CRI/T/84/2000

IN THE HIGH COURT OF LESOTHO

In the matter of:

REX

vs

1. PUSETSO KHETLANE
2. TEBALO MOSUHLI THAMAE

JUDGMENT

Delivered by the Honourable Mr. Justice B.K. Molai on 12th day of June, 2002

The accused appear before me summarily charged with two counts of murder and housebreaking with intent to steal and theft, it being alleged that:

Count I "upon or about the 17th day of February, 1999 and at or near Mohohlong, St. Michael, in the district of Maseru, the said accused did one, or the other or both of them unlawfully and intentionally kill 'Mamatšeliso Maime."

Count II "Upon or about the 17th day of February, 1999 and at or near Mohohlong, St Michael, in the district of Maseru, the said accused did one, or the other or both of them unlawfully and intentionally break in and enter the house there situate of 'Mamatšeliso Maime and steal the following property:

1. Tempest Hi-fi and one (1) speaker
2. Black touch case
3. Global car battery

the property or in the lawful possession of 'Mamatšeliso Maime."

When the charges were put to them, A1 pleaded not guilty to both counts. A2 pleaded not guilty to count I but guilty to count II. Miss Mosisili, who represents A1 in this trial, told the court that the plea of not guilty tendered by A1 to both counts was in accordance with her instructions. Mr. Mahase, who represents A2, in this trial, informed the court that the plea of not guilty tendered by A2 on count I was in accordance with his instructions. However, the plea of guilty tendered by A2 on count II was not in accordance with his instruction. The correct plea should be that of not guilty. The plea of not guilty was accordingly entered on both counts in respect of both A1 and A2.

Six (6) witnesses were called to testify in support of the crown case. No witness were called to testify on behalf of the accused persons who closed their case without adducing any evidence at all in their defence. The court has, therefore, only the crown evidence to rely upon for the determination of this case.

In as much as it is relevant, the court heard the evidence of P.W.1, Joseph Mope Maime, who, testified that he lived at St. Michael, in the district of Maseru. He knew the deceased, in her life time. She was his own mother. P.W.1 and the deceased had their own separate houses in which they lived at St. Michael.

According to him, in February 1999, P.W.1 was working here in Maseru. When he knocked off duty at 5 p.m. he used to return home at St. Michael. On his way to. and from, work P.W.1 used to call at the house where the deceased lived alone to find out how she was keeping. On the evening of 17th February 1999, P.W.1 returned home from work and, as usual, went via the house where the deceased lived. He found her still keeping well. Thereafter, he proceeded to his own house.

In the morning of the following day, 18th February 1999, P.W.1 left his house for work. As usual he went via the deceased's house. It could have been about 8:00a.m. On arrival he found the kitchen door, which he normally used to enter the house, still closed. When he knocked at the door, there was no response. On trying to open it, he found that the door was not locked. He opened it and entered into the kitchen room. He was shocked to find her mother lying dead in a pool of blood on the floor. There was a wrist chain or bracelet, lying on the floor next to the deceased's head. According to him, P.W.1 immediately raised an alarm by rushing to the home of a certain Rantšo, who was a next door neighbour of the deceased and reporting the death of his mother. He then went to the home of one Mope who was the elder brother of his (P.W.1) father and reported what he had found at the deceased's home. He and Mope proceeded to the home of the latter's

son by the name of Michael Maime. They reported to him what had happened to the deceased.

In his evidence P.W.1 told the court that Michael Maime used his vehicle to transport them to the Chief's place where he reported to 'Mamasekoane Pasane, the Chieftainess of St. Michael, what had happened to the deceased. The Chieftainess immediately wrote a letter and detailed one of her subjects to take it to the police. She herself returned with P.W.1 and his party to the deceased's place where they found a large number of villagers already gathered outside the house. They all waited there until the police arrived.

According to P.W.1, on their arrival the police entered into the kitchen room of the deceased's house. Shortly thereafter, P.W.1 also entered into the kitchen room, at the request of the police. In his (P.W.1's) presence the police undressed the dead body of the deceased and examined it for injuries. P.W.1 noticed that the deceased had sustained wounds on the head and the chest. P.W.1 then inspected the property of the deceased, in the house, with the permission of the police who, in fact, accompanied him. They first went into the bed-room where P.W.1 noticed that the deceased's black touch case which used to be kept on the wardrobe was missing. They then went into the living-room where P.W.1, again, noticed that

the deceased's Tempest Hi-Fi, one of its two speakers and a red global battery used to operate the Hi-Fi were missing. He went to the door leading into the living-room from outside the house and found that the key was still in the key-hole of the door which was firmly locked. P.W.1 observed that the window pane of the living-room window was broken and there was a hole next to the handle of the window frame. The window was slightly opened. On the floor, directly below the hole on the broken window pane, there were broken pieces of glass. From those observations he concluded that whoever had entered into the house had done so through the window of the living-room.

It is to be borne in mind that P.W.1 told the court that on arrival at the deceased's house he found the kitchen door not locked. That being so, I find difficulty with his assumption that because there was a hole on the window pane, whoever entered into the house must have necessarily done so through the window. In my view, entry into the house could have also been gained through the kitchen door which was admittedly not locked.

According to him, P.W.1 told the police what property was missing, in the deceased's house. He also told them that the bracelet which was found next to where the deceased was lying dead on the floor in the kitchen was similar to the

one he had seen A1 and Rantelali Tjotjela wearing on their wrists. However, he had always met them separately. He did not, therefore, know whether or not the bracelet he had seen A1 wearing on his wrist was the same as the one he had seen Rantelali Tjotjela using when he met them separately, in the village.

In the evidence of P.W.1, the police took possession of the bracelet. Thereafter, they conveyed, in their vehicle, the dead body of the deceased to the private mortuary at Masianokeng. He accompanied the dead body of the deceased when it was being transported from her house, at St. Michael, to the mortuary at Masianokeng and assured the court that it did not sustain additional injuries on the way. One day after the dead body of the deceased had been taken to the mortuary at Masianokeng, the police came to his (P.W.1's) home, at St. Michael, and informed him that a post mortem examination was to be performed on the dead body of the deceased. P.W.1 and Michael Maime then accompanied the police to Masianokeng mortuary from where they conveyed the dead body of the deceased to the mortuary of Queen Elizabeth II hospital. He, again, assured the court that the dead body of the deceased did not sustain additional injuries whilst it was being transported from Masianokeng mortuary to the mortuary of Queen Elizabeth II hospital.

P.W.5, D/Tpr. Tšalong, testified that he was a member of the Lesotho Mounted Police Service. On 18th February, 1999 he was based at Roma Police Station. On that day he was on duty at his duty station when he received a certain information following which he and Tpr. Mokobocho proceeded to a place called St. Michael, in the district of Maseru. They did not travel in a police vehicle to go to St. Michael. Instead, they travelled in the vehicle used by the Chief's messenger to bring the information to the police station. That vehicle allegedly belonged to a relative of the deceased in the present case. P.W.5 denied, therefore, the evidence of P.W.1 that when they came to St. Michael the police were travelling in the police vehicle.

Be that as it may, P.W.5 told the court that, on arrival at St. Michael, they went to the home of a certain 'Mamatšeliso Maime. In his observation, P.W.5 noticed that the window of the living room had a window pane broken and was slightly opened. He went to the door leading into the living-room from outside and found that it was not locked. He opened the door and entered into the living-room where he found clothes scattered about. From the living-room, P.W.5 went into the bedroom of the house. He again found clothes scattered about.

It is to be remembered that, in the evidence of P.W.1, the door leading into

the living-room was locked and the key was still in the key-hole. On their arrival the police entered the deceased's house through the kitchen door which was not locked. To that extent there was a discrepancy between the evidence of P.W.5 and P.W.1. Asked whether he used his police notebook, P.W.5 replied in the affirmative. He, however, told the court that his police notebook had been loosed. He could not, therefore, refresh his memory from the notebook. P.W.5 conceded that as a police officer, he had handled many other cases since the present one. In the absence of his police notebook from which he could refresh his memory, P.W.5 could not reliably remember the details of this case. I am inclined to accept as the truth P.W.1's story and reject as false P.W.5's version, on this point. In any event, P.W.5 told the court that, from the bedroom, he proceeded to the kitchen-room where he found a dead body lying in a pool of blood on the floor. The dead body was identified to him and Tpr. Mokobocho as being that of 'Mamatšeliso Maime, the deceased in the present case. Next to where the deceased was lying dead on the floor in the kitchen-room, P.W.5 found a wrist chain. He was later told by a certain Leburu Ramoseli, one of the boys who stayed with the two accused persons at the home of 'Mamosa Theresa Thamae, at St. Michael, that the wrist chain was similar to the one used by A1. P.W.5 took possession of the wrist chain. It had since been in the custody of the police. He handed it in as exh. "1" and part of his evidence in this trial.

According to him, P.W.5 examined the deceased's dead body for injuries and observed that she had sustained a wound in front of the right ear, two wounds on the chest and multiple scratches on the forehead and cheeks. Using the same vehicle in which he and Tpr. Mokobocho had travelled from Roma police station to St. Michael, P.W.5 conveyed the dead body of the deceased to Masianokeng private mortuary. He confirmed the evidence of P.W.1 that the dead body of the deceased was later transported from Masianokeng mortuary to Queen Elizabeth II hospital mortuary for post-mortem examination. He accompanied the dead body of the deceased when it was being transported from St. Michael to Masianokeng mortuary and then to the mortuary of Queen Elizabeth II hospital. It sustained no additional injuries whilst it was being transported.

It is common cause that, after it had been transported from Masianokeng mortuary to the mortuary of Queen Elizabeth II hospital, a post-mortem examination was performed on the dead body of the deceased, by a medical doctor who compiled a post-mortem examination report. The post-mortem examination report was, by agreement of the parties, handed in, from the Bar, as exhibit "A" and part of the evidence in this trial.

According to exh. "A", on 25th February 1999, a medical doctor performed

an autopsy on a dead body of a female African adult. The dead body was identified as being that of 'Mamatšeliso Maime by Michael Maime. The external examination revealed that the deceased had sustained multiple stab wounds on the left side of the chest and forehead. Semen was also found on the deceased's vagina. On opening the body, the examination revealed that the wounds on the chest had penetrated the sternum resulting in the rupture of the left lung. From these findings the medical doctor formed the opinion that the death of the deceased had been brought about by the rupture of her left lung.

I can think of no good reasons why the opinion of the medical doctor that the deceased's death was brought about by the injuries inflicted on her chest 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 inflicted the injuries on the deceased and, therefore, brought about her death.

In this regard the court heard the evidence of P.W.3, 39 years old Rantelali Tjotjela, who testified that he lived at ha Lekunutu in the area of Thabana-Limmele. His parental home was, however, at St. Michael. In 1999 he was still living at his parental home, at St Michael. He, together with Leburu, Makula. Sono. A1 and A2 worked and slept at the home of a certain "***Sankoma***" by the

name of Theresa, alias, 'Mamosa Thamae at St. Michael.

According to him, in the morning of 17th February 1999, P.W.3 left St. Michael and went to a place called Thaba-Bosiu where a relative of his had passed away. Before going to Thaba-Bosiu, he had lent his brown okapi knife to A1 who was to slaughter a goat, presumably for ***"Hlophe"*** (celebration for the initiation of new ***"sankoma"***) which was to be held in the evening of the day in question, 17th February 1999. In his evidence, P.W.3 returned home, from Thaba-Bosiu, at about between 7:00p.m. and 8:00p.m. on the same day. He first went to his parental home. From there he proceeded to the home of Theresa, where he found many people already gathered for the ***"Hlophe"***. There was a lot of noise as people were singing at the ***"Hlophe"***. Leburu, Makula and Sono were amongst those people. He (P.W.3) did not, however, see A1 and A2 amongst the people who attended the ***"Hlophe"***. When he asked for their whereabouts, Leburu and Makula told him (P.W.3) that A1 and A2 had said they were going to the home of 'Mamatšeliso, alias, 'Ma-Aupa Maime (deceased). According to P.W.3, they (A1 and A2) did not return until the ***"Hlophe"*** was over and he, Leburu, Makula and Sono went to bed. At about dawn, the two accused returned home and got into bed.

P.W.3 testified that, in the morning of 18th February 1999, A1 told him that he and A2 had gone to deceased's home to steal a Hi-Fi. When they broke into her house, the deceased heard them. They both caught hold of the deceased and he (A1) then stabbed her with a knife in the ear until she died. After the deceased had died they (A1 and A2) took her Hi-Fi and hid it in the fields. P.W.3 testified that he and the two accused persons were with Leburu Ramoseli and a small child on the forecourt of the hut in which they lived at the home of 'Mamosa Theresa Thamae when A1 told him that story. Makula and Sono were, however, not present. Because A2 was present and did not gainsay the story related by A1, P.W.3 assumed that he (A2) agreed with what A1 had said.

According to P.W.3, shortly after A1 had told him what he (A1) and A2 had done, he noticed P.W.1 passing, next to Theresa's home, in the direction towards the home of the deceased. He confirmed the evidence of P.W.1 that it could have been about 8:00 O'clock in the morning. P.W.3 told the court that, after he had come to the deceased's home, P.W.1 raised an alarm following which many villagers went there. P.W.3 himself also went to the deceased's home. On arrival at her home, P.W.3 found the deceased lying dead in a pool of blood in the house. He also noticed a wrist chain (bracelet) lying next to the dead body of the deceased. He identified the chain as the one normally used by A1 on his wrist.

In his evidence, P.W.3 further told the court that he himself never used a wrist chain. He denied, therefore, the evidence of P.W.1 that he had, some times, seen him (P.W.3) using a chain on his wrist. He always used the chain which he was wearing on his neck as he testified before the court.

P.W.3 confirmed that whilst he and many other villagers were at the home of the deceased, the police arrived in the vehicle of one Motsoenkana Michael Maime, a relative of the deceased. After the police had completed their work the dead body of the deceased was transported, by the vehicle of Motsoenkana Michael Maime, to the mortuary. He (P.W.3) himself did not accompany the dead body to the mortuary. He did not, therefore, know whether or not the dead body sustained any injuries on the way to the mortuary.

P.W.3 denied, therefore, the evidence of P.W.1 that the dead body of the deceased was conveyed to the mortuary in the police vehicle. He instead confirmed the evidence of P.W.5 that the vehicle used to convey the dead body to the mortuary was the one belonging to the deceased's relative, Michael Maime. I accept as the truth the evidence of P.W.3 corroborated by that of P.W.5 and reject as false the uncorroborated evidence of P.W.1 on this point.

P.W.3 told the court that after the police had taken the dead body of the deceased to the mortuary, he returned to where he stayed, at Theresa's home. On arrival he asked A1 the whereabout of his wrist chain. According to P.W.3, A1 looked at his wrist and appeared to get frightened. He then told him (A1) that he had seen the chain next to where the deceased was found dead in her house. Thereafter, A1 handed back to him the knife he (P.W.3) had, on the previous day, lent him to slaughter a goat. P.W.3 did not observe anything unusual, on the knife which he put in his pocket.

It is significant to bear in mind that in his testimony P.W.1, and, indeed, corroborated by P.W.3 himself, told the court that it could have been 8:00 O'clock in the morning of 18th February 1999 when he raised an alarm. In his own mouth, P.W.3 told the court that, as a result of the alarm, he and many other people went to the deceased's place. In my view, by the time P.W.3 returned from the deceased's place and arrived where he stayed at the home of Theresa, it was surely after 8:00a.m. As it will become apparent later in this judgment, A1 and A2 left Theresa's place, at St. Michael, very early in the morning of that day and at 7:00a.m they were already at a place called Qhuqhu. That being so, P.W.3 could not be correct in his story that at about 8:00 o'clock in the morning of 18th February 1999 he was sitting with the two accused persons, Leburu Ramoseli and

a small child on the forecourt of the hut in which he stayed at the home of Theresa when A1 told him what he (A1) and A2 had done at the home of the deceased. Nor could he (P.W.3) be correct in his evidence that on arrival at the home of Theresa from the deceased's place he found A1 and asked him the whereabouts of his wrist chain.

Leburu Ramoseli testified as P.W.4 and told the court that he was illiterate and lived at a place called ha Limo in the area of Koro-koro, here in Maseru district. He knew the deceased, 'Ma-Aupa 'Mamatšeliso Maime, in her life time. At the time the deceased met her death he was staying with A1, A2, P.W.3, Makula and Sono, at St. Michael. They were all staying at the home of a certain woman by the name of 'Mamosa Theresa Thamae. On the day preceding the morning on which the deceased was found dead, they were still at the home of Theresa Thamae, who was, in fact, their employer. In the late evening of that day, there was a ***"Hlophe"*** held for the initiation of a certain boy called Hlompho as a ***"sankoma"***. With the exception of P.W.3, he and the other boys (including A1 and A2) who stayed at the home of Theresa Thamae attended the ***"Hlophe"***. P.W.4 denied, therefore, the evidence of P.W.3 that he too had attended the ***"Hlophe"***. Although he conceded that when ***"Hlophe"*** was held at Theresa's home on previous occasions there was always meat eaten, P.W.4 told the court that

no meat was eaten on that particular occasion.

It is to be remembered that, in his evidence, P.W.3 told the court that, on 17th February 1999, he returned home from Thaba-Bosiu at about 8:00p.m. When he arrived at the home of Theresa, a large number of people had already gathered there for the ***"Hlophe"***. There was a lot of noise as the celebration had started and people were singing. The possibility that, under those circumstances, P.W.4 could have failed to notice the presence of P.W.3 who came late at the ***"Hlophe"*** cannot, in my view, be ruled out. I am not convinced with the evidence of P.W.4 that there was no meat at the ***"Hlophe"*** on the night of 17th February 1999, particularly because he, himself told the court that when ***"Hlophe"*** was held at the home of Theresa on previous occasions meat had always been available. Indeed, P.W.3 told the court that before he left for Thaba-Bosiu in the morning of that day, 17th February 1999, he had lent his knife to A1 who was to slaughter a goat, presumably for the occasion.

In his evidence, P.W.4 testified that after the ***"Hlophe"*** he and the other boys who stayed at the home of Theresa were about to retire to bed when A1 and A2 said they were going to the deceased's home where they would break in and steal a Hi-Fi. A1 then took a brown okapi knife from the table saying if the

deceased made noise he would stab her with it. According to him, P.W.4 did not know to whom that knife belonged. It had, however, been left on the table by a certain 'Mathato who had been using it to prepare vegetables. Before A1 and A2 could go out of the hut in which they were staying, the latter asked him (P.W.4) and Makula to accompany them to the deceased's place. Makula refused to do so. However, P.W.4 himself told A2 and A1 to go ahead and he would follow them. After A1 and A2 had gone out, P.W.4 did go out of the house and noticed them going in the direction towards the deceased's place. He, however, returned into the house and did not follow them, as he had promised.

P.W.4 told the court that, shortly thereafter, P.W.3 came into the hut in which they normally slept and asked where A1and A2 were. When he told him that they had said they were going to take a Hi-Fi from the deceased's place, P.W.3 told him to tell them not to make noise when they arrived because he would be asleep. He (P.W.4), Makula, Sono and P.W.3 then got into bed and slept. At about dawn, A1 and A2 arrived. They knocked at the door and he (P.W.4) opened for them. They then entered into the house, prepared their bedding and slept.

Initially, P.W.4 told the court that early in the morning and whilst he and the other boys who stayed with him at the home of Theresa were still lying in bed,

A1 and A2 woke up. A2 then told them that he and A1 had gone to the deceased's home. Whilst they were breaking into the house, the deceased heard them. When they entered into her house, they met her at the door. They both grabbed the deceased and A1 stabbed her with a knife. When she was thus stabbed with the knife the deceased fell to the floor. Thereafter, he (A2) and A1 took the Hi-Fi and left the place. They returned to Theresa's home where they arrived at dawn.

After he had told them that story, A2 asked P.W.4 and Makula to help him and A1 carry the property they had taken from the deceased's place to his (A2's) father at Qhuqhu. According to P.W.4 he and Makula declined. He (P.W.4) told A2 that, on the day in question, he was going to look after his animal in the veld and Qhuqhu was too far away from St. Michael. Thereafter, A2 and A1 left.

P.W.4 told the court that after they had left, he went outside the house and noticed A2 and A1 going behind a kraal from where they picked up a Hi-Fi, a speaker, a battery and a black touch case. They carried them through a fence and went into a nearby public road. He (P.W.4) then returned into the house and got into bed. P.W.4 assured the court that although it was early in the morning the visibility was good. He had, therefore, no difficulty in seeing what was happening.

Later on, P.W.4 somersaulted and testified that when A2 told him what had happened at the time he and A1 came to the deceased's place, they were outside the house in which he and the other boys stayed at the home of Theresa. A1 and the other boys were inside the house. He later, again, changed and told the court that they were all inside the house but A1 and the other boys were, however, just lying on their bedding and not yet asleep. Eventually P.W.4 conceded that he no longer remembered whether or not he and A2 were inside the house in which they stayed at the home of Theresa when A2 related to him the story of what had happened at the deceased's home.

It is to be observed that although in the evidence of P.W.4, it was A2 who had related to him and the other boys what he (A2) and A1 had done at the home of the deceased, on the night of 17th February, 1999, P.W.3 told the court that it was A1, who had related the story. For reasons already stated, earlier in this judgment, I have rejected, as improbable P.W.3's evidence on this point. Although P.W.4 conceded that he no longer remembered whether or not he and A2 were inside the house in which they stayed at the home of 'Mamosa Theresa Thamae, his evidence that it was A2 and not A1 who related the story of what they (A2 and A1) had done at the deceased's place, on the night in question, was not challenged. I am inclined, therefore, to accept P.W.4's evidence as probable, on this point.

It is to be observed that although in the evidence of P.W.4, it was A2 who had related to him and the other boys what he (A2) and A1 had done at the home of the deceased, on the night of 17th February, 1999, P.W.3 told the court that it was A1 who had related the story. For reasons already stated, earlier in this judgment, I have rejected, as improbable P.W.3's evidence on this point. Although P.W.4 conceded that he no longer remember whether or not he and A2 were inside the house in which they stayed at the home of 'Mamosa Theresa Thamae, his evidence that it was A2 and not A1 who related the story of what they (A2 and A1) had done at the deceased's place, on the night in question, was not challenged. I am inclined, therefore, to accept P.W.4's evidence as probable, on this point.

Be that as it may, P.W.4 confirmed the evidence that, before he could drive his animal to the veld for grazing in the morning, an alarm was raised at the home of the deceased. As a result many villagers went there. He himself did not go because he was afraid to see a dead person. He instead drove his animal to the veld for grazing. At about 4 p.m. he returned home from the veld. On arrival he found A1 and A2 already at home. According to P.W.4, A2 told him that he and A1 had left the property they had taken from the deceased's place with his father, at Qhuqhu.

In his evidence, P.W.4 further testified that he had learned that before he (P.W.4) came to stay at the home of Theresa, A1 had been shot and injured on the leg. He, however, did not know that, as a result of the injury, A1 was admitted in hospital. In any event, when he first came to stay with him and the other boys at the home of Theresa, P.W.4 noticed that A1 had a plaster of paris on his leg. He was some times using crutches to support himself as he walked and at other times not using them. P.W.4 told the court that on the night he went with A2 to the deceased's place, A1 was using only one crutch. He, however, later somersaulted and said A1 used a stick and not a crutch to support himself because it was raining on the night in question.

P.W.4 confirmed the evidence of P.W.3 that of all the boys who stayed at the home of Theresa, A1 was the only one who used a chain on his wrist. He had, however, not noticed that P.W.3 was using a chain on his neck. He denied, therefore, the evidence of P.W.1 that there were times when P.W.3 also used a chain on his wrist.

47 years old Hanyane Mosuhli testified as P.W.2 and told the court that he was a traditional doctor or ***"sankoma"*** and illiterate. He lived in Quthing district where he was working. However, in February 1999 he was living in the village

of Qhuqhu, in the district of Maseru, which was his real home. He knew the two accused persons before court.

A2 was his eldest son by his first wife. He was born on 4th April 1977 and already married to three wives. P.W.2 had, however, separated with his first wife a long time ago and was living with another woman as husband and wife. He (A2) never told him when he wanted to get married to his first wife. P.W.2 did not, therefore, pay ***"lobola"*** for A2's first wife as he ought to have done according to Sesotho law and custom. In fact A2 was brought up by the parents of his (P.W.2's) first wife. According to P.W.2, the real surname of A2 was Mosuhli and not Thamae. P.W.2 did not know how A2 acquired the surname of Thamae. He was, however, aware that A2 was employed by a certain ***"Sankoma"*** called 'Mamosa Theresa Thamae at St. Michael, here in Maseru district. 'Mamosa Theresa Thamae was in the habit of visiting Qhuqhu to attend to her patients in the village. When she was in the village of Qhuqhu 'Mamosa Theresa Thamae always stayed at his (P.W.2's) home. On two or three occasions she came to Qhuqhu in the company of A1 and that was how he (P.W.2) first came to know him (A1). According to P.W.2, there was also a time when he visited the home of 'Mamosa Theresa Thamae, at St. Michael. He found A1, A2 and other employees of 'Mamosa Theresa Thamae working at her home. They were grinding herbs which

she used as medicine.

In his evidence, P.W.2 told the court that one day in February 1999 he left his home, at Qhuqhu, early in the morning and went to the fields to get fodder for his horse. On his return home from the fields, at about 7:00a.m. he found A2 and A1 sitting alone in the living room of his house. His wife was working in the kitchen room. They (A2 and A1) were listening to music which was playing on a Hi-Fi. A red car battery was used to operate the Hi-Fi which had only one speaker. There was also a black touch case next to the Hi-Fi. When he inquired from the two accused as to where the Hi-Fi and the other articles came from, A2 explained that one of the patients who had been treated by 'Mamosa Theresa Thamae could not afford to pay for the treatment. The patient then gave the Hi-Fi and other articles to her as security for the payment. 'Mamosa Theresa Thamae had instructed them (A2 and A1) to take the Hi-Fi and the other articles to him (P.W.2) for safekeeping until the patient could have paid her for the treatment. When he (P.W.2) told A2 that, to his knowledge articles such as a Hi-Fi always had covering papers and demanded its papers, he (A2) replied that the Hi-Fi and the other articles would not be long in his (P.W.2's) safekeeping. 'Mamosa Theresa Thamae would come to collect them as soon as her patient had paid for the treatment. P.W.2 then observed that the touch case was already torn and asked

A2 if 'Mamosa Theresa Thamae had said it should also be brought to him for safekeeping in that condition. In reply A2 explained that he and A1 had used the touch case to carry the car battery which was apparently leaking. The touch case had, therefore, been damaged by the acid leaking into it from the battery.

In the evidence of P.W.2, A2's explanations about the Hi-Fi and the other articles were made in the presence of A1 who, however, kept quiet and did not gainsay them. P.W.2 assumed, therefore, that A1 agreed with all that was said by A2. Following A2's explanations, and more especially because 'Mamosa Theresa Thamae was also his acquaintance, P.W.2 allowed him and A1 to leave the Hi-Fi and the other articles in his house, at Qhuqhu, for safekeeping. He, however, promised to go to St. Michael, in a near future, and see Mamosa Theresa Thamae about the Hi-Fi and the other articles she had sent to him, at Qhuqhu, for safekeeping.

In his testimony, P.W.2 went on to testify that one day, still in February 1999, and before he could go to see 'Mamosa Theresa Thamae at St. Michael A2 and A1 came with the police to him, at Qhuqhu. They were all travelling in a police vehicle. He noticed that one of A2's legs was tied to one of A1's legs. On arrival at his home, A2 told him (P.W.2) that they had come to fetch the property

he and A1 had earlier left with him for safekeeping. Asked what was wrong with the property since they were in the company of the police A2 told P.W.2 that it was alleged he and A1 had killed the owner of the property. According to him, P.W.2 felt he could not ask further questions. He released the property to the accused persons who, in turn handed it to the police. As the Hi-Fi, the speaker, the battery and the black touch case were being loaded on the police vehicle, A2 said to him (P.W.2): "Father, since I have committed a wrong, you should let me go to goal and serve my punishment. On my return from goal I shall no longer go back to where I have been staying. I shall come to live with you." Thereafter, the two accused persons left with the police.

P.W.6, D/Tpr. Moletsi, testified that he was a member of the Lesotho Mounted Police Service stationed at Roma police station. In February 1999, he was already stationed at Roma Police station. He remembered that on 2nd March, 1999 A1, A2, P.W.3, P.W.4 together with Makula Phahamane and Salang Thamae who all stayed at the home of 'Mamosa Theresa Thamae, at St. Michael were called to Roma police station for interrogations in connection with the present case and another case involving the shooting of a certain Ntaote. During the interrogations P.W.6 and the other interrogators found that Salang Thamae was the suspect in the case involving the shooting of Ntaote. However, the interrogations

continued in respect of the present case. On 4th March 1999 the interrogations were not completed and an order for further detention of the accused persons, together with the other boys with whom they stayed at the home of Theresa Thamae, had to be obtained from the Magistrate.

P.W.6 told the court that on 5th March 1999 he called A1 and A2 into his office where he informed them that they were regarded as suspects in the present case. He then warned the two accused persons in terms of the Judges' rules. Following the warning, the two accused persons gave him explanations, on their own volution, and undertook to take him to a place called Qhuqhu where they would produce the property which had allegedly gone missing from the home of the deceased on the night she met her death. According to P.W.6, he did not, at the time, know a place called Qhuqhu. For fear that the undertaking to take him to Qhuqhu might be a pretext used by the accused persons to escape from the police detention, P.W.6 fastened one of A1's legs to A2's leg and told them to direct him to where Qhuqhu was. They travelled in a police vehicle. They eventually came to a certain village which the accused persons said it was Qhuqhu. In that village the two accused persons directed him to the home of P.W.2. In his evidence, P.W.6 confirmed the evidence of P.W.2 that they found the latter at his home. He further confirmed that, on arrival at P.W.2's home, A2 told him (P.W.2)

that they had come to fetch "that property". P.W.2 then handed a Hi-Fi, a speaker, a battery and a black touch case to the accused persons who, in turn, handed them to him (P.W.6). They have since been in the possession of the police.

P.W.6 testified that, whilst the articles were being loaded on to the police vehicle, A2 told P.W.2 to let him go to goal because he had killed the owner thereof. He (A2) further told him (P.W.2) that on his return from goal he would come to live with him at home (Qhuqhu) and would no longer go to live with Theresa at St. Michael.

According to P.W.6, from Qhuqhu, the accused persons directed him to the home of P.W.3 at St. Michael. They found P.W.3 in. A1 then demanded, from P.W.3, the knife which he (P.W.3) handed over to him. A1, in turn, handed a brown okapi knife to P.W.6 as the one he had used to stab the deceased. He (P.W.6) took possession of the knife which had since been in the custody of the police. He handed in the Hi-Fi, the speaker, the battery, the black touch case and the brown okapi knife as exh. "2", exh. "3", exh. "4", exh. "5" and exh. "6", respectively.

From the home of P.W.3, at St Michael, P.W.6 and the two accused persons

returned to Roma police station, where P.W.1 later identified exh. "2" - "5" as the property which he had found missing from the deceased's house on the morning of the day she was found dead.

In his evidence, P.W.6 further told the court that he remembered that, some time back, A1 was shot on the leg. In fact, he was the one who assisted A1 by taking him to a medical doctor who medically treated and admitted him in hospital. Upon his discharge from the hospital, A1 had a plaster of paris put on his leg and was using crutches to support himself as he walked. However, when he (P.W.6) met him on 2nd March 1999, A1's injury had completely healed. He no longer used crutches to support himself as he walked and the plaster of paris had already been removed from his leg.

I must say I observed all the crown witnesses as they testified before the court. There were some discrepancies in their evidence. I did not, however, get the impression that the witnesses were outright liars. The discrepancies were, in my view, due to the fact that the events of this case had occurred some three (3) years ago. It was, therefore, only natural that the witnesses' memory might fail them in some details unless, of course, they had been schooled on what to say in their evidence.

It is to be recalled that, in his evidence, P.W.4 told the court that following the ***"Hlophe"*** celebration which was held on the night of 17th February 1999 he and the other boys who stayed with him at the home of 'Mamosa Theresa Thamae were about to retire to bed when A1 and A2 said they were going to steal a Hi-Fi from the deceased's home. Indeed, A2 invited him (P.W.4) and Makula to accompany them to the home of the deceased. According to P.W.4, Makula declined the invitation. He (P.W.4) himself told the two accused to go ahead and promised to follow them. Before the two accused went out of the house, P.W.4 noticed A1 picking up a brown okapi knife from the table saying should the deceased make noise he would stab her with it. P.W.4 told the court that shortly after A1 and A2 had gone out he too went out of the house. He actually saw the two accused going in the direction towards the deceased's house. He, however, returned into the house and got into bed. He did not, therefore follow the accused persons to the deceased's house as he had promised. At about dawn the two accused persons returned to the hut in which P.W.4 and the other boys stayed at the home of 'Mamosa Theresa Thamae. They knocked at the door and he himself opened for them. They entered into the hut and got into bed. In this regard the evidence of P.W.4 was corroborated by that of P.W.3.

According to P.W.4, early in the morning A1 and A2 woke up. A2 then

requested him and Makula to help him and A1 carry the property they (A2 and A1) had taken from the deceased's home to his (P.W.2's) father at Qhuqhu. However, P.W.4 and Makula declined A2's request. Thereafter A1 and A2 went out of the house. Shortly after the two accused persons had left, P.W.4 also went out of the house and noticed them going behind a kraal from where they picked up exh. "2" - "5", carried them though the fence and disappeared into a nearby public road. The evidence of P.W.4 that early in the morning of 18th February 1999 he saw A1 and A2 carrying away exh. "2" - "5", was, in a way, corroborated by P.W.2 who told the court that at about 7:00 o'clock, in the morning of the day in question, he returned to his home, in the village of Qhuqhu, from the fields where he had gone to get fodder for his horse when he found the two accused persons with exh "2" - "5" in the lounge room of his house.

It must always be borne in mind that, as they were entitled to do, the accused persons elected to close their case without adducing any evidence at all, in their defence. The above stated evidence of P.W.4, P.W.3 and P.W.2 had, therefore, remained unchallenged. I accept as the truth the uncontradicted evidence of P.W.4 that, when he left with A2 for the deceased's house, A1 took the brown okapi knife with which he said he would stab the deceased should she make noise. After the two accused persons had returned from her house, the

deceased was, indeed, found fatally stabbed in the kitchen-room of her house. There was, in my finding a strong ***prima facie*** case that A1 had done it. Although A1 bore no onus of proof, the strong ***prima facie*** case against him was buttressed by his failure to give evidence in rebuttal.

There can be no doubt in my mind that when he fatally stabbed the deceased, A1 was in the company of A2. There is, however, no evidence indicating that A2 did anything as proof that he was dissociating himself from what A1 was doing. All the evidence indicates that the two accused persons were, at all material times, acting in concert. On the well known principle of common purpose, A2 was, in my finding, as criminally liable as A1. The question I have earlier posted *viz*. whether or not the accused are the persons who inflicted the injuries on the deceased and, therefore, brought about her death must be answered in the affirmative.

The Next question that arises for the determination of the court is whether or not in inflicting the fatal injuries on the deceased, as they did, the accused persons had the requisite subjective intention to kill. There is no evidence that the accused persons actually planned or premeditated the death of the deceased. On the contrary, there is evidence indicating that when they went to the home of the

deceased, on the night in question, the accused persons' intention was to steal her Hi-fi. However, in using a weapon as lethal as exh "6" to stab the deceased on the upper portion of her body *viz.* the head and the chest which are vulnerable parts of a human body, the accused persons were aware that death was likely to occur. Nonetheless, they acted regardless of whether or not it did occur. That being so, it must be accepted that in inflicting the injuries on the deceased, as they did, the accused persons did have the requisite subjective intention to kill, at least in the legal sense.

Turning now to the second count, there was undisputed evidence by P.W.1 that exh. "2" - "5" were the property of his mother (the deceased), normally kept in her house. On the morning of the day he found the deceased dead in the kitchen-room of her house he inspected all her property in the house and noticed that exh. "2" - "5" were missing. He reported the missing property to the police. The property was on 5th March 1999 found at the home of P.W.2 in the village of Qhuqhu, far away from the deceased's home at St. Michael.

In his evidence P.W.2 told the court that the property was brought to his home, early in the morning of 18th February 1999, by the two accused persons. They claimed that it belonged to 'Mamosa Theresa Thamae who had instructed

them to take it to him for safekeeping. The evidence of P.W.2 that the property was brought to his home by the two accused persons was corroborated, in a way, by P.W.4 who told the court that, very early in the morning of the day on which the deceased was found dead at her home, he saw the two accused carrying it away from behind a kraal, at St. Michael.

In my view, the property could not have brought itself to Qhuqhu. I accept, therefore, the evidence of P.W.2, corroborated by P.W.4, that it was taken there by the two accused persons. If they did not have the intention to steal the property the accused persons, would not have deceived P.W.2 by telling him that it belonged to 'Mamosa Theresa Thamae who had instructed them to take it to him for safekeeping.

I have, however, found on evidence that there was no certainty that whoever entered into the deceased's house necessarily did so by breaking into the house. In his evidence, P.W.1 told the court that when he came to the deceased's house on the early morning of 18th February 1999 and found his mother (deceased) lying dead in the kitchen, the door thereof was not locked. The possibility that the accused persons might have gained entry into the deceased's house through the open kitchen door and stole exh. "2" - "5" could not be ruled out. In that

eventuality, it could not be said the accused persons have committed the specific crime of Housebreaking with intent to steal and Theft. In my finding, they have, at the most, committed the crime of theft common.

In the result, I come to the conclusion that the crown evidence has succeeded in establishing, beyond a reasonable doubt, that both the accused persons have committed the offence of murder as charged under count I and the offence of theft common which is a competent verdict to a charge of Housebreaking with intent to steal and Theft under count II. I accordingly find both accused persons guilty of murder and theft common on count I and count II, respectively.

Extenuating Circumstances

Having found the two accused persons guilty of murder as charged on Count I, 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 any factors that tend to reduce the moral blameworthiness of their act. The court was, inasmuch as it is relevant, invited to take into account the fact that the two accused persons were illiterate and, therefore, unsophisticated youths.

As stated, earlier in the judgment, both accused did not give evidence and tell the court what their ages were. However, P.W.2 did testify on oath and told the court that he was the father of A2 who had been born on 4th April, 1977. Assuming the correctness of P.W.2's evidence, it must be accepted that A2 was 22 years of age at the time he committed this offence, in 1999. There was no evidence regarding the age of A1. In the absence of any such evidence, the court could only look at A1 and estimate that his age was approximately the same as that of A2. At the trial, the court was told, in evidence, that A2 was a married man and already had three wives and children. The court was also told, in argument, that A1 was a married man and had one child.

I must say I find it difficult to accept that married men, who are 26 years old and have children of their own, can properly be considered youths. However, what is of importance is the age of the accused persons not at their trial but at the time of the commission of the offence against which they stand charged. There is no evidence that at the time of the commission of the offence the two accused were already married men. It can only be assumed that the accused persons were, at the time, unmarried boys because there is evidence that they were sleeping together with other boys in one of the huts at the homestead of Theresa 'Mamosa Thamae. Assuming the correctness of my assumption that, at the time they murdered the

deceased in 1999, the two accused persons were unmarried boys of 22 years of age, it must be accepted that their minds were still immature and could not, therefore, reason like grown up persons. In convicting them of murder, the court found that the accused persons had intention to kill, at least, in the legal sense i.e they had not planned or premeditated the death of the deceased.

The cumulative effect of all the above factors, ***viz.*** that the accused were unsophisticated members of the society, relatively immature of mind due to their tender age of 22 years at the time of the commission of the offence against which they stand charged and the absence of plan or premeditation to kill, is that extenuating circumstances do exist, in this case. In my finding, the proper verdict on Count I should, therefore, be that the two accused persons are guilty of murder, with extenuating circumstances.

Both my assessors agree with this finding.

Sentence

In mitigation of their punishment, the court was informed, by the crown counsel, that A1 and A2 had no record of previous convictions. They were,

therefore, first offenders - a factor which must properly be taken into account in assessing what punishment is appropriate for the accused persons.

His defence counsel told the court that A1 had a wife and a child. His wife was not working. Both his parents were still alive but not working. A1 was, therefore, the sole bread winner for his parents, wife and child who were all his dependents. A1 had been arrested and kept in custody since February 1999 until 2001 when he was released on bail by a magistrate court, here in Maseru.

It is to be observed, however, that, in terms of subsection (1) of section 99 of ***the Criminal Procedure and Evidence Act, 1981,*** the offence of murder is not bailable before a magistrate court. The subsection reads:

> " (1) Every person committed for trial or sentence in respect of any offence except sedition, murder or treason may be admitted to bail in the discretion of the magistrate."

In the light of the above cited subsection (1) of section 99 of ***the Criminal Procedure and Evidence Act, Supra,*** I find it incredible that A1 who was admittedly charged with the crime of murder, under Count I, could have been granted bail by a magistrate court. In all probabilities, it was the High Court, and ***NOT*** the Magistrate Court, which released A1 on bail.

On behalf of A2, the defence counsel invited the court to take into account a number of factors in mitigation of his punishment. The factors were clearly tabulated by the defence counsel in his written submissions. There is, therefore, no need for me to go over them, again. Suffice it to say they were all taken into account in determining the sentence which is about to be imposed on the accused persons.

As regards the sentence on Count I, the court has also taken into account that, in cases of this nature, the relatives of the deceased are likely to sue the accused persons for compensation in accordance with our Sesotho custom. In that eventuality, this court may only be the first to punish the accused persons. Another court, namely a civil court, may yet impose punishment on them. I have taken this into consideration so that the courts of law may not be accused of punishing a person twice for the same offence.

The court is, nevertheless, not prepared to turn a blind eye to the seriousness of the offences with which the accused persons have been convicted. They brutally assaulted to death a defenceless old lady of about 62 years of age. According to exh. "A", multiple stab wounds had been inflicted on the deceased's chest and forehead resulting in the rupture of her left lung and death. Semen was

also found on vaginal examination, thus suggesting that the deceased might have been raped. However, exh. "A" ran short of saying penetration had actually taken place.

As regards Count II the law does not allow people to steal from others. There is nothing wrong with our law that forbids theft. It derives from the Divine Command. **" Thou shall not steal".** The accused persons are no exceptions to that. What I find even more disturbance is when young men of about 22 years of age steal from a 62 years old lady who is, for obvious reasons, quite helpless.

The crimes of murder and theft are rampant in this country. There is a real need to impose deterrent sentences that will serve as a lesson to the accused persons, and people of their mind, that the courts of law will not tolerate a repetition of the kind of behaviour with which the two accused have been convicted.

In the result, I come to the conclusion that the following punishment is appropriate and the two accused persons are, accordingly, sentenced:

Count I : A1 - To serve a term of 15 years imprisonment without an

option of a fine.

A2 - To serve a term of 15 years imprisonment without an option of a find.

Count II: A1 - To serve a term of 2 years imprisonment without an option of a fine.

A2 - To serve a term of 2 years imprisonment without an option of a fine.

The sentences on Count II are to run concurrently with the sentences on Count I.

B.K. MOLAI

JUDGE

12th June, 2002

For Crown : Ms Nku
For Accused No. 1: Ms Mosisili
For Accused No. 2: Mr. Mahase