

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

v

1. THABANG MOHLALISI
2. REFELETSOE PHATE MPOBOLE
3. TSELISO JOHANNES ISAACA

J U D G M E N T

Delivered by the Hon. Mr. Justice M. P. Mofokeng  
on the 19th day of December, 1980

The three accused, Thabang Mohlalisi, Refeletsoe Phate Mpobole and Tseliso Johannes Isaaca (hereinafter referred to as accused Nos. 1, 2, and 3 respectively) are alleged firstly, to have murdered one Bitsamang Mafifi (hereinafter referred to as the deceased) on or about the 8th day of November, 1978 at or near Makoe's in the Quthing district and secondly, to have committed the crime of Housebreaking with intent to steal and theft the items listed in the indictment. When asked to plead<sup>to</sup>/the first charge, that is one of murder, accused No.3 pleaded guilty. The plea was noted but a plea of not guilty was entered on the second charge, that is Housebreaking with intent to steal and theft, all three accused pleaded not guilty.

It is not disputed that on the morning of the 9th November, 1978 the body of the deceased was found inside a rondavel next to chief 'Maseribane's shop at Ha Makoe (hereinafter referred to as the shop) and that it was

transported to Quthing where Doctor De Rhoter carried out a post-mortem examination on the 10th November, 1978. There is also no dispute that when the body was found the hands were tied behind the back with a wire as also the feet above the ankles. There were superficial wounds on both wrists and ankles which were probably caused by the resistance the deceased put up. There was blood coming out of the nostrils; there was a swelling of the mouth and the throat. There were wounds on the edges of the mouth. In the doctor's opinion death was due to "suffocation which was applied, which was caused by applying of a piece of tissue into the mouth." On examining the throat from the outside he could see no bruises but from the inside he saw a swelling of the upper part of the throat. This was consistent with pressure applied from the inside. He did not see any other injuries on the deceased. The bruises or superficial wounds on both the wrists and ankles were consistent with the wires shown to him during the Preparatory Examination (and subsequently handed into Court at this trial as evidence and referred to as exhibits 22 and 20 respectively).

On the 9th November, 1978 D/Sgt. Liphamamo, together with other police, arrived at the shop. It was at about sunset. He was then showed a rondavel by the manageress. He entered but D/Sgt. Mara stood at the doorway. D/Sgt. Liphamamo observed the following:

- (1) That the head of the deceased was near the door. The body was covered by a Senqu blanket (exhibit 8(x)).
- (2) That the deceased had a small wound on the crown of the head which appeared to have bled a little.
- (3) (i) That there was a cloth running over the deceased's slightly opened mouth and was tied at the back of the head. (This is exhibit 19).

(ii) That running over exhibit 19 was a thin wire and it was also tied at the back of the head. It had been twisted several times as though a pair of pliers had been used. (This is exhibit 21). The position with (i) and (ii) as explained by the witness was that the cloth and wire ran not quite over the mouth. It was as though the deceased was about to bite them.

(4) That the removal of exhibits 19 and 21 revealed that there was another cloth which seemed to have been pushed to the back of the deceased's mouth. This cloth was similar to exhibit 19. Blood had come out of the nostrils staining a portion of exhibit 19 directly below the nose area. The cloth found inside the mouth is exhibit 18. This cloth he also removed.

(5) That the deceased's feet, above the ankles, were tied, very tightly, with a wire (exh.20) which was similar to exhibit 21.

He then removed the blanket and this is what he observed:

(6) That the deceased's hands were tied behind. The wire used (exh. 22) was of a different kind. It was thicker - like the one used to fasten lucern bales, as the witness described it. It was also twisted but not as many times as those over the mouth and ankles.

(7) That inside the rondavel there were signs of a struggle.

I shall return later to the rest of this witness's evidence.

'Matholang Mosenene works at Mothoosele Thulo's shop, which is about half a mile from Chief 'Maseribane's shop. She knows accused No.1 very well and there is no dispute about this. She knew him to be working for Chief 'Maseribane

as a bus conductor. She says that during the middle of the month of November, 1978 and shortly after sunset she saw accused No.1 in the company of accused Nos.2 and 3. She saw them arrive by bus. They came to her house where accused No.1 bought a nip of brandy. She is sure that this accused had put on a Moholu (Sandringham) blanket. She is not sure of the others except that they wore Europran hats and blazers. After drinking they left. The following morning she saw the three accused. They lay in the field, It was about 70 yards away. After she opened the shop, they came to her. Accused No.1 spoke to her and said that they had come from Chief 'Maseribane's shop. He requested a sack on which to lie down. He said they had come to collect chief 'Maseribane's truck which had a puncture. I must mention here that accused No.1 had also made a request for food which he was given. He ate with accused Nos.2 and 3. After the sack (exhibit 1) was given to him, accused No.1 left with his co-accused. That was the last time she saw them on that day. The next time she saw the three accused was when they were being escorted by police. They were then wearing blankets. She identified exhibit 1 at Outhing police station subsequently.

Matseliso Stephen says that she lives about 150 yards away from Chief 'Maseribane's shop. She knows accused No.1 very well as a bus conductor for the said chief. On the 7th day of November, 1978 she saw the three accused at her home. They arrived shortly before she went to bed. Accused No.1 bought three bottles of grape-brew. It was while this stuff was being consumed that accused No 1 asked the whereabouts of one Tsela who apparently was a night-watchman at the shop. She replied that he, Tsela, was in the village. She was then asked by accused No.1 when he, Tsela, would go to work whereupon he was informed that he, Tsela, no longer worked at the

shop but that one Bitsamang had taken over Accused No.1 wore a brown (sometimes referred to as pink) Moholu, accused No.2 wore a Sefate blanket with maize-cob designs and accused No.3 wore a black jacket. After drinking they left. She did not see them the following day i.e. 8th November, 1978 but saw them in the company of the police at about sunset on the 9th November, 1978.

'Mampho Matsaba was employed in the cafe. On the 8th November, 1978, in the evening, she and the manageress closed the cafe. The manageress had to be present as part of her duties. The deceased was also present. Every door and window was secured and locked They parted. The following morning as usual, she went to fetch the key to the cafe as apparently she started work before the manageress opened the shop. She opened the cafe and already there were two customers waiting to be served. She did. As she went to put the money she noticed that the medicines which should have been on the shelf had fallen on the floor. She also noticed that the window at the back, was opened and a glass-pane directly opposite where the latch, which secures the window is located, was broken. She did not see some 4 x 30 Lexington cigarettes which she had in the shop the previous day when she closed. The match-boxes were not as many as they were the previous day. Aware of these signs she immediately closed the cafe, whose door automatically locks, and went to report to the manageress.

She and the manageress came towards the cafe but she was instructed to go and call the deceased. As she approached the rondavel, wherein he slept, she shouted his name to catch his attention. There was no response. When she opened the door and tried to wake him up <sup>and</sup> while bending down she saw that his feet appeared below the blanket and they were tied with a wire above the ankles. She screamed

with fright. She went to the manageress who was a few paces away. The latter called a certain Rev. Wilson Rabiri who was passing by. He looked at the deceased and announced to them that the night-watchman was "no more living "

The following day the cafe was inspected in her presence and that of the manageress. It was discovered that three 750ml. bottles of Limosin brandy, 4 x 3 Lexington cigarettes and a number of boxes of matches were missing. She said that the three missing bottles were similar to exhibits 2(a), (b) and (c) and that the Lexington cigarettes were similar to exhibit 3.

'Mamontsi Mokonyana corroborates the previous witness. She agrees that the deceased could have been about 70 years. She had locked and secured both the shop and the cafe on the evening of the 8th November, 1978. During the day she had seen accused No.2 in the shop. She had asked him if she could serve him but he declined. He then moved towards the counter where blankets are sold. He looked around and went out. The witness noticed a peculiarity which accused No.2 has of tending to look up when he speaks and his eyes becoming squint. It is a noticeable peculiarity. In the shop the following types of blankets were sold at the time, Moholu (Sandringham); Sefate; Letlama; Kotulo; Sentebale; Alphas and Charmaine (both used at night) and Lilala. Liquor was only sold in the cafe. There were Lexington cigarettes sold both in the cafe and the shop. She says she looked at accused No.2 while he was at the counter where blankets are sold because there was no person serving customers there. At that time accused No.2 wore a Sefate blanket.

After the discovery of the night-watchman's death, she proceeded to Mt. Mborosi to report to Chief 'Maseribane.

She came back with the police arriving at the shop at about sunset. She showed D/Sgt. Liphamamo the rondavel wherein the deceased lay. The following day, when the shop was inspected, she saw that one of the double-doors at the back of the shop - which door was not used at all - had been tempered with. The mesh wire which covered, and was nailed to it, had been lifted up. It seemed to her as though one door had been forcefully attempted to be pulled out. There were wool of different colours which had stuck to the bottom of that door. There was a big hole on the window-pane next to where the handle, used for opening and closing the windows, is situated. The window was opened. Where blankets were hung and kept, there were now gaps. Blankets of various types she sells in the shop, were missing. There were seven gaps where blankets are hung and one where they are kept folded in a shelf. These gaps were immediately noticeable as one entered the shop and looked at the section where blankets are sold. There had also been attempts to force open the safe. She noticed that a packet of Lexington cigarettes containing 10 x 20 was missing. The packets of thirty cigarettes in a box were not as many as they were the previous evening. She described exhibits 8(1) - (viii) as being similar to those she had in the shop and were missing. She also said exhibits 2(a), (b) and (c) are similar to the bottles of Limosin brandy kept and sold in the cafe and were missing. The missing Lexington cigarettes, she said, were similar to exhibit 3. She saw exhibit 8(x) worn by the deceased on the evening of the 8th November, 1978. She said that when she closed the shop and the cafe everything was in order. If anybody had the right or consent from Chief 'Maseribane to take the above-mentioned articles she would have known. There would have been a written consent. Nobody had the right therefore to remove the said articles from both the shop and the cafe.

On the 9th November, 1978 the three accused arrived at 'Maqaba's home. It was before sunrise. They asked for water to drink. They then left together with her for 'Mammolaeng's house which was about 100 yards away. 'Matlhokomelo says when she first saw the accused arrive at 'Maqaba's, she was present. They carried no luggage. Two of the accused wore Meholu blankets and the third wore a brown blanket with maize-cob designs. Her mother-in-law ('Maqaba) came back after 30 minutes and made a report. She showed signs of drunkenness. She went back to 'Mammolaeng's house. She had left behind an empty bottle. Then she came with the accused and instructed 'Matlhokomelo to give them food. She saw a bottle full of liquor being opened. She was offered a drink by one of the accused but she declined. 'Manyefolo took that drink and polished it off. Thereafter 'Maqaba had to be put to bed as she was literally dead drunk and she never recovered from that drunken coma. She died at the hospital a few days later. To continue, the brandy in the bottle was not all consumed. It was left behind when everybody left.

The three accused left 'Maqaba's house, and shortly thereafter 'Matlhokomelo left for the fields. She could see the three accused. They had taken the path leading to the village of Mapheelle, but now one of them carried something - "biggish luggage" - fawnish in colour. On the 10th November, 1978 i.e. the following day, she saw the three accused arrive in the company of the police. She was asked if she had seen the accused the previous day and she said she had. She was asked where she had seen them and she said she saw them at home. She was asked how they were dressed and she told the police. The accused were asked if they had seen her and they answered in the affirmative. They <sup>went</sup> to her home where the three bottles exhibits 2(a), (b) and (c) were taken away. 9/ 'Mammolaeng...



'Mammolaeng corroborates the evidence of 'Matlhokomelo that European liquor was consumed at her home and that two empty bottles which had contained the liquor drunk at her home, were taken away by 'Maqaba to her home. She says that the European liquor came from the accused. She denied that she sold any European liquor at her house. In this she was corroborated by 'Manyefolo. 'Mammolaeng did not accompany the accused to 'Maqaba's place but went to the fields. 'Manyefolo drank European liquor at 'Mammolaeng's place with the accused. They went to 'Maqaba's house where the accused were given food and drinking continued. She says that 'Matlhokomelo left for the fields and thereafter the accused left. When the accused left 'Matlhokomelo puts the time as "when children go to school", which would be about 8 a.m

When the accused left 'Maqaba's house they went to Mapheelle. There is a beerhall there owned by 'Malebohang Matlotlo. About mid-morning she saw the three accused arrive. Accused No.2 carried a sack which seemed to contain something. She inquired from him what he carried but she received no answer. She says that the three accused wore Meholu blankets one of which was pink in colour. They said they were looking for beer. They entered the beerhall. She could not see the contents of the sack as it was fastened at one end. They bought beer. Other customers came but they carried nothing by way of a luggage. Now and then the accused kept going out and behind the beerhall. Then accused No.2 went out and when he came back from behind the beerhall, he stood at the door and said to his companions that they should leave. But there was no response. He went in. Then after a time there was silence. All three of them were asleep. Two of them used the sack, with its unknown contents to her as a pillow. They slept thus until they were woken up

by the police later. On their arrival she did not notice that they were drunk already. She only realised when they were in the beerhall that they were drunk because of the amount of noise they made.

On the arrival of the police the sack was opened and she saw blankets being taken out of it. She was present when accused No.3 gave an explanation about the blankets that they came from a shop at Makoe's. The three accused were searched and various items were found on the person of each accused including exhibits 3 and 4 among others. She says that when the accused entered the beerhall they took off their blankets and slept on top of them.

On the 9th November, 1978 the police in Outhing camp received a report from the Roads Department at Mt. Moorosi. As a result of that report they left for Ha Makoe. At Mt. Moorosi they picked up the manageress. When they arrived at Chief Moleleki's they received a report. They then left the manageress and some people there and Sgt. Liphamamo, Sgt, Mara, Sgt. Mohafa and Chief Moleleki proceeded to Ha Mapheelle. In a beerhall the three accused were found fast asleep. Sgt. Liphamamo found accused Nos.1 and 2 "leaning against the sack as though it were a pillow." Accused No.1 lay on a pink Moholu, accused No.2 wore a Moholu blanket joined together by means of a safety pin. The Moholu is exhibit 8(viii). Accused No.3 wore a "blackish" jacket. Sgt. Mara says that accused No.2 sat near a Moholu blanket. The sack was opened and exhibits 8(1)-(viii) were found. When they were asked about their possession of the sack and its contents at first, accused No.1 and 2 disclaimed all knowledge of it. It was later that they gave an explanation which was the same as that given by accused No.3 even then after being asked if they ever

saparated from him. They were searched and various articles were found on them such as exhibits 3 and 4. He says that the search was carried out by Sgt. Mara, However, 'Malebohang was also present. Sgt. Mara found on the person of accused No.3, in addition, exhibit 24 which is similar in make, colour and texture to exhibits 18 and 19. More about this later.

As far as the inspection of the shop and the cafe is concerned he corroborated the evidence of the manageress and Sgt. Mara. After the inspection, the manageress was called near a police vehicle which was parked near the shop. The accused were present. She was shown several blankets and she said they were similar to those missing from the shop. The accused said not a word.

The depositions of D/Sgt. Mohafa were admitted and read into the record as evidence. He was present at Ha Mapheelle He was present at the shop. He slept with the accused. The following day after the shop and the cafe were inspected the accused took him to the house of one 'Maqaba where they pointed out the three empty bottles bearing labels "Lemosin" brandy. 'Matlhokomelo, in the presence of the accused, explained that those bottles had been full of brandy and the accused did not deny. These three bottles are exhibits 2(a), (b) and (c).

It only remains to be mentioned that it was suggested to Sgt. Mara that he had acted irregularly by interrogating the accused after he had cautioned and arrested them at the beerhall previously. This argument would have been valid if the accused were before this Court charged with only one crime, namely, that of Housebreaking with intent to steal and theft. The caution and the arrest in the beerhall were in respect of such a crime. At that stage investigations

Into the crime of murder (count 1 in this trial) had not even begun. The interrogation, in my view, related to this crime and to that extent was regular.

The events in this trial occurred more than two years ago when the witnesses gave evidence before me. Since such a long lapse of time had taken place between the happening of the events and the trial, it is a commendable fact to the Crown witnesses that the discrepancies in their evidence were not many and of a serious nature. I gathered the general impression that the Crown witnesses were fair and endeavouring to tell the Court the truth. Not one of the witnesses went out of his or her way to falsely implicate any of the accused. They each gave their evidence as best they could under the circumstances obtaining at the time. Sgt. Mara and Mrs. Stephen for an example did not hesitate to give evidence favourable to the accused where that was the case.

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Now as I indicated earlier, accused No.3 pleaded guilty to the crime of murder. I noted this accused's plea of not guilty. It must be stated at once that all the accused were legally represented as is always the case where an accused is charged with a crime of this seriousness. The Crown did not, moreover, indicate that it wished to act in terms of the provisions of section 235(1)(a). The Court in my view had a discretion in the matter and it chose that the trial should proceed on the basis that the plea was one of not guilty. (Compare Rex v Letlaka Motetee, 1974 - 75 L.L.R. 21; Swift p.487). It is interesting to note that whereas an accused person can be sentenced on his mere plea of guilty in the High Court, on any charge without hearing evidence, the offence of murder is specifically excluded in such an arrangement. (s.79(1) is to the same effect where an accused pleads guilty at the conclusion of a Preparatory Examination). It would seem, therefore, that in such a case

evidence must be heard and most probably because there is now a judicial confession before Court, only evidence aluinde as to the actual commission of the offence is all that is required. However, in the present case I required proof beyond reasonable doubt. If I have erred in doing so, then I did so in favour of the accused and there cannot, therefore, be any question of prejudice to the accused in the conduct of their case. (See Fakisandla Nkambule v The King, 1955 H.C.T.L.R. (Privy Council Criminal Appeal) 1 at 7F). It was stated in argument, by Mr. Modisane at the end of the day, that accused No.3 meant to plead guilty to Culpable Homicide. But Mr. Kolisang did not state so. Very often accused persons plead guilty to a charge of murder, but then their representatives usually and immediately explain such a misunderstanding and the error would then be corrected. This is the practice in this Court. But this was not the case here nor was the the usual practice followed. Even when he, Mr. Modisane, was now present, representing the accused, no such explanation was made to me nor a reference made to the usual practice. Mr. Kolisang, an officer of long standing of this Court, requested the Court, after a short adjournment, that the accused's plea be altered to one of not guilty. I informed him that such a plea had already been entered. The Court, did, of its own, suggest to Mr. Kolisang whether in his view, accused No.3 or the other accused would then not suffer prejudice as a result of the former's plea. He assured me they would not. He had his instructions and I did not know them. The mere fact that according to the preparatory examination there appeared to be two "confessions" made by two accused, did not matter as those depositions were not evidence and I had no idea as to what their fate would be. All seemed well. (See Patoeng Maretwaneng and Kediekgile Maretwaneng V.R. 1963-66 H.C.T.L.R. 231 at 234B). Then the Crown led the medical evidence. Thereafter the case of the accused was adjourned

to the 11th day of November, 1980. On that day Adv. Modisane appeared for all the accused. He made an application that accused No.3's plea be altered to one of not guilty. Although this had already been done, it was clear to me that either he had not been fully informed about what had already transpired or what had in fact transpired was not fully appreciated. It was then that the Court said his application was granted, superfluous though that was. However, the Court had been satisfied that accused No.3 pleaded guilty with the full appreciation of the offence with which he was charged. I was fully satisfied that the charge had been properly translated to him. I am a Mosotho. Mr. Kolitsang is a Mosotho. My assessors, although purely on an advisory capacity, are Basotho. The only person who did not understand the Sesotho language was Mr. Muguluma (the Crown Counsel). This accused, in my view, pleaded guilty with deliberateness. There was no misunderstanding of any kind whatsoever. This was therefore, a judicial confession of all the material facts alleged in the first count, i.e. murder. (Rantsoti Nkhatho v Rex, CRI/A/39/76 (unreported) dated 24th April, 1978). In the case of Rex v Kumalo and Another, 1930 A.D. 193 at 207 Stratford, J.A. put the same principle neatly as follows, and I entirely agree with respect:

"The formal withdrawal of a plea of guilty no doubt gives the accused the right to full trial on the issue of his guilt but that does not alter the fact, if it is the fact, that he has solemnly and freely admitted his guilt, that confession stands as admissible evidence. The accused may, of course, retract his confession and explain how he came to make it, but even then the trial Court may reject the explanation and believe the confession "

The accused has not explained to me the circumstances of how he came to make such a confession before me.

'Matholang Mosenene saw the three accused in November, 1978. They were getting off a bus. She knew accused No.1 very well. The place where they were was estimated to have

been about half a mile from the shop. Accused No.1 bought a nip of brandy. She observed that accused No 1 wore a Moholu blanket. She was not sure of the others but she thought they wore blazers but she was sure they all wore European hats either in the form of caps or hats. There was no dispute that the three accused did arrive at her place. She was, however, mistaken when she said that they were there during the middle of the month, because by then they were in custody. It must have been earlier in the month, because we now know that the accused were apprehended on the 9th November, 1978 and this is common cause.

The following morning she saw the three accused lying in the field. They came to her. Accused No.1 spoke to her. He said they had come from the chief's shop. He asked for food and they all ate. He borrowed a sack from her. She obliged. The other accused were still with him. He said they had come to fetch a truck. There was, in fact, Chief 'Maseribane's truck nearby which had had a puncture. That was the last she saw of accused No.1 and his co-accused. What were they going to use the empty sack for? When it was next seen it was in the possession of the three accused; but this time it was no longer empty. When asked by Mrs. Matlotlo, the owner of the beerhall, what it contained (and it was carried by accused No.2) there was no reply. Subsequently, when they were in the beerhall they put it very close to them. When they went to sleep they used it as a pillow. It was too precious. When opened, it contained new blankets. When asked for their possession of suspected stolen blankets, accused Nos.1 and 2 at first denied any knowledge of the sack. They said they found it in the beerhall. But later when asked if they ever separated from accused No.3 they replied in the negative and affirmed his explanation that

the blankets came from a <sup>shop</sup> /at Ha Makoe. It was a simple explanation and why was it difficult for accused No.2 to have given it to Mrs. Matlotlo? Why would Mrs. Matlotlo leave her valuable blankets in the beerhall frequented by Thom, Dick and Harry? The explanation which accused No.3 gave and subsequently given by the other accused was not a confession. (Rex v Malakeng, 1956(4) S.A. 232(T), see also Foloberg Mabothotsa v Rex, 1971 - 73 L.L.R. 235 - 6 and David Petlane v Rex, 1971 - 73 L.L.R. 85 at 91). It is open to accused No.3 to explain what he meant. It is not tantamount to a plea of guilty in a Court of Law. It cannot be concluded, therefore, that he meant only that he stole them. He could have bought them. In fact that was the line of defence all along, namely that the type of articles such as blankets and cigarettes found with the accused were not only sold at Chief 'Maseribane's shop and cafe. They could be found in every shop and cafe in the vicinity, indeed the whole country. Why did they hide this sack when they were drinking European liquor with the old ladies at Ha Moleleki? They were only seen carrying a luggage which was "biggish" after they had left the village and were a little distance away from the village. The colour of the luggage was "fawnish" which resembles the colour of the sack (exhibit 1).

Notsurprising, no blanket had a price tag. The manufacturer's labels were removed from some of the blankets. (e.g. exhibit 8(v1), 8(v11) ). On some, only a piece of cotton has remained to indicate where the manufacturer's labels were affixed. This indicates that the label was removed rather hurriedly. The Kotulo blanket (exhibit 8(111)) and Letlama (exhibit 8(v1)) have no labels and, as the manageress explained, they come with a piece of paper pasted on them. This piece of paper is fairly large, measuring seven (7)



inches by six (6) inches. These two blankets had these pieces of papers pasted on them. The manageress systematically, and very fairly, described the blankets which were shown to her. With her vast experience both as a Mosotho woman who has worn blankets and washed them for the greater part of her life and her experience also as a dealer in blankets, generally, she was able to tell the Court, with a degree of certainty, whether a blanket was new or had been slept in. This type of knowledge is acquired with practical experience. For an example, she very fairly told the Court that it is difficult to tell whether a Moholu blanket has been worn once or twice because of the nature of the texture of its wool. It is different from the wool of other blankets.

The three accused were close to the shop in question - about 150 yards away when they were at Mrs. Stephen's house. It is here, in my view, that accused No 1 in the presence of his co-accused, revealed the purpose of their presence in that vicinity although, at the time, Mrs. Stephen thought very little about it. Accused No.1 inquired after a man named Tsela. He wanted to know when he starts duties. He was informed that Tsela was no longer working at the shop but that the deceased did. This was an important piece of information not only to accused No.1 but to his co-accused. They heard the information so innocently supplied and yet so vital. It was on the 7th November, 1978 in the evening. They had begun their investigations already. Accused No.2 and No.3 were dressed as follows: Accused No.2 wore a Sefate blanket with maize-cob designs and accused No.3 wore a blackish jacket, accused No.1 still wore his brownish or pink Moholu. But when she next saw the accused on the 9th November, 1978 accused No.2 now wore a Moholu blanket (similar to exhibit 8(viii)) in addition to the blanket he wore the previous day. However, this Moholu blanket has

18/ been .....

However, this Moholu blanket has been described by the manageress as new and similar to the one that she had in her shop and which disappeared on the night of the 8th November, 1978. If accused No.2 had this blanket when he was at Mrs. Stephen's house, is it <sup>not</sup> strange indeed that she did not see it? He certainly carried no luggage with him then nor when he was at Mrs. Mosenene's. Sgt. Mara says that when he arrested accused No.2 he was wearing exhibit 8(vii) and accused No.3 was sitting on exhibit 8(viii). The fact is, accused No.2 and No.3 now wore Meholu blankets when a day or two previously they had none. These were new blankets.

When the accused were searched at the beerhall, on each one of them was found Lexington cigarettes in packets of twenties and thirties. On each of them was found at least two packets of thirty Lexington cigarettes. On accused No.3 was found a large number of boxes of matches. The shop which had been broken into, had similar items missing. Was it perhaps a coincidence? Was it also coincidence that a similar type of brandy to the one they produced and drank at Ha Moleleki was also missing from the same shop - cafe to be precise? They instructed their counsel that they had purchased the liquor at 'Mammolaeng's home. There was evidence, corroborated evidence, that no European liquor is ever sold at that village. I believe that evidence. I believe the evidence of Matlhokomelo Mafa when she says that she left after the three accused had gone. She could not surely have left the strangers in her mother-in-law's house. Her mother-in-law was, moreover, in a coma (although she did not know it at the time) from which she subsequently died. 'Manyefolo conceded that at that time she was too drunk. I accept without any hesitation whatsoever that the European liquor was brought by the three accused and these accused were also very shortly found in possession of other

goods suspected to be stolen from the shop. It will be recalled also that according to the manageress accused No.2 did enter the shop and have a good look at the section where the blankets are kept. From their conduct, their actions, from the moment they set foot at Ha Makoa until their arrest it is abundantly clear that they acted jointly. They drank together, went about together, acquired new articles together; slept together and were even arrested together. Accused No.1 and No.2 told Sgt Mara that they never separated from accused No.3 who had spoken in their presence as to where he obtained the blankets. If they had bought these articles from the shop and the cafe, as they could have, why was an issue made of accused No.2's presence at the shop on the 8th November, 1978? — — — — —

The totality of the evidence concerning the blankets starting from the very nature of the container in which they were found - a sack, the secrecy with which they were kept; carefully watched and the reluctance to explain how they came into their possession and the false explanations given leads but to one inference, namely, that they were unlawfully acquired. Since the previous day they were not in possession of these articles they were, therefore, recently acquired. To be precise, they were acquired on the night of the 8th November 1978. On the 7th November they did not have them in their possession. But on the morning of the 9th before sunrise, they already had them in their possession. It has been shown that similar blankets disappeared during the same night at the shop. Where, therefore, the lapse of time is too short between the theft and the finding in possession of the stolen articles there is a presumption of fact that theft has taken place. (Hlatsoane Mofolo and Another v Rex, CRI/A/52-3/69 (unreported) dated 11th January, 1973 at p.2). In the absence of any plausible explanation from the accused the inference is irresistible that blankets found

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with the accused are the same blankets stolen from the shop. (Magaphalla and Another v Rex, 1971 - 73 L.L.R. 39 at 43 A - B; R v Chetty, 1943 A.D. 514).

The circumstantial pieces of evidence mentioned above, taken individually or in isolation, may not amount to much but in combination constitute a formidable case, (see Rex v Bernard Faku and Others, CRI/T/47/78 (unreported) at page 11, dated 29th May, 1979) against each of the accused on the charge of Housebreaking with intent to steal and theft. (See R v Sello Lemphane and Others, CRI/T/38/78 (unreported), dated 1st May, 1979 at page 38 - 39). That there was a breaking into both the shop and the cafe is not seriously disputed. In any event there is an overwhelming evidence that there was a breaking in.

On the night of the 7th November, 1978 the three accused, through Mrs. Stephen, learnt that the shop premises were guarded by a man named Bitsamang Mafifi and not the man accused No.1 knew. They did not know how he would react to their presence. If their mission was to be a success, logically, something had to be done to him. From the evidence of Sgt. Liphamamo we know that the deceased's hands were tied at his back with a wire which was strong. It was twisted. The feet, just above the ankles, were also tied with a wire. It was twisted many times. There was a cloth which had been pushed inside the deceased's mouth as a result of which the air passages were blocked. Then a cloth, of similar colour, texture (the Court felt it) and similar design as a piece of cloth which was found in the possession of accused No.3. It was found in the beerhall when the person of accused No.3 was searched. It was also similar to the one found covering the mouth of the deceased and the two ends joined in a knot at the back of the deceased's head. Was it coincidence? Over the cloth covering the mouth was a wire, the two ends of which were joined at the back of the deceased's head, twisted many times. There was a cloth similar to the one I have just mentioned pushed to the back of the deceased's mouth, blocking

all air passages. The deceased had bled through the nostrils. There were signs of a struggle inside the house. The deceased would seem, therefore, to have put up a big struggle. However, the night-watchman was now silent. The silencing was effected while he was alive. This is borne out by the medical evidence. The deceased had been effectively immobilised. Whoever carried out this type of assault on the deceased, must have realised that it would have fatal results yet was reckless as to whether death resulted or not. In my view, the perpetrator was well aware that the night-watchman would surely die. He was rendered so ineffective that death was inevitable. This much must have been appreciated and in my view, that was aimed at. The night-watchman died. He was an old man. The assault upon the deceased was of a reprehensible and cruel nature. Even if the deceased tried to cough or spit out the cloth which had been pushed inside his mouth, he would not succeed because it would be stopped by the cloth, over which a wire was tied, running over the opened mouth. In my opinion, this was precisely what was desired. Taking all these circumstances together, there was a deliberate intention to kill in this case.

(Sello Lemphane and Others, C. of A. (CRI) No.8 - 10 of 1979).

As I said earlier, the people who broke into both the shop and the cafe desired to work in peace. They knew that they would not do so since there was a night-watchman whom none knew and therefore did not know how he would react to their presence especially that he was not, as it turned out, known to accused No.1 The inference which is irresistible is that either together or one of them embarked upon a plan of silencing the night-watchman. I say that the silencing of deceased was planned because he was tied with wires over the mouth, hands and ankles. There were

also pieces of cloth which turned out to be similar to a piece of cloth found on accused No.3 Normally, ordinary citizens do not go about carrying pieces of wires such as the ones used to tie the deceased. In this particular case there was a specific reason why they were used and the inference is that they were brought from elsewhere since no similar wires were found inside the deceased's rondavel. If one of the accused was so engaged in silencing the deceased, it does not matter because he was acting in pursuance of a common purpose. It is not possible to measure the degree or manner of silencing another. It is the result that is aimed at and not the method, that matters.

Now the three accused have elected to remain silent. Their rights were explained to them by their <sup>u</sup> counsel. He told me so. (See Ammon Matsosa Makara v Rex, 1974 - 75 L.L.R. 373 at 374E). The accused have every right to remain silent. (Rex v Faku and Others, CRI/T/47/78 at p.11 ; Rex v Thabo ~~Haroti~~ and Another, CRI/T/29/77 (3.3.77) p.14; Rex v Phoofofo, 1971 - 73 L.L.R. 255; Rex v Moletsane, 1974 - 75 L.L.R. 316, Makara v Rex, 1974 - 75 L.L.R. 373 - 375). However, the position at this juncture was clarified in the case of Rex v Basotho Makhetha & Others, CRI/T/32/78 (unreported) dated 17th October, 1978 where this Court said at pages 13 - 14.

"..... But when the defence has closed its case without leading evidence, the question to be decided is: has the crown established the charge beyond reasonable doubt. The Court, when considering this position, is entitled to consider the fact that accused has give no evidence. In Rex v Nyati, 1916 A.D. 342 Innes, C.J., said

'Where there is evidence entitled to credence which directly implicated the accused person, the fact that he refrains from giving evidence may well be regarded as a necessary element to be taken into consideration and weighed with all others in the case bearing in mind always that the onus is on the Crown.'

The accused's silence, however, does not supply evidence. It only serves to support credible evidence given by the Crown.

This was made clear in S. v. Theron, 1968 (4) S.A. 61 at pages 63 - 64.

"Generally, in regard to an accused's failure to testify, a useful, practical distinction can be drawn between situations in which the State's case is (i) the direct testimony of a witness or witnesses and (ii) circumstantial evidence. In (i), if the testimony is wholly credible or noncredible, no problem arises, for in the former case the accused's failure to contradict the credible evidence must inevitably result in the prima facie becoming conclusive proof and in the latter case, it would be irrelevant, there would then be no prima facie proof and the accused's silence could not make or restore the State's case. It is only when State's evidence, although amounting to prima facie proof creates some doubt about its credibility that the accused's silence becomes important, and may be decisive for his failure to contradict the State's evidence may then resolve the doubt about its credibility in the State's favour. Of course, if the accused adduces other evidence to contradict the State's, his silence would then usually lose much, if not all, of its importance, similarly, in (ii) if the inference of the accused's guilt or innocence can be drawn with the requisite degree of certainty, the accused's silence is unimportant. It is only of importance, if, although there is prima facie proof of his guilt, some doubt exists whether that proof should be now regarded as conclusive, that is, that the only reasonable inference from the facts is one of guilt. His silence then

'becomes a factor to be considered along with the other factors, and from that totality the Court, may draw the inference of guilt. The weight to be given to the factor in question depends upon the circumstances of each case. (per Holmes, J.A. in S v Letsolo and Others, 1964(4) S.A. 768 (A.D.) at p.776C - E). See also R v Ismail supra, at p.210; S v Masia, 1962 (2) S.A. 541 (A.D.) at p.546E - H).

(See Rex v Tamo & Others, CRI/T/7/76 pp. 14 - 15; R v Haloli & Another, (supra) at page 14)"

In my view, at close of the defence case, the Crown had established both charges, against all the accused, beyond reasonable doubt. There was evidence entitled to credence as indicated earlier in this judgment but the accused, in the face of such incriminating evidence chose not to contradict it. In the face of all these indices which all point but to the same direction, and cumulatively lead to one irresistible inference, (Bernard Teboho Faku v Rex, C. of A. (CRI) No.7 of 1979 at p.9), that the accused acting in pursuance of a common purpose committed the offence with which they stand charged, the accused remain silent. I am satisfied, and the Crown has proved beyond reasonable doubt, that the three accused acting jointly committed the offences mentioned in the indictment.

This is the state of the evidence at the close of accused No.2's case or to put in another way, that was all the evidence which affected accused No.2.

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Accused Nos.1 and 3, in addition to the above-mentioned evidence, made statements before judicial officers pursuant to section 223. These statements are confessions and in each of these each one of them / accused makes a clean-breast of it. In them they make mention of accused No.2 but I am very well aware that whatever they say about him in them is not evidence against him and in this judgment I have studiously tried to avoid such an influence. That is the reason why I approached the evidence firstly, without any reference to any of these statements except, of course, the judicial confession which does not affect accused Nos.1 and 2. I approached that part of the judgment purely on other evidence. The statements which accused Nos.1 and 3 made before judicial officers have been given in full during the trial and are quite lengthy, especially that of accused No.3. What I will, therefore, do now is to give a brief summary of



each. Accused No.1 said he had been forced into making it but the Court found otherwise. Accused No.3's statement was objected to but <sup>he</sup> later changed his mind and withdrew his former objection to its admissibility.

Accused No.1 briefly stated that on the 6th November, 1978 he left Lower Moyaeni in the company of accused No.2 and accused No.3. They arrived at Ha Ntho where they wanted for a taxi. Accused No.2 then suggested that they should go and break into a shop at Ha Makoe and look for money. They agreed. They travelled to Mt. Moorosi where they spent the night. The following morning they boarded a bus and alighted at Mothoosele's shop at about early dusk. It was on the 7th November, 1978. On their arrival there they bought a nip of brandy, drank it and left. Then they went to sleep in the fields. On the 8th November, 1978 they kept drinking Sesotho beer until sunset. Thereafter they disappeared in the valley and got to the shop. Accused No.2 carried a stick. They had stopped at the fence and cut three wires which "we took with us to Makoe's shop." They found the night-watchman sitting in front of the house. Accused No.2 struck him with his stick and the night-watchman fell into the house. "We then entered the house and got hold of him. Then Refeletsoe (acc. No.2) instructed me to throttle the night-watchman and I did so. But the night-watchman screamed whereupon Refeletsoe said I should leave him he was making noise. Refeletsoe then throttled him. While Refeletsoe was throttling the night-watchman he instructed us to tie his hands at his back as well as his feet. Refeletsoe took a cloth which he tied over the mouth of that night-watchman. He then tied it with a wire. He tied that wire over that cloth." They then closed the door and accused No.3 was instructed to remain keeping guard in case the man got up or woke up.

Thereafter accused Nos.1 and 2 went to the cafe. Accused No.2 lifted accused No.1 up who then opened a window and entered. He handed to accused No.2 Lexington cigarettes, matches and three bottles of European liquor. He then came out. They then went to the shop. They lifted up the mesh wire nailed on the door. Accused No.2 then called accused No.3 Both pulled the door so that accused No.1 was able to enter. Eight blankets were pulled out and handed over

26/ to accused .....

to accused No.2 who was then peeping at the door. Accused No.1 also chopped at the safe in an attempt to open it. While doing so accused No.3 said there was a person coming. They disappeared with their loot.

They divided the blankets; he and accused No.2 got three blankets each while accused No.3 got two. They went to sleep in the mountain and early in the morning of the 9th November, they got up. They took off the blankets and hid them in a tree plantation. They went up to the village to ask for food and water. They drank the European liquor with the people of the village.

The left and retrieved their blankets from the plantation. They put six of them in a bag while accused No.2 wore a Moholu and so did accused No.3.

They got to a beerhall where they bought beer. They got drunk and slept. That is where the police woke them up and arrested them.

Accused No.3's statement is largely to the same effect and shall only refer to its highlights:

To him accused No.2 said that they would be away for a short time but later he was requested to take a blanket but he refused as it had been said they would not be long wherever they were going. They travelled by taxi up to Mt. Moorosi then by bus where they arrived at a certain place at about sunset, accused No.1 said that was the shop which they were going to break into at Ha Makoe. However, a nip of brandy was purchased. To him it was obvious that accused No.1 and the woman in the house knew each other. Thereafter they slept in the fields. In the morning they went to the same shop. They drank Sesotho beer. They went to sit in the shade of a vehicle inside the yard of Chief Sekhonyana. He says: "It is where we again started discussing the matter of money and blankets. It is where Thabang (accused No.1) said: "Gentlemen, we are not going to get much money here. We can get much money in the shop which is situated up at Chief Sekhonyana's." They did not argue about the matter. They agreed.

In the evening, they went to the shop. This is where they played hide and seek with the night-watchman. Eventually,

27/ they went .....

they went to the rondavel where the latter lived. Accused No.2 carried a stick. Accused No.1 said that he would knock at the door and as the man appeared accused No.2 should hit him. When the man peeped at the door and said: "Are you here again?", accused No.2 struck him. They entered the house. He says that there was a struggle and

"Thabang (accused No.1) started by throttling him. That person called out to Moeketsi saying that Moeketsi should come and help him. Thabang said I should go and help him where he was holding that person on the hands. I tried to tie his hands with a wire I failed. I left his hands and went to hold him by the feet. He was then throttled by Refeletsoe (accused No.2). Thabang handed one wire to me. I went to tie this man at the feet. The hands were tied by Thabang. In the mouth he was tied by Thabang with a cloth. Refeletsoe was still holding him at the neck where he had throttled him. We only knew while we were on the way that Thabang had also tied his mouth with wire."

Thabang came out carrying a torch. He, accused No.3, was left behind and given accused No.2's stick and instructed to "see that that man does not raise an alarm."

He says accused No.2 lifted accused No.1 who entered the shop where European liquor and tobacco were kept. These were handed to accused No.2.

They then lifted the mesh wire nailed on the door. He was then called. He came. He and accused No.2 pulled one of the double doors until there was space for a person to go in. Accused No.1 went in. Accused No.1 kept taking articles which turned out to be three bottles of European liquor, cigarettes 6 x 30, 6 x 20 Lexington and ten boxes of matches. Then accused No.2 received blankets from accused No.1 through the same door. He said that there were seven blankets and one Letlama. Then accused No.1 said he had found the safe and there was a sound from the inside as if hitting something. Then a person was seen. Accused No.1 came out. They left. They divided the cigarettes and blankets. They slept on the side of the road. They got up very early. They hid the blankets in a tree plantation. They went to a village and asked for water and food. Accused No.1 took out a bottle of liquor and put it down. It was polished off. Refeletsoe's also. They were given food. Then accused No.1 said that it was not necessary to go about carrying liquor. He says accused No.1 asked for a sack. The old ladies were drunk.

They went to the tree plantation and put the blankets in the sack. He and accused No.2 carried the sack while accused No.1 came behind.

They came to the beerhall where they bought beer and slept. The police found them there. At that time accused No.1 still used the sack as a pillow. They asked him what it was he used as a pillow and he said he did not know. But when he saw that they were serious he said they were blankets. They were arrested.

The statements constitute in law confessions within the meaning of s.223 of the offences charged against these two accused in the indictment. Firstly, these two accused are charged with the crime of murder. The medical evidence has established beyond any reasonable doubt that the deceased was murdered. Secondly, in count two there is overwhelming evidence that there was a breaking into the shop and the cafe and removal of certain articles which were recovered almost immediately thereafter, still in accused's possession. There is therefore sufficient evidence aliunde and thus in my view the Crown has once again, in respect of these two accused, established by competent evidence, other than accused's confessions, that the offences with which they stand charged have actually been committed, thus satisfying the proviso to s.235(2) of the Proclamation. The same reasoning, with respect, applies in respect of accused No.3 in relation to his judicial confession

In the present case, because of the special circumstances of accused No.2, the Crown did not only rest its case by merely proving the commission of the offence by leading evidence aliunde but had to prove its case beyond reasonable doubt against the three accused on all the charges, independent of the statements that some of them had made. In my view, the Crown has succeeded admirably. This case is distinguishable from the decision in R v Baartman and Others, 1960(3) S A. 534(A) wherein it was held that

Baartman and Kock were convicted solely "because the trial Court found in his confession that Honey was one of the murderers, and that they had been in his company not long before and not long after the murder." In this case it has been demonstrated by evidence, both direct and circumstantial, the active role accused No.2 played in the commission of the offences with which he is charged.

Taking the evidence against each accused it is my view that the Crown has succeeded in proving beyond reasonable doubt that they, acting jointly and in pursuance of a common purpose, deliberately, intentionally and unlawfully killed Bitsamang Mafifi and are also guilty of the crime of Housebreaking with intent to steal and theft as alleged in the indictment. (See Sello Lemphane & Others v Rex, C. of A. supra).

My assessors unanimously agree with all my findings in this case.

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J U D G E

19th December, 1980

For the Crown: Mr. E. Muguluma

For the three Accused: {Mr. G. Kolisang  
                              {Mr. J. Modisane