CRI\T\32\96

**IN THE HIGH COURT OF LESOTHO**

**In the matter of :**

**R E X**

**v**

**SEKOTOKO BADBOY THABO MOLIKUOA**

**J U D G M E N T**

**Delivered by the Hon. Mr Justice M.L. Lehohla on the 17th day of November, 1997**

The accused pleaded not guilty to a charge of murder wherein it is alleged that on or about the 24th day of January 1993 and at, or near Ha Malofo in the district of Butha Buthe he did unlawfully and intentionally kill Motšelisi Thabo.

Although the defence indicated that it was prepared to accept all depositions in the Preparatory Examination of this case the crown proposed to lead oral

evidence of three witnesses who had made their depositions in the court below. These are :

PW2 : Matšoarelo Malalane

PW6 : L\Sgt Tšolo

PW8 : Alfred Motšoari

In the result the admitted depositions of

PW1 : Thelisi Tjantji

PW3 : Rapokisa Rapokisa

PW4 : Maliitseng Malofo

PW5 : Molapo Malofo

PW7 : D\Tpr Motlatsi

PW9 : Mapontšo Motšoari

PW10 : Dr Ramokepa

were read into the recording machine and made part of proceedings in the trial.

In stating that it was prepared to admit all Preparatory Examination depositions the defence had indicated that it was however challenging the admissibility of the confession made before the learned Mrs Molise who died even before the P.E. was held in Butha Buthe magistrate's court; in consequence whereof the public prosecutor successfully moved the magistrate's court to adopt that confession as part of the P.E. record.

Before this Court *Mr Ramaema* for the Crown, faced with this hurdle sought

to lay a basis for applying for admission of the confession as a free and voluntary statement made before the late Mrs Molise who could no longer be available as a witness before this Court to testify to the admissibility of the statement taken before her on 8th February, 1993. It also happened that PW11 Mrs Pitso the court interpreter was in her capacity as such present and doing her duty as interpreter when Mrs Molise was taking down the confession. More of that later.

The court accordingly heard the oral evidence of PW2. Thereafter the Crown led the evidence of PW11 in a trial within a trial conducted in the absence of my assessors.

Because as stated above the Crown sought to lay a basis for an application for admission of the confession and disprove anticipated allegation of undue pressure and influence exerted by police to extract the confession from the accused *Mr Ramaema* led the oral evidence of PW6 followed by that of PW7 who gave oral evidence at this stage of the proceeding which was, as stated earlier, a trial within a trial. The evidence of the two police officers was in rebuttal of allegations as to their role played made in cross-examination of PW11.

Thereafter the accused gave sworn testimony There being no further

evidence in the trial within trial the Court was addressed by both counsel. At the end of the addresses the Court ruled the confession admissible for reasons that it gave in an extempore judgment that was recorded on audio tape in this proceeding.

The Court was therefore re-constituted and sat with the assessors for purposes of hearing the balance of this proceeding. Thereupon *Mr Ramaema* indicated that he was desisting from leading PW8's oral evidence which he had earlier been intent on leading. As *Mr Nchela* for the defence intimated he had no objection to PW8's deposition at P.E. being read into the recording machine and being made part of the proceedings; this was accordingly done.

Immediately thereafter the Crown closed its case; so did the defence which exercised its right of silence at this stage of the proceeding even though if it elected it could lead evidence either through the accused or his witnesses if any.

The procedure outlined above helped by large measure to shorten proceedings in this trial.

PW1's evidence that was read into the recording machine indicated that he or she is literate and knows the accused as the two are fellow-villagers. PW1 says it

was on 24th January, 1993 at around 9 a.m. when she\he was returning from the fields when she\he saw the body of the deceased lying on the ground. Even as at this point I may just point out that PW1's evidence about the date i.e. 24th January taken especially in conjunction with 9 a.m. the hour mentioned therewith cannot be accurate or true given that the credible evidence of PW2 supported by that of PW3 shows that as late as around 6 p.m. of that day i.e. 24th January, 1993 the deceased was walking alongside or immediately behind the accused's mounted horse. Thus nohow could the deceased have been seen lying dead in the morning of the day on whose late afternoon she was seen alive and kicking; so to speak. The fact that those who reacted to the alarm on 25-1-93 did so immediately after it had been raised by PW1 would give credence to the fact that PW1 was mistaken when he or she gave the date as 24-1-93. See PW4's evidence at page 3 line 2 of the P.E. record, as well as line 2 at page 4 of the same record, at page 6 where at line 2 she said :

> "I remember the events of 25-1-93. I was at home around 8.30 a.m. when the alarm was raised and we attended. On arrival I discovered that the deceased had already passed away".

The proximity of this witness's stated hour of 8.30 a.m. to PW1's stated hour of 9 a.m. would appear to relate to the same day of the raising of the alarm which, in my view, would on good reason appear to be 25-1-93 as opposed to 24-1-93.

The oral evidence of PW2 is to the effect that she lives at Ha Malofo. She knows the accused as the two live in the same village. On 24-1-93 which was a Sunday PW2 was taking some rest near two cocoa trees at around 6 p.m. on her way to Manamela. She says she was in the company of PW3.

While so resting she immediately saw the accused on horse back followed closely on foot by the deceased who was travelling together with him.

The accused and the deceased were talking normally. They proceeded along, going past PW2 some 19 paces away (as actually paced by court's orderly) and ultimately disappearing from her view beyond the near side bank of the Kepile river lying (by court's estimation) some 350 paces away from this witness. The deceased was walking (as estimated) two paces apart from the accused's mounted horse. PW2 didn't see the two reappear as expected on the far bank which (by court's estimation) was barely 40 paces away from the near bank. PW2 buttressed her evidence about the fact that the two went past not far from her by saying she was able to hear some of the words exchanged between the deceased and the accused

PW2 remained on the same spot of her rest for some 5 minutes of the disappearance of the accused and the deceased as they descended into the Kepile

river bed and then left without seeing them re-appear on the far side. It was her avowed view that it couldn't have taken the deceased and her companion more than 5 minutes to reappear on the far side of the Kepile river. In fact she stressed that she would have expected them to even reappear in far shorter time than five minutes.

PW2 then proceeded on her way which was in an opposite direction to that from which the deceased and her companion had come when she first saw them.

PW2 arrived at Manamela just before dusk. It was her evidence that Ha Malofo village lies some 500 metres (per court's estimation) from Kepile.

On her return two days later from Manamela PW2 learnt of the deceased's death whereupon she put Alfred the deceased's father up to what she had observed when last she had seen the deceased alive walking in the company of the accused; her suspicion having been aroused by the fact that here was the accused who apparently emerged alone from whatever might have been accountable for the deceased's fate.

PW2 stood the cross-examination very well. Because of her description of

the terrain and the excellent manner she was able to convey to the Court the distances from which various points were apart from others I was able to gain the impression that it would have been not easy for anyone near where PW2 was to hear the deceased's screams if she made any to draw attention to what turned out to be her terrible plight.

It was the mark of impeccability in PW2's testimony that even when her cross-examiner tended to ask her questions which, in my view, were merely petti-fogging she maintained her composure and balance of thought. For example the following text will illustrate the point

> "At magistrate's court you said these people were talking peacefully.....? Yes I said so.
>
> But here you say they were talking in a normal way.....? Yes; talking normally means talking in peace".

PW2 agreed that there are two paths leading to Kepile one being for horses while the other is for people. She however explained that even on people's path horses travel. She denied that as the accused and the deceased disappeared into Kepile the accused took the bridle or horse path. She explained as follows :

> "..... where I was seated is where the foot path is and the accused turned the horse to join the people's foot path".

She developed her story and added the necessary aspects which gave it proper perspective or local colour by indicating that they (the accused and the deceased) even met the boys from the concert held at Ha Malofo before disappearing into the Kepile bed. She indicated that the accused appeared to ask them to make way for his horse. Clearly in my view, the accused used the footpath used by the boys as against the bridle-path.

PW11 gave her evidence in the trial within trial and said she is employed as interpreter at the Magistrate's Court Butha Buthe where she started working in 1975 to date. She referred to the left bottom corner of the confession marked Exhibit "A" in this proceeding and said what appears there is her own signature. She said she put her signature there because she was present when the accused made his confession before the late Magistrate Molise. She indicated that she didn't know the accused's name well but by looking at him she recalls very well that he is the man who came to make the confession before Mrs Molise in her own presence as interpreter. She had seen the accused first when he had come to make the confession and next when the P.E. was in progress.

She testified that the accused made his confession on 8-2-93 in the presence of the late magistrate and herself.

She said the accused appeared sober and was speaking freely and voluntarily having been warned by the magistrate that he was not obliged to make a statement if he wasn't feeling free to do so.

I dealt in detail with relevant aspects pertaining to PW11's evidence in the ruling I made yesterday on admissibility of the accused's statement. I dealt also with the evidence of PW6, PW7 and of DW1 the accused in that ruling.

I need only for the sake of emphasis highlight that the accused on his own in a shock move cut short the cross-examination by *Mr Ramaema* by stating categorically that what he had stated before the magistrate was free and voluntary. The re-examination which was intended to reduce the damage done to the defence case was foiled by the accused leaving the Court in no doubt that he understood what was conveyed to the question that elicited his resiling from his initial stance Even when his counsel in an effort that amounted to impermissible cross-examination of one's own witness sought to make him stick to his original stance such effort fell on deaf ears. Consistently with the accused's change of heart he went further to show that contrary to the impression he had created that Mrs Molise had departed from the normal procedure of hearing a confession in a fair and proper

manner in fact the Magistrate didn't depart from this basic norm and practice.

It had been sought to show on behalf of the accused that the statement he is alleged by PW6 to have made i.e. that "this is the knife I stabbed or killed the deceased with", was an inadmissible confession before a police officer. But the authority of ***Petlane vs Rex*** 71-73 LLR 85 by Milne JA -

> "militated against that attempt because no evidence showed that in making the statement the accused conveyed the meaning that he did so intentionally or not for purposes of defending himself".

See CRI\T\13\90 ***Rex vs Thabang Sosolo Maqeba*** (unreported) at page 27.

Furthermore the accused seemed inclined to embellish his version by ascribing ill-motive to PW11, and the deceased Magistrate and stating that PW6 came several evenings to torture him before he felt compelled to make a confession as perhaps an escape from these tortures. But it turned out according to the record that the accused made his confession the next day after his arrest. It is thus palpably false that he endured torture several evenings before he could confess. In any case this is the embellishment that was not put to PW6 at the time of the cross-examination of that witness. Nor the fact that he handed the envelope to the Magistrate. It characterised the accused's version that he hadn't even told his counsel what he himself had up his sleeve. It was a curious feature of the accused's

story that it kept on growing in the telling. But as stated in ***Phaloane vs Rex*** 1981(2) LLR at 246 :

> ".....even making due allowances for certain latitude that may be afforded in criminal cases for a failure to put the defence case to the Crown witnesses, it is important for the defence to put its case to the prosecution witnesses as the trial court is entitled to see and hear the reaction of the witness to every important allegation".

The defence failed to live up to this requirement largely because the accused had denied his counsel necessary ammunition with which to conduct the defence properly. See also ***Small vs Smith*** 1954(3) SA at 434. The accused seemed instead to be unable to resist the temptation to embellish his story with afterthoughts and last minute fabrications

The defence closed its case without leading any evidence. At this juncture I should point out that it is a distressing feature of this case that although the accused in his confession alluded to having raped the deceased before she died no charge of rape was preferred by the Crown against the accused in part because Dr Ramokepa who performed the post-mortem didn't bother to investigate any signs of disturbance of the deceased's generative tract. It was shamefully remiss of this Medical Officer to just content himself with saying "I did not examine whether the deceased was raped or not. I was never informed of her rape". Surely a medical practitioner who is worth his salt should know better than treat a dead body of a

female who is a victim of vicious assault even to parts of her body which are distinctly female such as her breasts, as if it counts for naught or constitutes an inconvenience to him or inflicts an unnecessary encroachment upon his time or leisure as it seems to me to have been that doctor's attitude.

The medical form which serves as a guideline to medical practitioners amply indicates with particularity to female bodies what has to be done in circumstances where death does not result from natural causes. The fact that it is specifically indicated in that form that generative tract be examined, to my mind, implies that the purpose is to exclude or establish signs of any sexual abuse tampering, interference or offence connected therewith as the case may be. A medical doctor who examines such a body needs no prompting by police or whoever has brought such a body to him for examination to also establish or exclude signs of sexual abuse as the case might be.

Thus even though the accused confessed to raping the deceased before killing her because no rape charge was levelled against him this Court is not going to pay any regard to that offence.

I should indicate that the defence acted within its rights when it closed the

case and maintained its silence. Silence is no admission of the commission of an offence. However if at that stage the Crown had made a *prima facie* case the defence was at large to rebut it. See **Criminal Law and Procedure Through Cases** by Mofokeng J at pg 216 where it is stated :

> "..... The failure of an accused to give evidence may, in certain circumstances, be taken as a factor in determining whether his guilt has been proved beyond reasonable doubt".

See also ***S vs Khomo & Ors*** 1975(1) SA 344 at 345 that :-

> "It is well known that an accused person, although not obliged to say anything, may nevertheless assist the State case when he remains silent. When I say he may assist the State case, I mean no more than that his silence is one of the factors which may be taken into account in assessing the weight of the evidence in its totality, and may be given some weight, depending upon the facts and circumstances.
>
> In general, greater weight will be attached to silence where there is direct testimony implicating the accused, which the Court could reasonably expect he would explain away if it were not true, than in a case where there is no such direct evidence, and where the question of his guilt or otherwise depends upon inferential reasoning. ..... In such a case an accused person might well take up the attitude that he concedes all the facts proved, but challenges the ability of the Court to draw an inference of guilt from the facts, and, if that is his view, his failure to give evidence may not be attributable to any consciousness of guilt on his part, but to his confidence that the evidence does not establish guilt and does not require to be answered".

Having said this, it should be recalled that under cross-examination in a trial within a trial the accused virtually admitted his guilt. But I will proceed on the basis

who flees from the scene where he believes he is unobserved as he does so. At the trial the accused wishes to say nothing about the matter. Given the above set of circumstances it would be idle to think that the accused's acts can be explained on any reasonable hypothesis short of one leading to the conclusion that the accused is closely and exclusively answerable for the fate that befell the deceased.

Further, the fact that when it was discovered that the deceased had died and that the last person she was seen with alive was the accused the latter was nowhere to be found until after two weeks when he was escorted to the police Charge Office by the villagers who had been looking for him since the chief's command that they should look for him speaks volumes for the accused's guilty knowledge of what had happened. When PW6 searched him at the charge office "Exhibit 1" was found on him and the accused stated that that was the knife with which he killed the deceased.

See ***S vs Theron*** 1968(4) SA at 61 where it was stated that :

> "An accused's failure to testify can be used as a factor against him..... only when ..... the State has *prima facie* discharged the onus that rests on it .....it cannot, therefore be used to supply a deficiency in the case for the State ..... where there is no evidence on which a reasonable man could convict".

I have tried to avoid basing proof of the accused's guilt on his own confession

made before the late Magistrate on the grounds that I am alive to the statement of Scoble in **The Law of Evidence in South Africa** 3rd Ed. At 250 that :

> "The statements, although actually made as deposed to, may be false, for the prisoner, oppressed by the calamity of his situation, may .....be induced by motives of hope or fear to make an untrue confession and the same result may have arisen from a morbid ambition to obtain an infamous notoriety..... or from anxiety to screen ..... a comrade ..... or it may even be the result of the delusion of an overwrought and fantastic imagination".

This Court has seen the weapon used in the vicious assault on the deceased. This was handed in marked "Exhibit 1" by PW6 who told the Court that when he searched the accused before the latter was detained in custody he uttered words to the effect that the knife is the one he used to kill the deceased. The Court rejected the objection based on the allegation that those words amounted to inadmissible confession to a peace officer. A confession is an unequivocal admission of guilt. The charge sought to be proved by the Crown is of unlawful and intentional killing of a human being. Thus if a man says I killed so and so that doesn't amount to an unequivocal admission of guilt because in that so-called "confession" there cannot be excluded justification for such killing or self-defence or execution of a lawful command all of which are lawful acts.

The Court has had a look at the album containing photographs taken

immediately on discovery of the deceased's dead body. There is evidence that when discovered the dead body was virtually naked in that the private parts were exposed, and the deceased's panty stuck high up at the parting of her thighs or between her legs while the dress was lifted and tied in a knot around the torso. This in itself shows the contempt in which the offender regarded the body of a female person. In a sense it even provides the motive i.e. to titillate morbid sensuality and lustful pleasure out of holding a female body in disgrace.

The deceased was subjected to multiple injuries inflicted with an object which in my view is consistent with "Exhibit 1". The cause of death is said to be "haemopneumothorax due to sustained injuries on the chest".

The medical report makes reference also to collapsed left lung which had a wound on it and presence of blood in both the right and left pleural cavities.

Even if the motive referred to above differs from the perpetrator's real motive I take solace in ***R vs Mlambo*** 1957(4) SA 727 at 737 C that :

> "Proof of motive for committing a crime is always highly desirable, more especially so where the question of intention is in issue. Failure to furnish absolutely convincing proof thereof, does not present an insurmountable obstacle because even if motive is held not to have been established there remains the fact that death resulted either

immediately or in the course of the same night".

In my view the accused in the instant case is faced with a strong *prima facie* case based on the fact that he was the last person seen in the company of the deceased while the latter was alive. The deceased was found dead only hours after she and the accused were seen headed for the spot where the deceased was found dead. The deceased succumbed to injuries inflicted by means of a sharp instrument. The evidence of PW6 was to the effect that the accused admitted having used "Exhibit 1" to kill the deceased. The injuries on the deceased are consistent with the use of Exhibit 1. When a man hunt was mounted for the perpetrator of the offence the accused was nowhere to be found.

The above set of circumstances and the conclusion they provide against the accused's escape from guilt bear great resemblance to what moved Schutz J.A., as he then was, in C. Of A. (CRI) No.5 of 1980 ***Khoabane Sello vs Rex*** (unreported) at p.4 to say :

> "There was therefore, in my view, not merely a *prima facie* Crown case, but one of considerable weight to which a reasonably acceptable answer could be expected. But then the appellant did .....fail to give evidence which would have left the Court to decide whether speculative explanations could reasonably possibly be true.....".

In ***Theron*** above at p.470 it is stated that :

> "The situation is rather different when the evidence against the accused is not direct but circumstantial. If the prosecution has proved suspicious circumstances which the accused, if innocent, could reasonably be expected to answer or explain, his failure to testify will strengthen any unfavourable inferences which can properly be drawn from the prosecution evidence".

Although the Appeal Case No.4\1984 ***Clement Kobedi Gofhamodimo vs The State*** (unreported) by Maisels P. sitting in Botswana deals mainly with absence of *corpus delicti* it says quite a lot about an accused person who was last seen with the deceased who later is discovered dead or presumed dead.

The extract of words from ***R vs Bhardu*** 1945 AD 813 at 822-3 by Davis AJA appearing at page 9 of ***Gofhamodimo*** bears citation as follows :

> "It must not be overlooked that the accused has given an explanation which has been rejected - which cannot even possibly be true .....the court should not, as it seems to me, find on his behalf some explanation which if given might have been true but which he himself has not given".

*Mr Nchela* for the defence proposed either that the accused be acquitted or convicted of Culpable Homicide. But the authority of ***Mlambo*** at 738, whose remarks have been approved in ***S vs Nkomo*** 1966(1) SA 831 (A) at 833 D - F, in ***S vs Rama*** 1966(2) SA 395 (A) at 401 B - C and ***A vs Sauls*** 1981(3) SA 172 (A) at 182 H to 183 B is very compelling in its instructive statement that :

> "Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so".

Needless to say the Court rejected the accused's story at the trial within a trial. He chose to give no evidence in the main trial. The Crown had by then established a strong *prima facie* case against him. In the absence of any explanation from which it could be said his story is reasonably possibly true the *prima facie* case against him becomes conclusive. He ran that risk by giving no explanation of circumstances which place him inside the time frame and place where his conduct is reflected as highly suspicious.

The Court finds no difficulty in finding that the intention to kill is amply provided by the number of injuries inflicted; the use of a lethal weapon in inflicting them on the upper part of the body that houses the vital organs of the victim. Surely if a man drives a sharp blade of a knife into the chest wall of another person the only logical conclusion to draw from such an act is that he intends doing the other serious injury or killing him. Thus if the other dies the killing cannot be otherwise than intentional when there is no lawful justification for inflicting such injury in the first

place.

I accordingly find the accused guilty of the intentional and unlawful killing of the deceased in this case.

My assessors agree.

JUDGE

17th November, 1997

**ON EXTENUATION**

The accused proposed to give evidence in extenuation. But more than three quarters of it was mitigation as opposed to extenuation.

Extenuating circumstances are factors which the Court takes into account furnished by the accused in an endeavour to palliate the moral reprehensibility or blameworthiness of his act, and therefore, if successful, to accordingly escape the ultimate penalty in regard to the crime committed and carrying a death sentence.

Extenuating circumstances may consist of such factors as (1) drunkenness (2) immaturity due to youthfulness (3) provocation and many others provided that they are relevant. The accused is obliged on a balance of probabilities to establish that extenuating circumstances exist in his case.

All that the accused told this Court is that he is a member of the Apostolic Mission Church and has a wife who is not working; and five children. None of these factors individually or cumulatively approximate the requirement to establish extenuating circumstances.

The accused alluded to the fact that the community in which he lives is primitive and rural without showing what the relevance of this state of affairs is in relation to the task facing him i.e. reducing the moral blameworthiness of his acts in regard to the crime of which he has been convicted.

At this stage of the inquiry attention is focussed on the moral reprehensibility of the convicted person and the test is subjective. It is in this regard that it becomes questionable that because the accused comes from a primitive background that factor alone would serve as something reflecting the attitude of his community towards murder. Indeed the fact that it was villagers who arrested him and in the

process assaulted him tends to reflect the attitude of the accused's rural community in an opposite light to what he seeks to project it in before this Court.

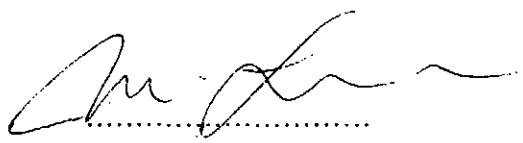
The accused is further required to show whether the factors which he has advanced, in their cumulative effect, had a bearing on his state of mind in doing what he did. So far and in relation to the factors reviewed above he has failed to satisfy this requirement.

However upon the Court taking it upon itself to investigate and find out if there is any factor immediate or remote that could have accounted for the accused's conduct; thereupon the accused stated that the deceased, the chief and villagers were engaged in a fight against him. This consisted in the fact that the chief deprived the accused of his field and gave it to the deceased. The accused took advantage of the trip he and the deceased had undertaken to question her about this. When the deceased dismissively told him that there was nothing she would discuss with the accused about that matter he felt intensely aggrieved and decided to punish the deceased. This, in my view, did not only have a bearing on the accused's state of mind in doing what he did but had such bearing as would sufficiently be appreciable to abate the accused's moral blameworthiness in doing what he did.

I may add that although even at this stage of the inquiry he reiterated that he had first raped the deceased and is probably telling the truth in so saying, he is lucky that due to the remissness of Dr Ramokepa it was not possible to charge the accused with rape.

The Court finds that extenuating circumstances exist in this case.

My assessors agree.



JUDGE

17th November, 1997

The Court has been addressed in mitigation of sentence. The Court feels it would be failing in its duty if it overlooked the seriousness of the crime you committed against a defenceless female who in a sense must have least expected an attack from you because 350 paces back you and she were seen conversing peacefully. It was an act of unpardonable cowardice on your part to spring this blackguardly surprise on her and in the process kill her when to all appearances there was nothing untoward between you and her. It seems you had lulled her into a false sense of security only to pounce on her like a wolf when she least expected

you to.

You have taken away an innocent life of a single mother with two minor children to support. I feel for your own children and their mother who have such an irresponsible thug for a father and husband. But you must pay for your misdeeds. I am not unmindful of the fact that you have been in jail for 5 years awaiting this trial. That has to be taken into account.

You are therefore sentenced to 20 years' imprisonment.

My assessors agree.

.....

JUDGE

17th November, 1997

The Registrar of this Court is directed to forward a copy of this judgment to the Superintendent of Medical Services in Lesotho in an effort to bring to the attention of all medical practitioners in this Kingdom the Court's displeasure with those of their colleagues who deliberately shirk their important duty of being

serviceable to the Courts in the overall administration and dispensation of Justice.

JUDGE

17th November, 1997

For Crown : Mr Ramaema

For Defence : Mr Nchela