

IN THE HIGH COURT OF LESOTHO**In the matter of :****R E X****VS**

- 1. TABOLANE TANONO**
- 2. RALECHOBA MOSOOTHONYANE**
- 3. POULO RALIENYANE**
- 4. MOTLALEPULE MOLATI**
- 5. THAPO SEFATSANE**

J U D G M E N T

**Delivered by the Hon. Mr Justice M.L. Lehohla on the
14th day of February, 1997**

The above accused, together with one Thapelo Tanono since late, were originally charged with the murder of one Qetello Khata who died on or about 16th October, 1989 at or near Ha Malofo in the Butha Buthe district. The killing was alleged by the Crown to have been both unlawful and intentional. Only the five accused above pleaded to the charge and stated that they were not guilty.

The Crown, in an attempt to prove its case, relied on the oral evidence of

PW1 Molapo Malofo (a headman\chief)

PW2 Thienyane Makhalemele

PW3 Trooper Motlatsi and of

PW4 Police woman Molapo

It also relied on the contents of a post-mortem report "Exhibit A" prepared by Dr Corea whose evidence was admitted and read into the recording machine and incorporated into this proceeding in terms of Section 223(7) of the Criminal Procedure and Evidence Act 7 of 1981.

PW1's evidence was to the effect that in the absence of the chief of Ha Malofo, the incumbent working on the mines in South Africa, he was acting in that capacity as the incumbent's substitute. He testified that he was awakened around midnight one night in October 1989, by Thapelo who intimated to PW1 that the deceased, a notorious thief and lawbreaker in the area, had been arrested. It should be noted that PW1 is illiterate.

PW1 after being so awakened found that the deceased had his hands tied with a rope. The deceased's upper body and legs had some weals and injuries or what appeared to be whip-marks. PW1 described the injuries as consistent with severe beating. He had also observed an injury above the deceased's left eye. PW1 saw all the present accused and Thapelo at the time after being awoken by those accused who had accompanied the deceased to the chief's place. He went so far as to indicate that accused 5 is his brother-in-law in that the two are married to blood sisters.

PW1 testified that he ordered the accused to take the deceased to the Charge Office but only learnt later that because of the fast deteriorating condition of the deceased the latter was taken instead to the hospital.

PW1 vehemently denied the suggestion that he subjected the deceased to some assaults by using accused 3's whip. He rejected as utterly false the suggestion that he had called accused 3 and ordered him to bring along his whip to the place where the deceased would be subjected to some further beatings:

PW2 a relative of the deceased testified that the deceased was his nephew. He said that one night in October, shortly after his nephew had arrived at the house which he shared with him he was awakened by people who first knocked at the window to the house he shared with his nephew. The two were awakened by the knock. Before lighting a candle PW2 said to the

deceased "listen here are people knocking at the window". As soon as these people entered the house Thapelo started raining blows on the deceased with a stick. The rest of the other accused except accused 3 who was absent at the time did likewise. When PW2 tried to intervene for the deceased he was also assaulted by the intruders.

PW2 stated that Thapelo and his companions tied the deceased with a rope and left with him.

Under cross-examination PW2 was adamant that accused 1,2,4 and 5 entered his house and assaulted the deceased; and that he too was assaulted by the culprits mentioned.

PW3 testified that he was a member of a team of investigators whose special task was to take photographs of the deceased's body. He identified the body of the deceased and took photographs of it as well as making a mental note of the injuries on the deceased's body especially the bruises at the back and on the face. These photographs which were handed in at Preparatory Examination of this case were not produced in this proceeding apparently because they were misplaced in the office of the Court below.

PW3 stated that he was in the company of PW4 Policewoman Molapo when photographs were being taken. He denied and rejected the cross-examiner's suggestion that he took photographs of a wrong corpse. Strangely though he said he didn't observe any whip-marks on the legs of the deceased, neither did he observe rope-marks on the wrists thereof. *Mr Sakoane* submitted that PW3's failure to make these observations should form no basis for the suggestion that he took photographs of a wrong corpse. I would put PW3's failure to observe these injuries down to inexcusable remissness. But I am not inclined to accept that PW3 took photographs of a wrong corpse. The evidence of PW4 indicates that the photographs taken were of the deceased Qetello Khata a notorious thief therefore a regular customer to the police in that area. PW4 testified that she saw the corpse and recalls that it had some whip-marks and weals but no open wounds.

PW4 testified that she was on duty at Butha Buthe police station when she got a report

about the deceased's death. Thereafter Thapelo arrived to give a report about it whereupon she arrested him. Thereafter the rest of the accused surrendered themselves to her at the police station on diverse dates and different times each of them handing over to her the instrument he had used in the assault on the deceased. She thus took all the instruments as part of the evidence in a murder charge. All these were handed in at the Preparatory Examination of this case. But they were not produced in this Court as PW4 had parted with them at the time she handed them to the Court below.

Under cross-examination she denied that any of the accused came to the charge office in the company of the deceased. In fact the deceased never reached the charge office as he was taken to the hospital by the chief's messengers among whom was Thapelo. PW4 vehemently denied that any of the accused was fetched from his home. On the contrary she stressed that all the accused surrendered themselves.

The post-mortem report handed in and marked "Exhibit A" revealed that the body was examined on 20th October, 1989 after being identified to the doctor by Seeiso Khata. There was a 3 cm laceration on the left parietal region. I may just observe that this finding is in keeping with PW1's evidence on the point. "Exhibit A" further shows that there were a bruise and haematoma on right parietal region. There were also bruises and weals all over the body. There were no bone fractures felt or observed on the skull or anywhere on the deceased's body. Nor were there any epi- or sub-dural or intra cerebral haemorrhage. The doctor was however not able to find the cause of death.

It is important to indicate that accused 3 only surfaced at the chief's place after his co-accused had arrested and belaboured the deceased in the process of effecting the latter's arrest. Thus *Mr Sakoame* for the Crown submitted that the suggestion that accused 3 came with his own whip which was used in beating the deceased exposed him to certain adverse inferences which could reasonably be drawn in the absence of any answer.

At the close of the Crown case the accused gave evidence in their defence starting with DW1 who testified that on the night of 16th October, 1989 he was awakened by accused 4 who

said he had been sent by accused 1's father to seek assistance in arresting a thief who had broken into a shop. He left together with accused 4 and followed the alarm in pursuit of the thief until they arrived at the deceased's home. They met and found other people there. On arrival there the deceased opened the door for them after Thapelo had knocked at the door. There was light in the house.

DW1 then saw blood on Thapelo's head. Thapelo explained that the deceased had hit him with a stick. Thapelo then asked the accused who were in there to assist him in tying the deceased with a rope and take him to the shop where he had broken in. The time was then at about 1.00 am when they came to the deceased's house and found two people in there.

The deceased resisted arrest and was full of fight in him. They tied him with a rope and didn't assault him in the course of the arrest. They then took him to the chief's place about a kilometre away. Nothing happened between the deceased's home and the chief's place.

On arrival at the chief's place, the chief was awakened. After being awakened the chief came out of the house. The deceased had been beaten by Thapelo and villagers gathered outside the chief's place when the chief was awakened. Thapelo was using a small stick to hit the deceased while the villagers were using some sticks. DW1 says that he didn't observe any injuries on the deceased on arrival at the chief's place.

After receiving a report the chief asked the deceased "what is happening with you Qetello in the middle of the night?" The deceased replied that he had broken into 'Malethetsa's cafe. The chief then drove him to the cafe with the villagers. At this stage accused 3 was present. He had arrived after accused 1 and the other accused came with the deceased to the chief's place. He however didn't join them en route to the cafe.

When the deceased was taken to the cafe the accused were together with other villagers. The deceased was being beaten by the villagers as well as by the chief. From the cafe, and after the inspection of the damage there, the chief ordered that the deceased be taken to Butha Buthe police. He detailed Thapelo, accused 2, accused 4 and others for the purpose.

DW1 learnt later about the deceased's death when he went to look for Thapelo upon receiving a message that Thapelo had been arrested by the police. On arrival at the police station DW1 was arrested. DW1 concluded his evidence on a high note that he agreed with what PW4 policewoman Molapo said about his arrest and surrender of weapons.

He conceded under cross-examination that he participated in the assault meted out on the deceased soon after the arrest and while the latter was being taken to the chief's place. He stated that all the accused including accused 3 assaulted the deceased at the chief's place.

According to DW1 he himself was armed with a plastic whip about 45 cm in length; accused 2 was armed with a stick $\frac{3}{4}$ metre in length; accused 3 wielded a whip $\frac{3}{4}$ metre in length, accused 4 had a $\frac{3}{4}$ long stick while accused 5 was holding a similar stick to accused 4's.

DW2 Ralechoba testified that he was awakened by 'Malethetsa at around 12.00 midnight. 'Malethetsa told him that the deceased had broken into the shop. DW2 woke up and told 'Malethetsa that he feared the deceased and would not be able to confront him alone. 'Malethetsa reacted by summoning Thapelo to assist. Meanwhile DW2 took cover under the shadow of the wall of the cafe for he knew the deceased was a notorious burglar who owned or might be in possession of a gun at the time.

Thapelo came but because he had cast caution to the wind by not keeping silent the man in the cafe got wind of Thapelo's approach and when the two met at the door Thapelo who was not sufficiently on his guard was overpowered by that man and was left there fallen in a heap only to recover his composure long after the man had made good his escape into the night.

However Thapelo and accused 2 gave chase while 'Malethetsa had gone to wake up accused 1 and 4. Thus when accused 2 and Thapelo ran past the homes of accused 1 and 4 the latter joined in the chase. Though the deceased had outrun them the gap between him and the chasers was however closing with the result that as he stormed into the house they were close on his heels. Thapelo hit the deceased with a stick in the house and the other accused entered and helped Thapelo overpower and subdue the deceased by holding and pinning him to the ground.

Thapelo sent accused 2 to fetch a rope from 'Mamaseko's place nearby. He complied and came with it and the deceased was tied with it. Accused 2 then observed a bruise on the deceased's head. The deceased's companion PW 2 paced up and down in the house as the deceased was being tied. He asked accused 2 what was happening whereupon accused 2 said he should ask the deceased where the latter came from. This he did and was told by the deceased that he was from breaking into Ralechoba's shop.

They drove the deceased to the chief's place. On their way there Thapelo sent accused 2 and 4 to go and give a report to accused 2's father about the breaking into the shop. At this stage the group had left the deceased's place which was then about 75 paces behind them. Accused 2 had earlier felt like beating the deceased but was prevented from doing so by his preoccupation with helping Thapelo when arresting the deceased.

On arrival at the chief's place villagers were given whips by the chief to beat up the deceased. DW2 says he didn't see what accused 3 was doing because of the crowds who had gathered.

DW2 denies taking part in the assault on the deceased. He says he didn't see any of his co-accused participate in the assault. He however singles out two women - 'Mathabo and 'Mak'hehla - as the ones who assaulted the deceased on the chief's instructions. Needless to say none of this was put to PW1 at the time when he was testifying. It can thus be justifiably discarded as a distressing fabrication and congeries of worthless afterthoughts.

DW2 was in a group of persons detailed by the chief to take the deceased to the charge office. On arrival there around 3.00 am they registered and reported what had happened. They all gave statements. After that Thapelo and the deceased were given medical forms to take to the hospital while the rest went to their respective homes.

DW2 learned about the deceased's death on the following day. He was arrested as he went to town to see Thapelo who had been in hospital with the deceased. He, in the same vein, says he was arrested at the police station as he went upon hearing that Thapelo was there. He got

this piece of information at the hospital.

Under cross-examination he denied that he took part in the assault of the deceased anywhere or at all. Although he was afraid of the deceased, and angered by his breaking into the shop, he nevertheless had enough courage to arrest him and in the process not do him any harm despite the deceased's resistance to the lawful arrest.

He denounced contents of his application for bail as untrue and said he knew nothing about them. He however concedes that he signed in acknowledgment of his authorship of those contents.

Confronted with a written statement he made at the charge office on 15th October 1989 at 04.35 hours he said that he indeed never disclosed the full details about the people who had assaulted the deceased nor did he mention the alleged detour to his father's place with accused 4 soon after the deceased had been on his way to the chief's place.

DW3 on his part said on the night in question he was aroused from his sleep by barking dogs. He woke up to see what was happening. On peering through the door he saw a lot of people moving towards the chief's place. He then stood outside and observed the events.

He saw one member of a group knock at the door to the chief's house. He identified him by voice to be Thapelo. The chief then appeared and the chief and Thapelo held some conversation the titbits of which DW3 couldn't quite hear. Then the chief called DW3 and as DW3 approached the fence separating the two the chief asked DW3 to lend him a whip. He went back into his house to fetch it. He got it and handed it to the chief. The chief invited accused 3 to join him. He went back into the house to dress up and came to the chief's place where he noticed a person who was sitting down. His co-accused were all there except accused 2 and 4. Then accused 3 asked "This is Qetello, what has he done?" He was prompted to so ask because he observed a wound on the deceased's head, weals on his legs and that his hands were tied to his back. The reply to his question was that Qetello is a thief and had been caught breaking into a shop. Thereafter the chief said he should be driven to the cafe to see the damage. This was

done and along the way to the cafe the deceased was being beaten. The beating was effected by people gathered at the chief's place. However accused 3 says he cannot know who these people were. He says he did not take part in the beating as the deceased had already been beaten and his hands tied to his back. He parted with his whip when he gave it to the chief. He says it is not correct to say that he was already there when the chief was woken up.

The deceased was driven to the cafe and on arrival there money was found to have been strewn on the ground outside. During this time the deceased said he was responsible for breaking in and that this was for the second time round. From there he was driven to the chief's place and the chief wrote a letter. Thereafter Thapelo asked his son to provide a vehicle to take the deceased to the police.

DW3 further stated that the chief didn't bring back his whip. He fetched it from the chief after he got a message from his mother saying police had said he should bring it along with him to them. He took the whip to the police station where he introduced himself to PW4 who took down his explanations. He then was taken to Court with accused 4 and 5 where a charge of murder was preferred against them. He was later released on bail.

Under cross-examination DW3 said that he didn't take part in the beating of the deceased. He said accused 1 was mistaken in saying he was also involved in the assault of the deceased. He didn't mention the name of the chief as one of the participants in the assault on the deceased. He stated that the chief has his own whip and thus was in a cleft stick to say why it would have been necessary for the chief to be availed of an extra whip in the circumstances.

When referred to contents of his bail application, he said he could not recall what he told the agents of his lawyer. However, he disavowed the averment that he also participated in assaulting the deceased.

DW4 testified that he was one of the people who went to fetch the deceased from his home. This he did in deference to the request by 'Malethetsa who had awoken him at night. He accordingly took a stick and ran towards the shop and when he appeared next to the shop he saw

people "chasing each other". He joined in the chase. But Thapelo sent him to wake accused 1 up and he complied so speedily that he was able to catch up with his colleagues who were still chasing after the deceased even after DW4 had broken away from them in his attempt to comply with Thapelo's request.

They chased the deceased up to his home. What followed is as was testified to by DW2 and in part DW1. He told the Court that after the deceased had been tied up and taken out on the way to the chief's place Thapelo asked accused 2 and DW4 to go and wake accused 2's father up and tell him of what had happened and was happening. DW4 denied that he and his co-accused were vicious in their beating up of the deceased and that they threatened to beat up PW2 at all.

He told the Court that after he and accused 2 had awakened accused 2's father they went to the chief's place where he saw villagers assaulting the deceased. The chief met with accused 2's father and the chief ordered that the deceased be taken to the cafe. After seeing the damage the chief sjambokked the deceased and said "you come from your village to cause destruction in my village". The chief ordered that the deceased be taken back to the chief's place. Then DW4 left for his own place to dress up.

On returning he met the deceased who was still being beaten by the villagers. The chief was holding the deceased's leg and asking 'Mak'hehla to beat his private parts. DW4 intervened and admonished the chief who had even suggested that the deceased should be thrown into the dam. Needless to say none of these highly prominent features in DW4's evidence was put to PW1 the chief in order for him to respond or react to them and, if need be, to also enable the court to make its observations of his reactions. I have no difficulty then in rejecting these allegations as ill-conceived exaggerations and last minute fabrications calculated at discrediting a man behind his back.

DW4 stated that the deceased was taken to the police station. This witness swears that he was part of the group that went there.

He goes further to state that five days later he was arrested. He had got a message from the chief that the police had been looking for him. The message also stated that he should bring along with him to the police station the weapon he had had at the time of the deceased's arrest. DW4 obliged, and accordingly met policewoman Molapo at the police station. He says PW4 inquired of him if he was part of Thapelo's group. He answered in the affirmative whereupon PW4 wrote down what DW4 told her about the events at the cafe and the deceased's arrest. Then DW4 signed in acknowledgement of that statement which PW4 had taken down.

He told this Court that he didn't take part in the assault of the deceased.

Under cross-examination he stated that he didn't give any names of people that he saw assault the deceased, to the police. He merely said it was villagers who had assaulted the deceased. He was aware that the generic reference, namely villagers, would not necessarily exclude him and his co-accused. Thus such reference could not have been of assistance to the investigators by way of eliminating him and or his co-accused. In fact this general reference exposed him and his co-accused to the risk of being arrested therefor.

DW4 disavows contents of his bail application where they relate to an averment in an affidavit that he was one of the people who assaulted the deceased. He denies being present at all material times when the deceased was taken to the chief's place. He denounces as false contents of his affidavit to the effect that he surrendered himself to the police. But the simple and straightforward manner in which the affidavit sets out the events which are even corroborated by factual observation exposes DW4 as turning himself into a proverb for telling lies.

DW5, the last accused, testified that he took part in the arrest of the deceased after 'Malethetsa had raised an alarm. His story is to the effect that after the pursuers reached the deceased's home a rope was procured from 'Mamaseko's house by accused 2. While the deceased was being tied with this rope DW5 observed a bleeding wound on the latter's head. He heard the deceased say "Do not beat me because I have told the truth saying I had broken into Ralechoba's cafe" The pursuers obliged, so did DW5 tell the Court.

After that they left with the deceased for the chief's place so that the latter could put him before the law. When they got out of the gate of the deceased's home Thapelo ordered accused 4 and 2 to go and wake up accused 2's father thus separating them from Thapelo, accused 2, DW5 and the deceased who followed the path leading to the chief's place. On the way heading for the chief's place DW5 and his company were joined by villagers who were progressively responding to the alarm. On their arrival the angry villagers wanted to assault the deceased but for accused 5's successful pleas not to do so because the deceased had already told the truth.

However as the swelling numbers of the crowd neared the chief's place it was difficult to keep them under control with the result that they let out with whips and sticks at the deceased. DW5's attempts at intervention for the deceased were to no avail when pitted against the relentless and indiscriminate thrashing of a man by an unruly mob in a frenzied rage.

DW5 says that accused 1 and Thapelo were present while all this was taking place. He recalls that accused 1 heeded his advice not to beat the deceased while Thapelo ignored it. The group arrived at the chief's place whereupon Thapelo woke the chief up and thus to that extent relieved the deceased of beatings by Thapelo.

Having woken up and come outside the chief asked who the person was. Thapelo gave the chief details and circumstances that led to the deceased's presence at the chief's place. DW5 says it is at this point that the chief called accused 3 to come with a whip. Accused 3 complied. Be it remembered that accused 4 stated that he saw the whip exchange hands and being applied on the deceased by one villager after another. Accused 5 says he pleaded with the chief to stop beating the deceased and take him to the police.

The chief told all present to go to the cafe for assessment of the damage. This was after accused 2 and 4 arrived from fetching accused 2's father. En route to the cafe from the chief's place the deceased was being beaten by the crowd of villagers. Accused 5 says however that even though all the accused were present none of them participated in this beating. But the chief's behaviour in all this episode was of an inciter. For instance he is said to have kept saying the deceased was troublesome and had to be beaten as well as that the deceased was a well known

thief. DW5 also knows the deceased to be a well known thief.

On arrival at the cafe accused 5 saw that the latch to the door was broken and money scattered on the ground. There was also a watch and one shoe. From the cafe the crowd went back to the chief's place. On arrival there the chief ordered that the deceased be escorted to the police. It is at this point that accused 5 saw a wound on the deceased's head, whip-marks on the other parts of the body which were not covered by the deceased's clothes. Accused 2 and 4 were among people who accompanied the deceased to the police.

DW5 says after about a week he got a report that the police had come to the village looking for him. He then went to the police in response to this message he had obtained from the chief. On arrival he was asked if he was present when the deceased was arrested and he said, yes. The police told him that Qetello had died and for that reason the police arrested him and told him so.

He had heard PW4's evidence in this Court but says he disagrees with it as he never surrendered to the police as testified by PW4. However he told the Court that he did hand his weapon over to PW4 at the police station. He gave an explanation which was written down. Both accused 3 and 4 were present when a written statement was taken from him. Accused 1 and 2 had already been arrested.

DW5 said he is presently on bail obtained for him by Mr C.D. Molapo who was his attorney of record at the time. But even though he never met C.D. but only Mahlapane an employee of Mr. C.D. Molapo, the same Mr C.D. Molapo had already been briefed by accused 1 and 2. Thus accused 3, 4 and he only joined when they later came. Mahlapane made him sign an affidavit but he could not recall how she reduced to writing what he had told her. However he recalled making a statement to Mahlapane.

Under cross-examination, DW5 was referred to a statement he made to the police on 15th October, 1989. He conceded that his statement didn't go anywhere near suggesting that he participated in the arrest of the deceased and thus was not helpful. Furthermore he didn't tell the

police about who the possible culprits were in the murder case that was the subject matter of the police investigation.

When confronted with contents of his affidavit in the bail application, he was, to his credit, in general agreement with averments therein but was in an obvious quandary to say why he did not give the police some of the important information like the fact that he actively took part in the lawful arrest of the deceased and that he knew or saw the people who beat him up. Like most of his co-accused it seems that accused 5 mistakenly embraced the doctrine of no names no pack-drill.

In his submissions *Mr Klass* for all the accused contended the following :

That there is no direct evidence by the Crown that the accused assaulted the deceased except the evidence of PW2 the deceased's uncle who proved to be very unreliable in his testimony and the evidence of the chief who was also not impressive.

Cross-examination of PW1 on behalf of the accused suggested that he went with the group that took the deceased to the police, and that he had participated in the assault of the deceased using accused 3's whip. PW1 denied all this. Subsequent attempts by some of the accused to give local colour to the alleged participation of the chief in the assault amounted to empty embellishments for they had not been put to him in the first place and, in my view, for no apparent reason than that they were palpably false. Nohow, if it was true and told to *Mr Klass* by his clients, could he have omitted to put to PW1 the spicy element in his alleged participation that he even lifted the deceased's foot to enable women to hit the latter's private parts. It is this form of attempt to dupe the Court that has the effect of strengthening the case for the other side.

Mr Klass further submitted that the Autopsy report handed in by the Crown shows that the doctor was unable to tell what the cause of death was. He further indicated that it was not established what the deceased's state of health prior to his arrest was. At its lowest evidence showed that the deceased was strong enough to have swept PW1 off his feet and come off

victorious after the short wrestling that the two briefly had before the deceased fled, outrunning those in hot pursuit after him. He further gave a good account of his physical prowess when outmatched five to one in his house before being overpowered and tied with a rope.

Regarding therefore the question of the cause of death one need not be philosophical or let one's mind conjure up images of the metaphysical in a way that might distract one's attention from an inquiry that requires application of common sense.

The post-mortem report reveals injuries which are consistent with the tenor of the evidence which illustrated that the deceased was subjected to assaults with whips and sticks. Use of these instruments is bespoken by bruises and haematomas which were observed all over the deceased's body. The fact that notwithstanding all these injuries, the doctor could not establish the cause of death does not present any insurmountable barrier. Even if the medical evidence is silent as to the cause of death, as long as there is a connecting link between the acts of the accused and the ultimate fate of the deceased resulting from those acts, that should suffice. Thus in Tsomela vs Rex 1974-75 LLR 97 at 99 Cotran C.J. as he then was appositely rammmed the point home as follows :

"I am unable to subscribe to the view that a court of law is precluded from coming to a conclusion about the cause of death by reason only that no medical evidence was available, or if available, was not satisfactory or not 'scientifically' conclusive. There are numerous cases of convictions for murder or culpable homicide where no body was found at all, much less medical evidence respecting it, so also where a body was so decomposed that the cause of death could not be ascertained. It all depends on the circumstances"

For instance in Appeal Case No.4\1984 Clement Kobedi Gofhamodimo vs The State (unreported) at p.5 Maisels P sitting in Botswana said :

"As was pointed out by Schreiner J.A. in Nhleko at 721 F, it is wrong to hold that the State must prove the *corpus delicti*, the fact of an unlawful killing, according to a higher standard of certainty than that required to identify the accused as the killer".

Bearing in mind the remarks of Mr Justice Story when charging a jury in *William's Trial* (Wigmore, 3rd Ed. Vol. 7 at 420) that

“In no case can you arrive, perhaps, at absolute certainty of the death of an individual.....”it becomes doubly impossible in such circumstances to know the cause of death.

Suffice it then to cite Maisels P.s words in *Gofhamodimo* above at p.42 where in characteristic fashion and great clarity the learned Judge puts the point beyond dispute as follows:

“When, however, Mr Bizos submits that because the killing was inferred, there is no evidence as to how the present killing took place and poses the question as to whether it was preceded by a quarrel and what degree of force was used, whether a weapon was used or whether it was an impulsive push into the water or cave that caused the death, it seems to me that he is on somewhat thin ground”.

In *Sibanda and Others vs The State* 1969(1) P.H., H. 122 Wessels J.A. said

“The State was not required to demonstrate the cause of death with scientific exactness and as a medical fact beyond dispute”

I should not step off this point before citing the words of Devlin J in *R vs Bodkin Adams* 1957 CR.L.R 365 when charging the Jury that

“Cause means nothing philosophical or technical or scientific. It means what you twelve men and women sitting as a Jury in the jury box would regard in a commonsense was as the cause”.

The dictum in *Bodkin Adams* would have equal application in this Court where as a judge one sits as a trier of fact and law. While on this point dealing with cases where the cause of death could not have been established because the body itself was not found yet that didn't prevent conviction and punishment of the culprit by competent Courts of Law I wish to refer to what is recalled by R.B. McDonald in the December 1996 copy of True Crime at page 41 as “A Classic In Criminal Law”. This had to do with what McDonald referred to as California's Tragic McMonigle Case in which a 15 year old girl Thora Chammerlain was believed dead and killed by McMonigle though the body was never recovered or traced. The writer says of McMonigle

after his arrest

“.....He was under the delusion that he would not be convicted of murder because the corpse of Thora Chamberlain was not found”

At page 50 this writer says -

“D .A. Wyckoff (the prosecutor) was confident he could secure a murder conviction even though the body was never found. Much of the ensuing hue and cry raised on McMonigle’s behalf stemmed from the popular misconception about a *corpus delicti*. He himself shared this delusion that a murder conviction cannot be obtained without a *corpus delicti*, wrongly believed by many people to mean the body of the murder victim”

Needless to say this case

“.....is regarded as a classic in criminal law, and cited as an example of the fact that when a sufficient body of other evidence is present, the body of the victim is not necessary to secure a murder conviction” - I would add much less the cause of death.

I would therefore regard *Mr Sakoane’s* submission for the Crown as well grounded that the conduct of the deceased before his arrest shows that he was hale and hearty. He hared along from the cafe to his home as would any other healthy thief wishing to put as much distance between him and himself pursuers.

The nature of injuries on the deceased’s body show that he was subjected to a brutal assault. The Court has heard evidence showing that the bruises and weals were inflicted with whips and sticks carried by the accused on the very early morning that he was assaulted. He died soon after he had been admitted to hospital following these injuries. On a purely commonsense approach, death of a healthy person immediately following the type of assaults described in evidence would be ascribable to the assaults.

I endorse the Crown’s submission that acceptance of the contrary proposition would amount to a slide into the quagmire of conjecture especially in the absence of any suggestion of

a *novus actus interveniens*. It should be recalled that the chief said upon the return of the accused from the trip thought to have been to the police station he learnt that because of the deterioration in the deceased's condition he was taken to the hospital instead.

The Court accepts evidence that shows that the deceased was severely punished following his arrest on the suspicion that he had broken into a cafe. His hands were tied when these assaults were being carried out. In these circumstances the deceased could neither defend himself nor run away.

The Court accepts that the deceased died a short while after being subjected to brutal assaults. There is no suggestion that before he died the deceased suffered from any disease that was highly life-threatening. On the contrary the evidence shows that he was, in the words of *Mr Sakoane*, "on any health standards capable of pursuing an alleged career in burglary and had the athletic agility to evade arrest".

It is common cause that four of the accused chased after the deceased on the night of the events and arrested him at his home after tying him with a rope. Neither is it disputed that accused 3 came to the chief's place soon after the deceased was brought there by those who had arrested him.

The Court accepts that the deceased was assaulted by his arrestors during and after the arrest. Indeed assaults which were meted out to him to bring him under control during the attempt to arrest the deceased were under our law justified. But assaults which were effected thereafter were absolutely unwarranted and illegal. That they were done out of sheer lust for retribution and for purposes of satisfying sadistic appetites of the perpetrators is reprehensible in the superlative degree.

Section 30 of our Criminal Procedure and Evidence Act No.7 of 1981 provides :

"Any private person may without warrant arrest any other person upon reasonable suspicion that the other person has committed any of the offences specified in Part II of the First Schedule".

Among the specified offences is the offence of -

“Breaking or entering premises with intent to commit an offence either at common law or in contravention of any statute”.

Section 42 of the Criminal Procedure and Evidence protects a private person in the sense that if in an attempt to arrest the suspect he kills him that private person is free from criminal liability for the killing. But the Criminal Procedure and Evidence clearly stipulates that the deceased should have been fleeing or resisting arrest, and that killing him should have been the only means the arrestor could have used to put an end to the suspect’s resistance or flight. The scope of application of this section has been satisfactorily pointed out by Maqutu J in *Rev vs Nchela* CRIT\5\93 (unreported) at pp 19 and 20 as follows :

“Courts strictly interpret this section in favour of protecting lives. If conditions are fulfilled to the letter, then even where the accused has been unreasonable, he will be afforded protection under the section”.

In *R vs Britz* 1949(3) SA 293 (A) Schreiner J.A. said :

“.....consideration of the possibilities, in relation more particularly to some of the offences mentioned in the First Schedule, makes it clear that the section may, on any view of the onus protect persons who ought not to be protected Now the dangers would be greatly increased if the onus lay upon the crown to exclude the reasonable possibility that the specified circumstances were present. and bearing in mind also the emphasis which our law and customs have in general laid upon the sanctity of human life, I am satisfied that the Legislature must have intended that a person who has killed another and seeks to use the very special protection afforded by Section 44 should have to prove, by a balance of probabilities, the circumstances specified in the section, as pre-requisites to immunity”.

Mr Sakoane having conceded that the assault in the house was meted out for subduing the deceased’s resistance to arrest, goes further however to submit that the deceased continued to suffer assaults by his captors along the way to the chief’s place and from there afterwards to the cafe. These assaults were illegal and therefore unjustified.

Mr. Sakoane invited the Court to reject the question of the detour accused 2 claims he and accused 4 made from the deceased's home to the home of accused 2's father. Indeed it is a matter of some surprise that if this detour was as important as it is made out to be, why does it only arise for the first time when accused 2 was giving his oral evidence. Why, if it is not a last minute fabrication, was it not put to the Crown witnesses. This claim by accused 2 is susceptible to a further number of attacks as untenable because he himself didn't refer to it in his bail application. Accused 1 makes no mention of it. Even assuming accused 2 had forgotten to mention it in his affidavit, then it is strange that his companion on the detour accused 4 makes no mention of it in his own affidavit. In any case accused 2's affidavit concerning the detour does not involve going to awake his father but going to the cafe to collect money. But this story falls to pieces when put side by side with evidence showing that the money was collected by the group that came to the shop in company of the chief long after and certainly not before as accused 2's tenor of evidence purports to say; namely that he came there for this purpose of collecting the money. To this extent his claim feverishly adhered to by him has been exposed as untrue.

There however seems to be not much of value to be gained on concerning oneself with whether the detour took place or not because the evidence of the chief that all the accused were present when he was awakened was challenged by neither accused 2 nor 4.

With regard to accused 3 it makes no sense that the chief could demand of him a whip when the chief had his own whip. It is surprising that accused 3 should not revoke the loan he had made of his whip on realising that a helpless man whom he saw in a pathetic state when he pitched on the scene was going to be further assaulted with that whip. If accused 3 didn't intend to join forces with the arrestors including the chief, it would have been easy for him to distance himself altogether from the beatings immediately he realised the injuries the deceased had already sustained or when seeing him being beaten further. Nothing stopped him from demanding his whip back or giving the names of the culprits to the police. But in keeping with the conduct of a participant in the assaults he states in his affidavit that he followed the molesters of the deceased out of curiosity to the chief's place. Nowhere in that affidavit does he say he came there because he had been called by the chief. His affidavit indicates that accused 3 "gave the deceased a few strokes on the buttocks".

It is clear to me that all the accused instructed a firm of attorneys to get them bail in this Court. In this regard the Learned Authors Hoffman and Zeffert in their invaluable works The South African Law of Evidence 4th Ed. Pp 188 and 189 say :

“Admissions of fact by counsel or attorney within the scope of their authority to conduct the litigation or transaction in question are admissible against the client”.

This would tend to thwart *Mr Klass's* contentions about the fact that the statement cannot be admissible if it is shown that a person who made it intended to exculpate himself.

Although the accused say that they are not liable for the death of the deceased, none of them told the police the names of people who assaulted the deceased in their presence. It is proper to conclude from this type of conduct that the accused refrained from giving such names because they themselves were the culprits, or that they couldn't do so without implicating their colleagues. So the motive then was to shield themselves as well as their colleagues. But as time went on and they had an opportunity to reflect they had no option but to supply their lawyer Mr C.D. Molapo with what passes for grist to the mill. In the process the initial attempts at concealing the truth to the police crumbled in the search by their lawyer for palpable account for the deceased's death. What they told their lawyer Mr C.D. Molapo, as Hoffman and Zeffert above show is admissible as evidence before this Court.

With the exception of accused 1 all the accused denied throughout the cross-examination that they had assaulted the deceased. It stands to reason therefore that the defence of deference to superior orders cannot avail them. It should be recalled that according to them whatever instructions given by the chief to the villagers to assault the deceased, were never complied with by any of the accused.

Even assuming that the chief gave such orders, it seems to me that obedience to superior orders if advanced by accused 1 would be to no avail regard being had to sheer helplessness of the condition the deceased was in; the fact that the deceased had his hands tied and couldn't have warded off the blows to avoid further pain being inflicted on him, accused 1 testified that the

deceased cooperated and gave no problems after the arrest and being tied with a rope; accused 1 though pardonably, perhaps, being wiser after the event conceded during cross-examination that he could have refused to accept the chief's instructions if he wanted to. I would, though hesitate to be hard on accused 1 in respect of the last factor that counts against his conduct as I am aware that dealing with a similar situation Mr Justice Van Winsen (once a Court of Appeal Judge of Lesotho) sitting in Swaziland with Welsh J.A. and Aaron J.A. (Also once a Lesotho Court of Appeal Judge) said in APP.No.49\85 *Mjoniseni Mkhabela vs Regina* (unreported) at p.4 -

“The bonds of tradition could be expected in such a person powerfully to affect the course of his conduct. Indeed it is to his credit that he resisted the pressure brought to bear upon him to the extent that he did. To expect him to report his chief to the police and inform them of the latter's plans.....would, I think, be flying in the face of the tradition of loyalty to his chief and would have constituted a course of conduct that would have taxed the emotional resources of a much more sophisticated individual than appellant was”. But this should not be understood to excuse accused 1 for participating in the unlawful assault.

However in *R vs Smith* (1900) 17 SC 561 the principle governing obedience to superior orders is neatly enunciated as follows :

“..... as long as the orders of the superior are not obviously and decidedly in opposition in (sic) the law of the land.....”

the accused can avail himself of their obedience in carrying out a deed complained of.

In *S vs Banda* 1990(SA) 466 B it is stated :

“It is necessary to find an acceptable formulation of the duty to obey the orders of a superior, one which does not violate the law of the land and the soldier's duty of obedience. Furthermore, it should be borne in mind that the Courts and authorities in the main seem prepared to grant exemption from liability in the cases of obedience to unlawful orders, provided they are not manifestly or palpably unlawful.....”

I wish finally to consider if in carrying out the assaults that led to the deceased's death the accused did so with the requisite intent. Such intent should satisfy the subjective test if the

accused are to be convicted of murder. Although the evidence shows that the assaults were carried out for a long time with the set purpose of teaching the deceased a lesson the established circumstances and facts, and it is properly conceded by *Mr Sakoane*, cast a reasonable doubt on the question whether the accused had the requisite subjective intent to kill. There is no evidence to suggest that on hearing of the alarm each pursuer individually or collectively took sacrament to kill the deceased. Thus in my judgment the accused are entitled to acquittal from liability in the Capital Charge.


However what appears and remains manifestly patent is that negligence formed the crucial part of the criminal conduct that resulted in the deceased's death. The assault was illegal and unwarranted. The accused out-numbered the deceased six or five to one. Given their numbers and the duration of the assaults each one of them ought reasonably to have foreseen the possibility of death resulting from such conduct. Surely it must have been within the sphere of comprehension of each of the accused that continued whipping by each of them might result in death. But they didn't desist until too late. To that extent each one of them was negligent. Nevertheless in the words of Holmes J.A in *S vs Burger* 1975(4) SA 877 (A) :

"One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense".

The learned Judge pointed out further that :

".....A *diligens paterfamilias* may not have heard of the Queensberry Rules but it would be asking too much to suppose that he would not appreciate the possibility that kicks by a strong man, wearing shoes, in the stomach of a slender youth might well cause serious injury, and that such injury could bring death hovering in attendance. Serious injury and death are sombrely familiar as cause and effect in the walks of human experience, for the vulnerability of the human body are legion, and death may come to mortals through a variety of corporeal hurts and derangements".

Each one of the accused is found guilty of Culpable Homicide.


.....
J U D G E
14th February, 1

SENTENCE

With regard to sentence I am told that the accused are all first offenders. It has further been submitted on their behalf that they got involved in this unfortunate episode while enthusiastically discharging a public function.

I am however skeptical about the logical implication of the submission that if the deceased had not been a thief the accused would never have had the misfortune that has befallen them. I seriously question myself whether it would make sense to say of a rapist that he would not have suffered from venereal disease if it wasn't because of the rape victim's immorality.

The accused are married and have children. They also have children and are employed on the mines except for accused 5 who is a farming peasant of humble means.

I am prepared to temper justice with mercy in respect especially of accused 1 concerning whom it seems that the Sunday school message about telling the truth didn't entirely fall on deaf ears. I would be hesitant to dash his faith in the virtue of telling the truth. To a lesser extent the same would avail in respect of accused 5 who is also fairly more advanced in age than any of the accused.

Globally speaking the Court at this stage is at large to consider the individual contribution of each accused to the deceased's ill fate. I am thus of the view that the individual application of less formidable weapon such as a stick or whip on the deceased would not have necessarily resulted in the fatal consequences that befell the deceased unless carried out for far longer than

it did.

It would not be fair therefore to render an individual accused liable for the cumulative effect of injuries by his co-accused where possible at this stage of an inquiry of this nature.

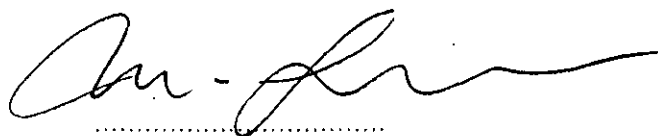
Consequently accused 2, 3 and 4 are each sentenced to 4 years' imprisonment or M2000 fine. Each is also sentenced to 2 years' imprisonment suspended for 2 years on condition that each respective accused is not convicted of an offence involving violence to a person committed during the period of the suspension.

Accused 5 is sentenced to 3 years' imprisonment or M1000 fine plus 1 year's imprisonment suspended for 2 years provided he is not convicted of a crime involving violence to a person committed during the period of the suspension.

Accused 1 is sentenced to 2 years' imprisonment or M800 fine plus 6 months' imprisonment suspended for 1 year provided he is not convicted of a crime of which violence is an element committed during the period of the suspension.

All accused are granted up to 30th April, 1997 to pay the fines if they wish to avoid serving prison terms.

My assessor agrees.



J U D G E
14th February, 1997

For Crown : Mr Sakoane
For Defence: Mr Klass