the chief's place they found Abdula Rantletse. They were, therefore, attended to by Abdula and not Masefothafotha. If chieftainess Masefothafotha were present when the accused persons arrived with the deceased and the other detainees at the chief's place, as P.W.2 wished the court to believe, I find no reason why Abdula Rantletse and not chieftainess Masefothafotha herself would attend to them. I am prepared to accept, as the truth, the evidence of P.W.4, corroborated by P.W.3 and reject, as false, the version of P.W.2, on this point.

Be that as it may, P.W.2 told the court that notwithstanding the order that they should take the deceased and the other detainees to hospital for medical treatment, A1 and the other accused persons loaded the deceased on A1's horse and escorted him, together with the other detainees, back to A1's home where they spent the night. On the following day, A1 released the deceased and the other detainees to go to their respective homes, in the village. Shortly thereafter, the police arrived in the village looking for the people who had allegedly been assaulted. They were told by the headman (Sekautu) that A1 had released the deceased and other detainees to go to their respective homes. According to him, P.W.2 accompanied the police to his home where they found the deceased ill and lying in bed. At the request of the police officers, he assisted the deceased to the police vehicle which was waiting outside the village. Shortly thereafter, the other detainees were brought to the vehicle by the police officers who transported them to Paray hospital. As it has already been pointed out, earlier in the Judgment,

P.W.2 told the court that he had accompanied the deceased and his companions when they were transported to the hospital by the police. They sustained no additional injuries on the way.

The evidence disclosed by the deposition of Tlalimothoana Khalanyane was that he was illiterate and lived in the same area with all the accused persons. He, therefore, knew them well. He also knew the deceased in his life time. In his testimony, Tlalimothoana Khalanyane remembered that one day he arrived home from his business to learn that A1 had arrested and detained, at his (A1's) home P.W.1, P.W.3, P.W.4 and the deceased, on a suspicion that they had stolen his livestock. In fact, he was, later on, detailed by the headman (Sekautu) to accompany the accused persons when they escorted the detainees to the home of the senior chief's place. On the way to the senior chief's place, Tlalimothoana Khalanyane did not notice that any of the detainees had sustained injuries. Nor did he mention, in his evidence, that, on the way to the senior chief's place, the deceased was assaulted with a stick by A4. It was only when they were already at the senior chief's place that he observed that the detainees had sustained whip marks on their bodies, giving the impression that they had been assaulted.

It is worth noting that in his evidence P.W.1 testified that he was not amongst the people who had allegedly been arrested and detained by the accused persons at the home of A1, as Tlalimothoana Khalanyane wished the court to believe. At that stage, he had not yet returned home from the cattle post where A1

had taken him to look for his (A1's) missing sheep. The evidence of P.W.1 was in that regard corroborated by that of P.W.2, P.W.3 and P.W.4. I am inclined to reject, as false, the story of Tlalimothoana Khalanyane and accept, as the truth, the version of P.W.1 supported by P.W.2, P.W.3 and P.W.4, on this point.

Assuming the correctness of his evidence that, on the instructions of the headman (Sekautu), he accompanied the accused persons as they were escorting the detainees to the senior chief's place, I must say I find it rather strange that Tlalimothoana Khalanyane could have failed to notice when the deceased was assaulted with a stick by A4, or failed to observe that there were injuries sustained by the detainees, particularly the deceased who, according to P.W.4, P.W.3, P.W.2 and, indeed, the medical doctor who performed the autopsy on his dead body, had sustained injuries on his face. Regard being had to the fact that the incidents of this case took place in December 1993 but it was not until November 2000 that Tlalimothoana Khalanyane gave his deposition, at the Magistrate Court, the possibility that his memory might have failed him, in some of the details of this case, could not, in my view, be ruled out.

The evidence, disclosed by the deposition of D/Sgt Molelle, was to the effect that he was based at Thaba-Tseka police station, in the district of Thaba-Tseka, and the investigator in this case. In the course of his investigations, he met the accused persons whom he already regarded as suspects. After he had duly cautioned them, the accused persons gave him explanations. A1 and A3 also

handed to him a green plastic whip and a brown whip (sephali), respectively. He took possession of the whips which had since been in the police custody. The whips had, however, disappeared from the police exhibit-room and could not, therefore, be handed in as exhibits, in this case.

Following their explanations, D/Sgt. Molelle gave the accused persons a charge of murder, as aforesaid. He also charged them with assault with intent to do grievous bodily harm, presumably in respect of P.W.1, P.W.3 and P.W.4. As stated, earlier in the judgment, the charge of assault with intent to do grievous bodily harm has not been preferred against the accused persons, in this trial.

It is significant to bear in mind that in his evidence, P.W.3 told the court that he, P.W.4, the deceased and a certain Khau Rantletse (who, however, did not testify, in this trial) were arrested, fastened with ropes, detained in one of A1's huts and assaulted with plastic whips and sticks for several days by A1 and his co-accused. In the evidence of P.W.3, he and the other detainees neither ate nor drank anything during the period of their detention in A1's hut. Eventually A1 and his co-accused escorted him (P.W.3) and the other detainees to the senior chief's place. On their way to the chief's place, A4 hit the deceased a blow on the kidney region with a stick. When he was thus hit the blow with the stick, the deceased fell to the ground and was unable to walk. A1 had to put him on a horse which he (A1) pulled till they arrived at the chief's place. The evidence of P.W.3, that the deceased was assaulted in the manner he had described to the court, was

corroborated by P.W.4, P.W.2, the doctor who medically treated him at Paray Hospital and, indeed, the medical practitioner who performed the autopsy on his (deceased's) dead body.

As stated, earlier in the judgment, the accused persons closed their case without adducing any evidence in defence. The court had, therefore, only the crown evidence to rely upon for the determination of this case. The evidence of P.W.3, corroborated by P.W.4 and, indeed, P.W.2, that A1 and all his co-accused were amongst the people who had assaulted and inflicted upon the deceased the injuries that brought about his death remained, therefore, uncontradicted. That being so, I find no good reasons why the evidence should not be accepted as the truth. Assuming the correctness of my finding that the deceased was assaulted by A1 and all his co-accused, it seems to me reasonable to infer that in assaulting him, as they did, all the accused persons actively associated themselves with commission of the crime of assault on the deceased or acted in concert. On the well known principle of common purpose, they were, therefore, all criminally liable - **Vide** Vol. I of South African Criminal Law and Procedure (3<sup>rd</sup> Ed.) by J.M. Burchell where at p. 307 the learned author says, in part:

“where two or more people..... actively associate in a joint unlawful enterprise, each will, be responsible for specific criminal conduct committed by one of their number.....”

The answer to the question I have earlier posted, **viz.** whether or not the accused were the persons who had assaulted and inflicted upon the deceased the injuries

which brought about his death must, therefore, be in the affirmative.

The next question for the determination of the court is whether or not in assaulting the deceased, as they did, the accused persons had the requisite subjective intention to kill. In this regard, I have, for reasons already stated, accepted the crown evidence that No.1 accused, acting in concert with his co-accused, had arrested the deceased and three (3) other detainees whom they fastened with ropes and detained in one of A1's huts where they were, for several days, severely beaten up with plastic whips and sticks on the heads, backs and buttocks. They did not eat or drink anything during their long captivity, at the home of A1. Eventually, A1 and his co-accused escorted the deceased and the other detainees to the chief's place. Whilst the accused were thus escorting their captives, one of them (A4) hit the deceased a blow with a stick on the kidney region. When he was thus hit the blow with the stick, the deceased fell to the ground and was, thereafter, unable to walk. A1 had to put him on a horse which he pulled until they arrived at the chief's place.

The head, the back, the buttocks and the kidney region are all upper parts of a human body and, therefore, vulnerable. Moreover, a human being needs food and water to survive. In assaulting the deceased on the upper parts of his body and detaining him in A1's hut for several days with nothing to eat or drink, as they did, the accused persons did, in my finding, foresee the possibility of resultant death. They, nonetheless, acted reckless of whether death did ensure or not.

Assuming the correctness of my finding, it must be accepted that in detaining the deceased at A1's hut for several days with nothing to eat or drink and assaulting him, in the manner they did, the accused persons had the requisite subjective intention to kill, at least in the legal sense (**S. v. Mtshiza 1970 (3) S.A. 747 at p. 752B**).

The crown evidence has, in my view, established, beyond a reasonable doubt, that the accused persons have committed the offence against which they stand charged. Accordingly, they are all found guilty of murder, as charged.

### **Extenuating Circumstances**

Having convicted the accused persons of murder, the court is now enjoined, by the provisions of section 296 of the **Criminal Procedure and Evidence Act, 1981**, to determine the existence or otherwise of extenuating circumstances i.e. any factors that tend to reduce the moral blameworthiness of their act.

In this regard the court has found that there was no evidence indicating that in killing the deceased, as they did, the accused persons had planned or premeditated his death. Instead, they had intention in the legal sense or **dolus eventualis**. The absence of premeditation of the deceased's death is, in my finding, a factor tending to reduce the moral blameworthiness of the accused

persons' act. Secondly, subsection (2) of section 296 of the **Criminal Procedure and Evidence Act, Supra**, provides:

“(2) In deciding whether or not there are any extenuating circumstances, the High Court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the accused belongs.”

Now, there is evidence that the accused persons live at Semenanyana, in the mountain area of Lesotho. They are, therefore, members of the community whose livelihood depends on livestock farming. Accused no.1, 2 and 3 testified as D.W.1, D.W.2 and D.W.3 on the issue of extenuating circumstances and told the court that the incident of stock theft was very rampant in their area. According to the evidence of D.W.1 his sheep were, on several occasions, stolen by stock thieves. His evidence was, in that regard, corroborated by D.W.3 and D.W.2 according to whom, on the last occasion, 5 of his (D.W.2's) sheep were also stolen together with D.W.1's sheep.

The accused persons, who were all members of anti-stock theft association in their area, were very upset with the theft of the animals of accused nos. 1 and 2. In his evidence, D.W.1 got information that the deceased and the other people with whom he was admittedly arrested and detained at his (D.W.1's) home were amongst the thieves who had stolen the animals. It was, therefore, under their extreme anger that No.1 accused and his co-accused acted as described by the

crown evidence.

Regard being had to the fact that they belonged to the community of livestock farmers whose livelihood depended on their animals, I agree that the accused persons were extremely angered by the incident of stock theft which was rampant in their area. It is a fact of life that when angry people do things they would otherwise not do. This, in my view, is a factor tending to reduce the moral blameworthiness of the accused persons' act.

There are, in my finding, extenuating circumstances in this case. The proper verdict is, therefore, that the accused persons are guilty of murder, with extenuating circumstances.

Both my assessors agree with this finding.

### **Sentence**

In mitigation of their punishment the court is informed that all the accused persons have no record of previous convictions. They are, therefore, regarded as first offenders. The court is also invited, by the defence counsel, to take into consideration a number of factors. They have been eloquently tabulated by the defence counsel. There is, therefore, no need for me to go over them again. Suffice it to say they have all been taken into account in accessing what

punishment is appropriate for the accused persons.

The court has also taken into account that, in accordance with the Sesotho custom, the relatives of the deceased are likely to sue the accused persons before the civil courts for compensation or **“to raise the head.”** In all probabilities this court is only the first to punish the accused persons. There is still another court, *viz.* the civil court, which is yet to punish them. The court takes this into account less the courts of law are accused of punishing a person twice for the same offence.

Notwithstanding all the factors taken into account, for their benefit, 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 unlawfully 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 permit people to unlawfully kill others. There is nothing wrong with this law. It derives from the Divine Command **“Thou shall not kill.”** If they believed the information that the deceased was the person responsible for the theft of their animals, the accused persons ought to have taken him before the courts of law where he would have been given a fair trial and punished. The accused persons had no right to take the law into their own hands and severely beat the deceased to death, as they did.

The courts of law have, on numerous occasions, warned that they will take

a diem view of people who unlawfully kill others. This warning seems to be going unheeded. There are still too many murder cases brought before the courts of law in this Kingdom. There is, therefore, the need to impose a deterrent sentence. A sentence that will serve as a lesson to the accused persons and people of their mind, that courts of law will not tolerate a repetition of the kind of behaviour against which the accused persons have been convicted.

I must say I find it embarrassing to have to sentence A1 and A4 both of whom are old men of over 70 years old. According to the evidence A1 was apparently the cause of all the trouble. On a suspicion that the deceased and others were thieves he had them arrested and detained at his home where they were mercilessly assaulted day and night for several days with nothing to eat or drink. A sentence of 10 years imprisonment for A1 will meet the justice of this case. Following the ordeal they had suffered at the home of A1, the deceased and the other detainees were escorted by the accused persons to the chief's place. The evidence showed that on the way to the chief's place, A4 hit the deceased a blow with a stick on the kidney region. The blow was so savage that the deceased fell to the ground and was unable to get up and walk. He had to be loaded on a horse which A1 pulled until they reached the chief's place. There was no apparent reason why A4 meted out such cruel treatment to the deceased. I would likewise impose a sentence of 10 years imprisonment for A4. On the evidence, A3 and A5 were very active whilst the deceased and the other detainees were detained and brutally assaulted at the home of A1. They kept on going out to round up and take

some of the detainees to the torture house at A1's home. A3 and A5 are each sentenced to serve a term of 10 years imprisonment.

The evidence indicates that A2 took part in the assault on the deceased and the other captives where they were detained in one of A1's houses. There is, however, no indication that he played any special role which would make him deserve the same punishment as the one imposed on the other four accused persons. I would, therefore, sentence him to serve a term of six (6) years imprisonment.

To sum up, the accused persons are sentenced as follows:

A1 - Ten (10) years imprisonment

A2 - Six (6) years imprisonment

A3 - Ten (10) years imprisonment

A4 - Ten (10) years imprisonment

A5 - Ten (10) years imprisonment



**B.K. MOLAI**

**JUDGE**

**2<sup>nd</sup> October, 2002**

For Crown	:	Mr. Molokoane
For Defence	:	Mr. Mahlakeng