

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

IN THE MATTER BETWEEN

REX

V

**‘MAKHOTSO MOLISE
KHOTSO MOLISE
‘MANTOA MOKOALELI**

**1ST ACCUSED
2ND ACCUSED
3RD ACCUSED**

JUDGEMENT

**Coram : Hon. Acting Chief Justice T. E. Monapathi
Date of Hearing : 20th March 2014
Date of Judgment : 23-27 May 2014**

SUMMARY

In this case the Crown relied substantively on circumstantial evidence to prove its case. It rested on three pillars. Where Deceased was killed and apparently the intention being also to rob the Deceased the Crown relied on the fact that the items stolen were found in possession of the Accused. That was the first pillar. The Accused had offered no reasonable explanation for their possession of the property that being the second pillar.

Furthermore, the Crown relied on the closeness of the Accused to the Deceased and that Accused lied about the Deceased’s “disappearance” which was concocted. Relying on the fact of possession of the Deceased’s by the Accused, their motive and closeness to themselves and to the Deceased during her lifetime,

the Crown felt that was another pillar. That was because the Accused apparently hatched a plan and had intended to steal some property of the Deceased to which they had access.

The court agreed that reasonable inferences could safely be drawn on proved facts that the Accused were guilty as charged beyond a reasonable doubt. Finally common purpose between the Accused was strongly pointed out on the evidence and in addition probabilities showed that they were guilty as charged.

CITED CASES

- 1. *R v Kumalo and Nkosi 1918 AD 500***
- 2. *R v Mlambo 1957 (4) SP 737R v Diffora 1937 AD 370***
- 3. *R v Difford 1937 AD 370***
- 4. *R v Minister of Pensions 1947. 2. ALL RE 372***
- 5. *Maboso and Another v REX***
- 6. *S v Madlala 1962 (2) SP 637 (A)***
- 7. *R v Blom 1939 AD 188***
- 8. *Veddie Nkosi v Rex 1993 – 1994 LLR 39***
- 9. *S v Chabalala 2003 (1) SACR 134***
- 10. *Small v Smith 1954 (3) SA 434***

STATUTES

BOOKS

May – South African Cases and Statute on Evidence (4th edition) page 27.

[1] The three (3) accused persons before this Court are facing the following charges:

Count 1: Murder, it being alleged that upon or about the 11th day of August, 2009, and at or near Khubetsoana in the district of Berea, they unlawfully and intentionally killed one ‘MANTHAKOANA SISI MAHASE (Deceased) and
Count 2: Robbery, it being alleged that on the 11th day of August, 2009 the accused persons did rob the Deceased, MRS MAHASE of items of property listed in the indictment.

[2] The Accused all pleaded not guilty to the charges at the commencement of the trial. The Crown then led evidence of ten (10) witnesses in an endeavor to prove its case beyond a reasonable doubt as enjoined by the law. Only A1 and A3 testified in their own defence.

[3] It is common cause that at the close of the case for the Crown, Counsel for the defence attempted without success to persuade this court that A2 should be discharged and acquitted there being “no evidence that he committed the offences charged or any other offence of which he might be convicted”. The application was moved in terms of Section 175(3) of the *Criminal Procedure & Evidence Act, 1981*.

[4] The evidence led against him A2 that notwithstanding, elected not to testify in his defence, but rather elected to exercise his constitutional right to remain silent. The defence of the Accused persons is a complete denial of complicity in the crimes covered by the indictment. The issues which fell for determination by this court are two-fold. It is whether or not the Crown has proved its case beyond a reasonable doubt; and if the answer be in the affirmative, the question being whether the Accused persons had the necessary *mens-rea* at the time of the commission of the offences on the murder charge be it in the form of *dolus eventualis* or *dolus directus*.

[5] It is significant to note at the very outset, that the Crown in the present case relies exclusively on circumstantial evidence; there having been no eye-witness to both the murder and the robbery charges. Differently put, the evidence adduced by the Crown hinges wholly on indirect evidence. In determining the guilt or

otherwise of the accused persons this court has to decide *inter-alia* the issue whether or not the accused persons' story is reasonably possibly true.

[6] The Deceased was, up until her death a resident of Khubetsoana in the district of Berea on the outskirts of the Maseru Township. During her life time the Deceased was affectionately referred to by her neighbours, friends and peers as "Sisi," otherwise she was 'Manthakoana Mahase. At the time of her death she was staying with A3 whom the former had invited to stay with free of charge, presumably not only because of her advanced age, but due to her loneliness. During the period under review the Deceased's neighbours were among others PW1, Mrs. Kolobe and A1.

[7] On the 11th day of August, 2009, and shortly prior to her death, the Deceased invited PW1 to her homestead whereat she narrated to her how on the previous night she miraculously escaped death after consuming some fish which according to the Deceased tasted delicious. On the same day PW1 parted company with the Deceased on the note that should the Deceased fall sick as she previously did, PW1 was ready to render assistance in the form of mobility transport. This was not only communicated to the Deceased but also to A3 who had apparently nursed the Deceased throughout the illness and ordeal on the previous night.

[8] Surprisingly though on the 12th August 2009, the Deceased reportedly went to Hospital in Ladybrand in the Republic of South Africa using public transport as reported by A3 – This was "contrary" to the suggestion by PW1 that should there be need for the Deceased to see a medical doctor PW1 would be more than willing to assist in the transportation of the Deceased. On the same day, PW1 attended on Deceased's homestead thrice wanting to know if the Deceased had come back from Ladybrand, but all in vain. On the same day the Deceased's daughter, PW2 pitched up from the Republic of South Africa; and the news was immediately broken to her that the Deceased had not come back from Ladybrand Hospital. A search was mounted by PW2 inquiring about the whereabouts of the Deceased at Ladybrand Hospital and from some of the Deceased's children resident in the Republic of South Africa but all in vain.

[9] In the intervening period, it was discovered that one of the bed rooms to the Deceased house commonly used by PW2; and in which some of her belongings had been kept had been tampered with. The explanation proffered by A3 was that on the instructions of the Deceased the door to the bedroom was forced open for removal of some items of property therein to the store room adjacent to the main house. Upon entry into the said bedroom PW2 was able to discover that several items of property were missing, the room looked unkempt. At the material time PW2 was able, immediately upon entry to discover that the following items of property were missing: A gas cylinder, 48 kg, dishes in the boxes, sewing machine; and many other items of property.

[10] On the third day of the Deceased's disappearance, a decision was taken through the advice of PW2's daughter that the Deceased's bedroom be broken into all in a bid to ascertain the Deceased's whereabouts. This advice was conveyed to A1 who flatly refused to assist in the breaking into the said bedroom. A1 instead suggested the name of one Matsina whom A1 said could be of assistance in that regard. The upshot of the episode was that on the 14th day of August, 2009, upon force entry into the Deceased's bedroom she was found dead. This was approximately three days after A3 had insisted that the Deceased had gone to the Hospital in Ladybrand. Notably when the Deceased body was discovered in her bedroom A3 had disappeared and nobody knew where she was.

[11] The dead body of the Deceased was conveyed to the mortuary by the police on the same day it was discovered. On the same day of the discovery of the dead body of the Deceased certain items of property traceable to the Deceased's homestead were found in the possession of A1. Those were the following: A 48 kg cylinder gas, A cadac gas cylinder; and A 5 kg cobra polish. A3 claimed to have bought the items of property from A2.

[12] The following facts were common cause or not in dispute:

12.1 That at all material times the Deceased herein was the resident of Khubetsoana in the district of Berea.

12.2 That PW1, **Mrs. Kolobe** was also a resident and neighbour of the Deceased at khubetsoana.

12.3 That A1, '**Makhotso Molise**, was also a resident and neighbor of the Deceased at Khubetsoana. Most significantly A1 and the Deceased were very close neighbours sharing just a fence.

12.4 A2, **Khotso Molise** is the son of A1, and during the period under review, A2 used to be sent by the Deceased for some errands. Not only that, A2 used to keep guard over the Deceased's homestead in her absence during the period under review.

12.5 That A3 '**Mantsoa Mokoaleli**, was not at all material times staying with the Deceased at the behest of the Deceased. PW2, **Nthakoana Mahase**, is the daughter of the Deceased, who on occasions used to stay with the Deceased, and had a room specifically reserved for her in which some items of property belonging to her were kept.

12.6 That on or about the night of the 10th day of August, 2009 the Deceased fell terribly ill after she had consumed some fish prepared by A3.

12.7

12.8

12.9

12.10 That on the morning of the 11th day of August, 2009, PW1 attended on the homestead of the Deceased at the latter's invitation; whereupon the Deceased narrated to her how the previous night she narrowly escaped death. That the Deceased was last seen alive on the 11th day of August, 2009 by PW1. That when parting ways with the deceased on the evening of 11th August, 2009, PW1 had specifically offered to assist in transporting the Deceased to the doctor should she fall sick again. This was specifically directed to A3 as the helper of the deceased.

12.11 That PW2 arrived back in Lesotho the day following the one on which PW1 had parted ways with the Deceased.

12.12 That shortly after her arrival, PW2 discovered that her bedroom at her parental homestead had been forced opened.

12.13 That, immediately upon entry into the room, she discovered that certain items of her property were missing such as a 48 kg gas cylinder (behind the door) a sewing machine and some dishes that had been kept in a box. In short the bedroom was in a mess with things scattered all over.

12.14 That following the alleged (supposed) disappearance of the Deceased a diligent search for her was embarked upon both in Lesotho and Republic of South Africa, but no avail.

12.15 That following the unsuccessful search for the Deceased a decision was taken to force open the bedroom of the Deceased.

12.16 That the Deceased was found dead in her bedroom having sustained fatal wounds.

13.7 That the Deceased appeared to have been murdered a few days prior to her discovery.

12.18 That the Deceased did not die of natural causes – she had been killed.

12.19 That a sewing machine (part of exhibit 5) found at the homestead of A3 belongs to PW2.

[13] PW1 was ‘Mant’sabeng Kolobe. Her evidence was that she had been a resident of Khubetsoana since the year, 1977. The Deceased Mrs. Mahase was her neighbour up until her death in August of the year, 2009. The duo were not only neighbours but became close friends albeit the Deceased was far much older than PW1. She knew A2 and A3.

[14] That on the 11th day of August, 2009, she paid the Deceased a visit at the instance of the latter. On arrival there at the Deceased narrated to her how she narrowly escaped death the previous night after consuming a diet of fish. The Deceased looked frail and weak as she narrated the story. She left the Deceased homestead promising to check on her later in the day. Later in the day PW1

attended on the Deceased's place whereupon she realised that as opposed to the earlier occasion the Deceased looked much better. This was around lunch time.

[15] At around 5.00 p.m. PW1 yet again attended on the Deceased's homestead. Although the Deceased looked better PW1 advised that the Deceased should inform her children of her health condition. Yet again at 7.00 p.m. PW1 pitched up at the Deceased's homestead and found A3 present. PW1 advised that A3 should help the Deceased in informing her children about her condition. A3 was further advised that should her condition deteriorate A3 should feel free to inform her as she was ready to assist with her vehicle to transport the Deceased to hospital.

[16] The following morning of the 12th August, 2009, PW1 once again attended on the Deceased homestead whereupon she was informed by A3 that the Deceased had already gone to the hospital in Ladybrand by public transport. The witness was taken aback as she had made it abundantly clear that should the Deceased need to see the doctor PW1 was ready to transport her.

[17] PW1 came back at around lunch time to find out if the Deceased had come back from seeing the doctor in Ladybrand. At 5.00 pm she came back and the Deceased still had not pitched up from Ladybrand. That a little while after PW1 had been to Deceased's home PW2, the Deceased's daughter Nthakoana Mahase (PW2) arrived at the home of PW1 whereupon the duo discussed the Deceased's state of health. The news about the disappearance of the Deceased were broken to PW2.

[18] PW2 caused phone calls to be made, first, to Thabiso Mahase, Deceased's son and the Ladybrand Hospital but all in vain. It was agreed that PW2 and Thabiso should physically go to Ladybrand the day following, 13\08\2009. The inquiry yielded negative results. PW2 on the other hand informed PW1 that on arrival at her homestead she discovered that her own bedroom had been tampered with, and some items of property were missing.

[19] On the morning of the 14th August, 2009, PW1 got a call which broke the news, the Deceased was found dead in her room. PW1 rushed to the place and found multitudes of people already gathered thereat. PW1 personally entered the Deceased's bedroom. The Deceased lay dead covered in blood with a duvet on the bed. The police subsequently attended the crime scene, at the end of which the Deceased's corpse was conveyed to the mortuary.

[20] The Crown wanted recorded that the cross-examination of PW1 by Counsel focused on the following:

20.1 That PW1 was not telling the truth that she went to the Deceased's homestead three times on the 12th August, 2009. PW1 however, insisted that she attended on Deceased home three times.

20.2 That before PW2 left for the Republic of South Africa, she and Deceased had quarreled. PW1 however denied and added that the Deceased had indeed told PW1 that PW2 brought her grandchildren to the Deceased to bid her farewell before they left for RSA. This was not a sign of people who had quarreled.

20.3 It was indirectly suggested to PW1 that the Deceased was not happy that PW2 had kept her property in one of the bedrooms to the house.

20.4 That one of reasons why PW2 and the Deceased quarreled was that the "Deceased was getting too close to A3".

21.5 PW1 was criticized that although she had been called once by the Deceased she "kept on going there".

[21] I found PW1a reliable witness. She was straight forward I her answer and was not shaken in cross-examination. PW2 testified that she resides at Khubetsoana under Chief Hlathe Majara.

21.1 That prior to the death of the Deceased A3 was staying with the Deceased.

21.2 PW2 testified that she knows A1 as her neighbour at Ha Rankhala. She also knows A2 as A1's son. Indeed A2 used to keep guard over the Deceased's homestead by putting up there in the absence of the Deceased.

21.3 PW2 first knew A3 at Easter of the year 2009 she became her mother's companion.

21.4 The Deceased had informed her about securing someone to stay with but not as a domestic worker as the Deceased was too old. PW2 did not have any reservations with the arrangement.

21.5 PW2 testifies that the only issue that she and her Deceased mother became dissatisfied with was in relation to the behaviour of A3.

21.6 That around the 3rd day of August, 2009 PW2 left for the Republic of South Africa. Before she left she took her grandchild to the Deceased to bid the latter farewell.

21.7 To the best of her recollection she came back from the Republic of South Africa on the 11th August, 2009.

21.8 PW2 testified that when she came back from RSA she went via her parental home, she knocked at the front door and the Deceased's bedroom's window but there was no response.

[22] PW2 resorted to using her own spare key to gain entry into the house. But before she could settle in she heard a sound of a vehicle outside the house. She discovered it was one Lebohang who inquired about the Deceased's whereabouts. PW2 had no idea as she had just arrived momentarily.

22.1 As the duo were conversing A3 emerged, and Lebohang gave the latter an envelope for onward transmission to the Deceased.

22.2 PW2 specifically inquired from A3 about the whereabouts of the Deceased. A3 responded by saying the Deceased went to the Ladybrand Hospital by taxi at around 6.30 am.

22.3 PW2 went to her mother's bedroom but discovered that it was locked. She asked A3 about the key to the bedroom, whereupon A3 informed her that the Deceased took it with her when proceeding to Ladybrand.

22.4 PW2 then proceeded to her own bedroom, but before she could reach same, A3 called her back to inform her that the bedroom had been forced open at the instructions of the Deceased. A3 further informed her that the Deceased had instructed that the property in PW2's bedroom be removed to the adjacent store room. PW2 indeed discovered that the door to the bedroom had been forced open.

22.5 PW2 ultimately entered the bedroom whereupon she realized that the doors to her wardrobe were open. PW2 further immediately discovered that the following items of property were missing: a gas cylinder, 48 kg (behind the door), some boxes containing the dishes had been opened; and many of the dishes therein were missing, a sewing machine, and many others. some of her important documents were on the mattress.

22.6 PW2 proceeded to the home of PW1, who got very excited on seeing her. PW1 started narrating how the Deceased fell sick in her absence. PW1 got surprised that A3 never relayed this information to her, despite having been advised so. PW2 was returning from RSA as her annual leave was almost over.

22.7 PW2 and PW1 agreed to exercise some patience in relation to the arrival of the Deceased from Ladybrand Hospital. She left PW1's home at around 6.45 pm, and on arrival at the homestead she found that the Deceased was still not yet back. A3 also was not present.

22.8 PW2 decided to confer with PW1 on learning that the Deceased was still not yet back. It was at this juncture that a decision was reached to call one Thabiso Mahase the Deceased's son to inquire about the Deceased's whereabouts. Thabiso advised that PW2 should keep mounting investigations about the Deceased's whereabouts in Lesotho whereas he was to carry out same in the RSA.

[23] PW2 then left for her Cousin's home to inquire about the Deceased whereabouts but to no avail.

23.1 PW2 and Thabiso agreed to meet at Ladybrand the following day, that is the 13th August, 2009. The duo met at Ladybrand Hospital. The inquiries yielded negative results. They went to one Dr. Mosala's surgery and to the mortuary, but all in vain.

23.2 The two parted company on the note that PW2 was to conduct a search in Lesotho whereas Thabiso would do same in RSA.

23.3 PW2 went to her parental home whereat she decided to call PW1 and showed her the state her bedroom was in. PW2 thought of reporting the matter to the police but was advised to defer same until the arrival of the Deceased. This was premised on the information that the Deceased was the one who had instructed that the property be taken to the storeroom.

23.4 PW2 inquired about the key to the storeroom from A3 and the latter said the Deceased took it with her when she left for Ladybrand.

25.5 Immediately upon arrival from PW1's place PW2 met her Cousin, Khauhelo and related how the Deceased disappeared – At the material time A3 had not pitched up. PW2 locked the house and left for her own homestead.

23.6 At around 9.00 pm she called Thabiso to confirm that the Deceased was still missing. PW2 suggested that radio announcements be made publicizing the Deceased's disappearance, but the brother advised otherwise and suggested a meeting whereat the way forward was to be mapped out.

23.7 PW2 met up with one Fusi whereupon she asked Fusi about the whereabouts of A3. The response was that the previous day A3 and A2 took a bag to the taxi rank.

23.8 The desperate unsuspecting PW2 innocently sought assistance from 'Makhotso Molise (A1) regarding the whereabouts of her mother. A1 said she did not know where the Deceased was. PW2 sought assistance from A1, for she thought she might have an idea when she (A1) last saw the Deceased as a neighbour.

[24] Instead A1 took PW2 to A1's sitting room and asked PW2 what A3 said concerning the Deceased. PW2's response was that A3 told her the Deceased went to see the Doctor.

A1 told PW2 the following:

24.1 That A3 said Deceased instructed her (A3) not to disclose to PW2 where she was. This piece of information puzzled her as the Deceased had other children. A1 further informed PW2 that A1_told her (A1) that Deceased was taken to Ladybrand by PW1 to see the Doctor in her own car.

24.2 As the duo were conversing a call came in from PW2's daughter, Zodwa advising that the mother should break into the Deceased bedroom to find out if the Deceased was not there. The daughter was calling from the RSA.

24.3 PW2 solicited assistance from A1 to accompany her to the place but the latter said:

24.4 "Not me please, look for another person". A1 suggested the name of one Matsina instead.

24.5 PW2 did not suspect anything on the part of A1 and went ahead looking for Mr. Matsina who agreed to assist.

24.6 Mr. Matsina used a crow-bar to force open the door to the Deceased's bedroom whereupon inside the bedroom the Deceased was discovered dead in a pool of blood. Matsina and another man pulled PW2 outside under the

tree. PW2 heard Matsina calling for A1 marveling at her that she was stunned and not helping them.

24.7 A1 ultimately came; and yet again the unsuspecting PW2 cried on her chest for consolation whereupon the latter “empathetically” responded that everything would be OK.

24.8 Matsina and his team awaited the arrival of the police. In the intervening period Matsina went to report to the Chief and police respectively.

[25] On the same day around 7.00 pm PW2 was called to A1’s place whereat A1 produced the following items of property: a 48kg cylinder gas, a cadac gas cylinder and 5kg cobra floor polish.

25.1 PW2 identified the property as hers which went missing from her bedroom. When asked by PW2 how she (A1) came by the property, A1 said she bought those items of property from A3.

25.2 Subsequently the police arrived, and took the Deceased body to the mortuary and did nothing to the property so produced. The following day they came in the company of A1 and A2.

25.3 The following day (on 15\08\2009), the police came at 9.00 am in the company of A1 and A2 and proceeded to the home of A1. Accompanying the police was Mr. Majara on behalf of the Chief. A1 produced items of property, namely: a 48kg gas cylinder, 5kg cobra polish; and a cadac gas cylinder.

25.4 PW2 positively identified the property as hers which went missing from her bedroom.

26.5 The following day 16th August, 2009 a certain woman came to her place. She informed her that she heard about what had happened at PW2's homestead. She went further to say A1 had left some items of property at her place of abode. PW2 proceeded to the place whereat the following property were produced: some pots, some sheets and some towels.

25.6 The above items were identified by PW2 as the property that went missing from her homestead. PW2 reported the episode to the Mabote police, namely Police Officers Itsana and Kubutu. At the Mabote police post PW2 found all the three accused present, including A3 whom PW2 had last seen on Wednesday when she arrived from RSA.

25.7 In the presence of PW2, A3 was confronted with the said property. A3 confirmed that the property belonged to PW2.

25.8 After some days PW2 received information which led her to Sea-Point whereat some items of property were produced, namely: a coffee set, wine glasses which were identified by PW2 as hers. The lady claimed to have bought the property from A1. Later in her evidence A1 confirmed this.

[26] Yet again after some days PW2 received information that A1 had a friend at Maqalika. PW2 went there in the company of the police. On arrival thereat a certain lady produced property, namely: some desert bowls, some glasses and confirmed that she bought same from A1. These were part of the missing property.

26.1 After some days, policeman Kubutu called PW2 to the Mabote police whereat she was to identify certain items of property. The property consisted of the following items: some plates, some mugs, some bowls, some towels, jug, a white sewing machine, some cell phones & a charger, shaving machine, some TV games and 7 table cloth.

26.2 The above listed property was identified by PW2 in the presence of A3 who confirmed that it was indeed PW2's property. PW2 had last seen A3 about a week ago and she had not reported to her where she was.

26.3 In the course of her evidence PW2 was, at the instance of the Crown accorded an opportunity to identify the items of property she had hitherto spoken about. The said property can be grouped as follows.

27.4 Property found\produced by A1 at her place consisting of 48 kg gas cylinder, 5kg cobra floor polish and Cadac gas cylinder.

The above were marked ID¹ for identification.

26.5 The property found from the lady at Ha Mabote consisting of 10 towels, curtains, 1 blue water jug, beer mugs, wine glasses, 1 champagne glass, 1 birth day glass, 4 beer glasses, 7 side plates, soup bowls, 1 computer mouse, 1 table cloth, 6 bigger side plates, 6 sweets bowls, 6 soccer games, amc pots, tuppertine salad dishes, TV games, 3 cell phones (Nokia, Motorola Phillips charger), soup mugs, 3 tuppertine dishes, tumbler with lids, 4 tuppertine bowls, tuppertine spoons, and ever-ready batteries R20.

The above were marked ID² for identification.

26.6 Property found at Maqalika consisting of Pie dish & a lid, salad dish & lid, Tea set (6 cups), 5 wine glasses and Kettle.

The above were marked ID⁴ for identification.

27.7 Property pointed out by A3 at Mohale's Hoek consisting of Sewing machine, 5 suit cloths (fabric) (2 grey, 1 charcoal, 2 black choke stripped back, and grey strips).

The above were marked ID⁵ for identification.

26.8 PW2 further testified that there were some items of property which went missing but were not part of the property that was retrieved. Such being the following a shaving machine, the blue seshoeshoe belonging to the Deceased, the seanamarena blanket, blue in colour and a brown leather jacket.

26.9 She could not get access to the store room as A3 said the Deceased took possession of the key to same. That the Deceased had gone to Ladybrand had been proved to be a lie drummed up by A3 acting in collusion with her cahorts clearly intended to mislead PW2.

[27] The cross-examination of PW2 was mainly focused on demonstrating that PW2 was confusing the dates in relation to her arrival back from the RSA to which PW2 honestly conceded that she might have confused the dates without vitiating the content of her entire evidence.

[28] It was suggested to PW2 that the deceased was, during her life time unhappy that PW2 kept her property in one of the rooms, for same had not been acquired through lawful means. PW2 was adamant that the suggestion could not be correct. Counsel for accused further put it to PW2 that before PW2 left for RSA the duo had quarreled over the property that was kept in one of the rooms, as the deceased was keen to renovate the room for occupation by A3. PW2 denied all this.

[29] It was further put to PW2 thus “A3 says when you were in RSA she (deceased) took advantage of your absence and she removed it”. “It is not true because if so, she could have told me before I left”. PW2 was further criticized for omitting some of the facts in her earlier statement before the police. PW2 was however, adamant that what she was telling the Court was the true state of affairs despite the omission(s).

[30] Counsel for the accused put it to PW2 that she could not say by what distinctive marks PW2 could identify the various items of property. PW2 responded by saying all the items retrieved had gone missing from her bedroom; and further that A1 led them to the property in issue.

[31] It is significant to note that even Counsel for the accused indirectly conceded that some of the items of property belonged to PW2. This could be gathered from question and answer thus:

Q: “Why these many cell phones, are you owning a shop?”

A: “They are old phones, and are no longer in use, except that one of my mum.”

31.1 All in all the cross-examination of PW2 centered on the items of property without mentioning how A1 & A2 came to be in possession of same or put differently, where and how the duo had acquired it.

[32] The evidence of PW3 (Lehlohonolo Moahloli) in the main is that he knew the Deceased during her life time. That he knows all the accused before Court. That sometime in early August, 2009 he happened to be in the company of A1, A2 and A3 whereupon one Thabiso Litabe joined them. That upon (his) Thabiso’s arrival he heard the trio conversing with PW9 about the bank cards, and it was PW9 who initiated the conversation around the Bank Cards. PW9 specifically inquired from A3 when exactly they were to execute what they had earlier discussed. That instead A1 responded not A3 to whom the question had been directed.

[33] A1 said they could only go to the ATM at certain times at night for if they were to go before then the maximum they could get was only M1,500-00. PW3 recalled that apart from ATM cards the trio also spoke about the money paid by the Chinese to the deceased during the period under review. PW3 further deposed that during the period under review A1 would constantly call A2.

[34] PW3 further deposed that when he, A1 called him aside and said PW3 “dare not talk about these”. PW3 interpreted this to mean that he “should keep mum about these issues of bank cards and money”. Consequent upon this episode, PW3 “would frequently hear A1 call A2 and sometimes A3”. The trio would go and gather at A1’s place or sometimes would be at Deceased’s place.

[35] PW3 deposed that the meetings would be held on a daily basis. To his recollection at the material time, the Deceased was still alive. The suspicious PW3 went to the extent of inquiring from A2 about the meetings, only to be told by A2 that those were strictly family issues with regard to which PW3 should not involve himself in. PW3 deposed that since that time he stopped visiting A2 on account of some misunderstanding between the two.

[36] The salient features of PW3's cross-examination focused on the following:

36.1 That PW3 was excluded from the company of A1, A2 and A3 because they avoided sharing alcohol with PW3 for fear that his parents might get to know that they drank together. PW3 denied this as "A2 never smelled of alcohol on his return from their company".

36.2 That A1 never uttered anything concerning bank cards and ATMs. The witness would not agree.

36.3 That A1 denied ever saying to PW3 that he "dare not talk about these things". In sum the accused denied that they ever conspired to commit any crime either against the Deceased or any of her personal property.

[37] PW4 (Fusi Makhata) deposed that she knows all the accused before this court. In particular she knows A3 as her Sister's friend, (Rethabile). She also knew the Deceased, Mrs. Manthakoana Mahase (alias Nkhono Sisi). PW4 deposed that sometime in August, 2009 she was staying at Khubetsoana and so were all the accused persons. A3 in particular was staying with and at Deceased's place. She deposed that sometime in August, 2009 PW4 paid a visit to A3 on her private matter.

PW4 deposed that after concluding their business A3 "out of the blue" said she could finish me without anybody noticing." After this A3 further said "we killed Sisi by suffocating her with a pillow." The witness exclaimed and said "you say these things and they may end up happening". They parted company.

[38] PW4 distinctly noticed during the period under review that A3 was frequently visiting A2 and *vice-versa*. Consequent thereto PW4 learnt that Nkhono Sisi had been killed. When she heard that Nkhono Sisi had passed on it was a matter of weeks after PW4 had been to A3's place. The cross-examination of PW4 focused mainly on denying that A3 ever said to her things she, PW4 attributes to her. For example A3's Counsel put it thus:

Q: "A3 says these things you are saying about her are your imaginations?"

A: "I cannot imagine such things."

[39] PW9 (Thabiso Litabe) deposed that he knows all the accused persons before Court. He further testified that around August, 2009 he was staying at the place of the Deceased though a scholar at Khubetsoana High School. He last stayed with Deceased in 2009. PW9 deposed that sometime in July, 2009 he attended on deceased's place to collect his Form C symbols, whereupon he saw the three accused persons with Fusi and Lehlohonolo, seated under the tree shade.

[40] PW9 deposed further that on his return from the deceased's house A2 called him and on arrival thereat A1 pleaded with him to secure them a customer for buying a drilling machine. PW9 says A1 said since they had already taken PW2's plates they might as well take the machine. A3 informed PW9 that she wanted to attend the funeral in Mohale's Hoek but could not raise funds for the journey. She (A3) said she would take deceased's bank card to draw money from Nutri-foods, but if not she would proceed to Ladybrand, or else she would get money from the house. A3 accompanied PW9 to the taxi stop whereupon the former met a dark complexioned male person driving a Colt vehicle. This according to A3, was a man she was working with.

[41] The cross-examination on this witness concentrated on the following: That A3 said PW3 once talked about ATM cards to A3 which version was denied by PW9, that PW3 never made any reference to the machine in his evidence, That A3 says although she had to attend the funeral in Mohale's Hoek she had no problems with funds, and that PW9 was not telling the truth. All in all the accused persons denied the version portrayed by PW9 on the material day.

[42] The evidence of PW6 (No. 7915 D/PC Kubutu) corroborates that of PW5 with particular reference to attendance at the scene of crime. The rest of PW6's evidence reveals the following:

42.1 That as at August, 2009 PW6 was stationed at Pitso Ground police station attached to the Serious Crime unit (SCU). He is one of the investigating officers *in casu* in which the Accused are charged with the murder and robbery of the Deceased, Mrs. 'Manthakoana Mahase.

42.2 That on the 14th August, 2009 whilst at Mabote police Station PW6 received a report in connection with the death of the Deceased.

42.3 That following the report, PW6 and PW5 proceeded to the scene of crime at around lunch time at Khubetsoana. On arrival thereat people had already gathered. The duo were led to the house of the Deceased and shown a room in which the Deceased was. They found the Deceased lying on the bed as if she was asleep covered with the bedding. PW6 uncovered the corpse that was wearing a hat, he observed that it had blood.

[43] PW6 observed that the deceased had not recently died; and estimated the death to have occurred one to two days prior to their attending the scene – He could gather this from the odour emitted from the corpse. The witness observed that the Deceased had sustained a wound, in the middle of the head; and another on the side of the head.

[44] PW6 and PW5 were shown another room, the door to which appeared to have been forced open by means of a hard object like a crow-bar. Inside this room things were scattered all over, plates, dishes and clothing were mixed up. The information they received was that other items of property were missing. The Lesotho Funeral Service vehicle arrived and the Deceased was conveyed to the mortuary.

[45] The following morning PW6 received information that two people had been arrested in connection with the death of the Deceased. Indeed upon arrival thereat PW6 found two suspects, namely, 'Makhotso Molise (A1) and Khotso Molise (A2). Having duly warned the suspects in terms of the Judges' Rules the duo freely and voluntarily proffered an explanation which led him to Khubetsoana.

[46] PW6 and PW7 reported their presence to the Chief of the area, Chief Lira Majara. Along with A1 and A2 they proceeded to the place of A1. PW6 and PW7 were led to the place by A1 who had informed the police that there was property thereat.

[47] Upon arrival thereat A1 produced a 48 kg gas cylinder still with gas, covered with red and white cloth. A1 also pointed out a five (5) litre floor polish which appeared to have been used previously and a blue cadac gas cylinder. After A1 had produced the items PW2 identified same as hers in the presence of both A1 and A2 as items which went missing from her bedroom which had been broken into. As she identified the property A1 and A2 confirmed that the items were hers.

[48] On the 18th August, 2009, PW6 received a call from a Mr. Tshabalala, the Prosecutor at Maseru Prosecution Office. A3 was handed over by Mr. Tshabalala to the police. A3 gave PW6 an explanation in the presence of PW7 and P\C Mohloai. Following her explanation which led them to Mohale's Hoek A3, PW7 and P\C Mohloai proceeded to the Mohale's Hoek district.

[49] On the 19th August, 2009 whilst at the Mabote police station PW6 received information from the Deceased's place at Khubetsoana. The information led him to Ha Mabote to one 'Malimpho Ncholu. She handed over to PW6 a "hold - all" bag containing some items of property handed in before the court as "Exhibit 2" collectively. The said 'Malimpho Ncholu gave a statement to the police that A1 had brought the items to her place.

[50] PW6 called PW2 to the police and at the material time 'Malimpho was present at the office. PW2 identified the items as hers except the "hold - all" bag. Momentarily A3 did identify all the items as PW2's except the bag which A3 claimed was hers. PW6 took possession of all the items of property that had been seized from divers places and handed same in as follows:

- ID¹ - "Exhibit 1" collectively, the items pointed out by A1 & A2 at A1's place.
- ID² - "Exhibit 2" collectively, items handed over by the Mabote lady

- ID³ - “Exhibit 3”, collectively items handed over by the Maqalika lady
- ID4 - “Exhibit 4”, collectively items retrieved from Sea-Point.
- ID5 - “Exhibit 5”, items pointed or produced by A3 in Mohale’s Hoek at the home of A3.

[51] PW6 as the chief investigating officer did after having cautioned the suspects, viz A1, A2 and A3 prefer against them charges of the murder and robbery of the Deceased, Mrs. ‘Manthakoana Mahase.

[52] The cross-examination of PW6 was mainly geared towards demonstrating that there were no distinctive marks by which PW2 claimed the property was hers. It is worth noting however, even the accused on the other hand did not claim directly or otherwise that the property belonged to them.

[53] The cross-examination of PW6 went as follows:

- That there was never a time when PW2 identified the property as hers – To which PW6 strongly disagreed.
- That the accused were never asked anything about the property – Similarly PW6 disagreed.
- PW6 was adamant that the Accused confirmed that the property belonged to PW2.

53.1 This court did in the course of cross-examination of PW6 pose the following question:

Court: “Are the accused going to say the property is theirs?”

Counsel: “No they are saying it’s not PW2’s property”.

53.2 Counsel for Accused had this to say in attempting to demonstrate that the 48 kg cylinder could not have been PW2’s:

Q: “Did she uncover the cloth and found the mark?”

A: “No she did not, she just knew it and Accused confirmed that it and Accused confirmed that it was her property.”

53.3 In reference to the cadac gas cylinder Counsel questioned thus:

Q: “She also said she would know the cadac with the letter “N” written?”

A: “No because accused also confirmed it as hers.”

[54] In sum Counsel attempted without success though, to say that there were no peculiar marks by which PW2 identified her property. PW6 on the other hand was adamant that there was no need to do so as the accused confirmed that the property belonged to PW2.

54.1 On yet another occasion the Court did pose the following question:

Q: “Is it going to be accused case that the property is theirs?”

A: “No, they were never asked to comment, even PW2.”

54.2 In yet another breadth, Counsel suggests that his clients were not at any stage asked to comment on how they came by the property in the course of investigations.

[55] The evidence of PW7 (D/P/C Itsana in material respects does corroborate that of PW6. PW7 is one of the investigating officers in this case in connection with the murder and robbery of the deceased. On the 19th August, 2009 PW7 had occasion to interview A3 who was a suspect in the case of murder and robbery. Having so interviewed the suspect, A3 freely and voluntarily gave him an explanation leading them to Mohale’s Hoek, Ha Potsane.

[56] PW7 proceeded thereto in the company of police officers Mohloai and Ntobo and A3 who was to produce certain items of property. Upon arrival thereat PW7 requested A3 to take the team to the chief of the area which she did. The chief joined the team whereupon A3 voluntarily in the presence of the chief took them to her homestead. It was around 11.00 am. At her homestead A3, produced and pointed out a white sewing machine, some Tupperware and fabric material (cloths), “Exhibit 1” collectively. A3 had earlier explained to the chief and her siblings the purpose of being there. A3 explained that those were the items of property she had taken from the deceased’s place in Maseru.

[57] PW7 testified that before he proceeded to Mohale's Hoek with A3 he in the company of PW6, proceeded to the home of A1 whereat she produced and pointed out the following items of property, viz, a 48 kg gas cylinder, 5 liter floor polish and cadac gas cylinder. PW2 immediately identified the property as hers; and this was confirmed by A1, 'Makhotso Molise. PW7 deposed that in the course of the investigation A1 took the police to Maqalika at one of her (A1's) friend. Thereat A1 produced and pointed out items of property consisting of dishes, saucers, glasses and dessert dishes. A1's friend explained that she bought the items from A1. The friend confirmed that she saw the items at A1's place.

[58] PW7 testified further that A1 led them to her friend at Sea-Point whereat she pointed out some dishes A1's friend indicated that she had bought the items from A1. PW2 subsequently identified items from both Maqalika and Sea Point as hers in the presence of A1. A1 on the other hand confirmed that this was the property she took from the Deceased's place. Following all this the accused persons were formally charged and remanded on the charges of murder and robbery.

[59] The cross-examination of PW7 was mainly focused on the statement or report he had made and was criticized for having omitted what Counsel referred to as "the most salient aspects of his evidence". PW7 was adamant that the court should attach greater significance to what he adduced before court as evidence. Consequently Counsel for the Accused strongly suggested that PW7's evidence was a fabrication, to which PW7 also strongly disagreed.

[60] Briefly the evidence of PW8 (Lithetha Kabane, Chief's Messenger) is as follows: He is a resident of Likoeneng Ha Potsane in the district of Mohale's Hoek. PW8 works as the chief's Right Hand Man he knows A3 from her childhood at Ha Potsane. By and large his evidence is corroborative of PW7's evidence in that on the 19th August, 2009 whilst on duty at Likoeneng A3 arrived in the company of the police. Upon her arrival PW8, A3 and the police proceeded to the home of A3 whereat they found one of A3's siblings, Katleho.

[61] At the home of A3 the police and the chief were led into the inner room at A3's homestead whereupon A3 explained that she was to produce the property she

had taken from Maseru. In the process, A3 produced a white sewing machine, five (5) fabric material (cloths), amongst which were a grey one with stripes and a black one. PW8 described the fabric material as similar to the ones from which suits are made or tailored. A3 further gave an explanation to the effect that those items of property were taken by her at the place where A3 was staying in Maseru. That at the time A3_{so} produced the items she was still normal, as she produced the property freely and voluntarily.

[62] The cross-examination of PW8 was geared among others towards demonstrating that when A3 produced and pointed out exhibit... She was not free and voluntary – To this PW8 responded by saying that A3 looked very normal as a child well known to him prior to the pointing out. The witness frankly conceded that A3 might have been scared or embarrassed on account of what “she did in Maseru”. In an attempt to dispel any voluntariness on the part of A3 Counsel put the following to PW8:

Q: “A3 says she was never free on the day?”

A: “I don’t know about that”

Q: “She says it is *moreso* because when she saw you were on the side of the police?”

A: “I was never on the police side, I was merely discharging my duties.”

[63] The prosecution adduced the evidence of PW10 (‘Malerato Mpete) as the last witness for the Crown. It be mentioned that this was after several postponements at the behest of the Crown as the prosecution was in dire need of calling a certain Mrs. Nholu in relation to the property retrieved at Ha Mabote, (Exhibit 2). This was all the *moreso* because the exhibit constitutes the greatest bulk of the property traceable to the homestead of the Deceased, Mrs. Mahase.

[64] PW10 deposed that she resides at Khubetsoana and is self-employed having gone as Junior certificate (Form C) at school. She knows A1 from their early childhood before they got married. A1’s maiden names are Matseliso Molapo, now Makhotso Molise. She knows A2 as A1’s first born child. She does not know A3 at all. PW10 further deposed that sometime in 2009 A1 once paid her a visit at

Boinyatso where she is currently staying. A1 on the other hand was, during the period under review staying at Ngoana-oa-lla, Khubetsoana. Both PW10 and A1 are bosom friends. A1 had come to her place to borrow some money to the tune of M100-00. PW10 did oblige and lent her the required amount.

[65] PW10 further deposed that after about a week or so, A1 once again paid her a visit. In the course of the duo's conversation A1 broke the news to her that a friend of hers had secured a job in the United States and the family was to leave soon. A1 informed PW10 that since the couple could not take all their property with them, they intended selling some of the property which included some household items such as dishes etc. A1 first thought of PW10 as she is the great lover of dishes. PW10 got attracted and promised to come for the inspection of the property. PW10 indeed turned up for the occasion and found the items displayed on the table. The property consisted of a variety of dishes with price tags. Albeit PW10 was not singularly impressed, she nonetheless decided to select some. The items she selected consisted of six side plates and six sweets bowls (Exhibit 3). The total cost of same was less than M100-00. PW10 deposed that an agreement had been that PW10 was to pay end of the month. After about a month as agreed PW10 attempted to get in touch with A1 telephonically, but she subsequently dropped the idea and decided to go to her place in person.

[66] PW10 deposed that on the way to A1's place she went via one of A1's neighbour's house just to greet. She duly informed the lady that she was proceeding to A1's place for a visit. The lady invited PW10 to sit down and started breaking the news to PW10 that A1 was a suspect in a murder case. At first PW10 was at a loss until the lady said something about the dishes. PW10 in turn informed the lady that now that there was mention of dishes her conscience was not at ease, as A1 had sold some dishes to her. The upshot of their meeting was that PW10 was shown and led to the homestead of the deceased which happened to be very close to that of A1's. PW10 got to know who the deceased was. PW10 proceeded to the deceased's homestead whereat she found PW2 who introduced herself as the child of the deceased herein. She too introduced herself to the lady and informed her the reason for her being there. PW10 invited PW2 to her homestead to identify (if she could) some items of property she had taken from A1. PW2 obliged.

[67] On arrival at PW10's place PW2 was shown the dishes placed on the table. These were six sweets bowls and six side plates. PW2 identified the dishes as those belonging to her homestead. The agreement was reached that there was need to report this to the police at Mabote police Station. The police did attend on PW10's place and obtained a tape recorded statement from PW10. PW2 was present at the material time. As PW10 was narrating how she came by "Exhibit 3" some of the police conducted a search in the house. A1 was not present at the material time. PW10 concluded her evidence by stating that she and A1 are best friends to date, to the extent that A1 commented that PW10 had forsaken her as they met at Court premises.

[68] The cross-examination of PW10 by Counsel attempts to portray a diametrically opposed version to that of PW10. It ran as follows:

68.1 Counsel for A1 suggests that "Exhibit 3" came from a lady called Lerato Sentle for whom A1 was to sell. PW10 frankly said she did not recall A1 ever mentioning the name Lerato Sentle.

68.2 The long and short of A1's defence is that A1 did in fact come by "Exhibit 3" through the agency of one Lerato whose family was migrating to the Republic of South Africa, Kimberly.

68.3 It is to be noted in the course of the cross-examination of PW10 Counsel had put the question thus:

Q: "Do you know A1's friend called Lerato Sentle?"

A: "I do not know her."

Q: "A1 informs me that this is the person who had asked her to sell her property before Court for her since Lerato was going to RSA Kimberly for good?"

A: "I don't recall her saying this."

Q: "A1 says "Exhibit 3" comes from Lerato Sentle?"

A: "I don't understand."

Q: “A1 says she sold the property for Lerato because she (Lerato) was going to RSA for good?” Before response....

A: “I don’t remember A1 saying so.”

[69] As will emerge later, not only was this type of questioning unfair to the witness but what sticks out like a sore thumb is that the duo were talking at cross purposes. Little wonder there was a heated debate during the re-examination of PW10 by the Crown on the very aspect. The defence objected thereto on the grounds that it amounted to leading fresh evidence. The Court ruled that the matter be left for argument. Albeit the matter had been deferred for argument, the following got clarified through questions for clarification by the Court.

Court: “Did A1 mention the name of the person going abroad?”

A: “No.”

The upshot of this was that PW10 said A1 never mentioned the name, referred to, rather it was the first time in this Court that she heard mention thereof.

DEFENCE CASE: EVIDENCE OF DW1 ‘MAKHOTSO MOLISE

[70] It is apposite to mention that after the unsuccessful application for the discharge of the Accused herein, DW1 elected to give evidence in defence of her case in this case. DW1 deposed that she was arrested on the 14th August, 2009 and has since then been in prison. DW1 confirms that she and the Deceased were neighbours and their homesteads were separated by a fence. DW1 further testified that she knows nothing about the death of the Deceased; and that she only knew on the 14th August that the Deceased was dead. It was after one Matsina had called her. She deposed further that she did not know how the Deceased herein met her death. DW1 further deposed that as regards the property she allegedly pointed out she never did, but rather that was her property, which PW2 “Nthakoana just came in my house without my permission and said it was hers.” And that she was never asked about same, and that it was at the time she was from police custody.

[71] DW1 deposed that on the 14th August, 2009 at around 10.00 am, PW2 attended on her place of abode. It was on this occasion that PW2 broke the news to her that her mother had disappeared and they were looking for her. DW1

responded by saying she last saw the Deceased on Tuesday, but A3 had told her that the Deceased went to Vereeniging to see her other children. PW2 told DW1 that they looked for the Deceased all over but all in vain, such that they thought of looking for the Deceased at old-age centres. DW1 corroborated PW2 that as they were conversing PW2's cell rang and it was her daughter Zodwa calling and this was in her presence. She further confirms that PW2 was advised by her daughter to force open the Deceased's bedroom. According to DW1, they agreed to heed the daughter's advice, and DW1 and PW2 parted company on the note that she was to hear from PW2 what became of the exercise. PW2 went to Matsina.

[72] It is worth noting that DW1 makes no reference to the plea (as deposed to by PW2) that DW1 should assist in the exercise. She further deposed that PW2 went to Matsina, suddenly Matsina called DW1 for assistance. On being called by Matsina DW1 abandoned everything, entered the Deceased's yard, assisted PW2 who was profusely crying. Only then did DW1 learn that Sisi was found dead in the house. DW1 deposed that PW2 handed over a cell phone to her and requested her to notify her next of kin. She obliged after which DW1 informed PW2 that she was proceeding to some place. Before DW1 left for the place she just went via to inquire if all was well with PW2. At around 5.00 pm PW2 called inquiring where DW1 was, to which DW1 replied that she was already on her way home. When she reached home it was already dusk, she went to Fusi and inquired about A2's whereabouts. On arrival thereat DW1 saw A2 in Matsina's van. A2 was in handcuffs.

[73] DW1 deposed that Matsina asked her about the whereabouts of A3, 'Mantoa. She responded by saying that A3 had gone to Mohale's Hoek to attend her grandmother's funeral. It was at this juncture that one Makoanyane handcuffed her accusing them of killing Sisi and also that DW1 was responsible for harbouring A3. As this was happening they were being whipped. Not long after this, PW2 and one 'Maseforo arrived, PW2 claiming that DW1 would surrender her missing property. DW1 responded by saying that the ones in the house were hers. PW2 went into DW1's house and pointed out a 48kg gas cylinder and claimed it was hers. DW1 did not respond as she was constantly being whipped. Momentarily PW2 also pointed out the pots. Surprisingly though, DW1 said "*Hela a ko tlohele lipitsa tseno tsa ka*". Ramokoena opened the vehicle door whereupon they proceed to Mabote police station. It is her evidence that it was the first and last occasion that PW2 claimed the cylinder was hers.

[74] DW1 was referred, in her evidence in chief to the evidence of PW6 to the effect that DW1 said A3 had sold her the property – DW1 denied this and said indeed she intervened to say “the property was mine.” DW1 deposed that the following day they were taken to Queen II Hospital, from Queen II they went to Mabote police whereafter a certain lady took them to DW1’s homestead. They proceeded thereto in the company of PW2, PW6 and PW7. On arrival thereat PW2 pointed out the following items of property, a 48 kg gas cylinder, a 5 liter floor polish and a blue cadac gas cylinder. A1 & A2 were ordered to load same onto the police vehicle. They were never asked how they came by the property as they were bull-dozed. DW1 denied that she said she had bought the property from A3.

[75] DW1 deposed that a certain lady by the name of Lerato Sentle had given her some property to sell on her behalf as the latter was migrating to Kimberly. The property consisted of wine glasses and many others. DW1 Confirmed that she did sell some items of property to PW10 ‘Malerato Mpete. The other property she sold to a friend at Sea-Point. DW1 testified that she was surprised that PW2 claimed that property as hers. She denied ever discussing anything with PW3, Lehlohonolo concerning ATM cards. She was adamant that she did not have anything to do with the death of the deceased herein. Under cross-examination DW1 confirmed that up until the death of the Deceased herein she was staying at Khubetsoana and was a very close neighbour of the deceased as their homesteads merely shared the fence. DW1 further confirms that she was on the best of terms with the deceased prior to or during her life time. And that the deceased used to send her children especially A2 for some errands. That as a close neighbour, DW1 used to visit the deceased to the extent of consulting her for advice whenever DW1 had problems. A day would not pass without seeing each other. Asked whether she knew that the deceased supposedly went missing during the period under review, DW1 said A3 told her that the deceased had gone to Vereeniging in the Republic of South Africa. DW1 does confirm though, that whenever the deceased went away, one of the neighbours would be in the know or notified, but that was not so this time around. DW1 was confronted with the undisputed evidence of PW1 that A3 told her the deceased had gone to the Ladybrand Hospital for routine check-up. She did admit that the two versions are different.

75.1 DW1 was pointedly asked thus;

Q: “You would not therefore dispute that whoever killed the deceased also wanted to rob her of her property?”

Q: “If deceased was found killed and her property was found missing, it is a bad suggestion that a person who killed the deceased was also interested in the property?”

A: “I am not sure about that because it could be taken while deceased was still alive or dead.”

75.2 DW1’s attention was, under cross examination drawn to the following:

- That one of the rooms at the Deceased’s place had been forced open; and some property went missing;
- That the Deceased’s bedroom was found locked and when forced open the Deceased was found dead;
- That the Deceased appeared to have been assaulted – All this DW1 confirmed.

[76] DW1’s attention was specifically drawn to her failure under cross-examination of PW2 to suggest that the Deceased was in Vereeniging and reference thereto was made for the first time in her evidence in chief – DW1 did concede to this omission. Taxed as to why she did not stay with PW2 for a longer period after the discovery of the Deceased body as a neighbor, she said she already had prior commitments of submitting her application for a job at Maseru Sun Hotel; since it was the last day of its submission. All this was done in a bid to demonstrate that this was just but a veiled attempt by DW1 to distance herself from the death of the Deceased. It was further put to DW1 that she conveniently went to town, for she knew she had a hand in the killing of the deceased, to which DW1 disagreed. DW1 was further referred to the fact that she knew that A3 had gone to Mohale’s Hoek for a funeral whereas PW2 did not know; all she knew was that A3 had mysteriously disappeared. DW1’s attention was yet again drawn to some striking aspect in this case, namely, according to PW1 the deceased had reportedly gone to Ladybrand, whereas A3 said to DW1 she had gone to Vereeniging - yet again A3 had informed DW1 that she had gone to Mohale’s Hoek for a funeral whereas PW2 could only say A3 had disappeared mysteriously, the latter having not informed her about her whereabouts. This, the cross-examination suggested, could only point to the duo having common purpose in the killing of the deceased herein.

[77] For the first time in her evidence in chief did DW1 refer to the episode when she was arrested by among others Matsina and one Makoanyane – All DW1 could say was that she says all this because it happened to her DW1 was challenged on this aspect. Viz; that she did not object to PW2 claiming the gas cylinder was hers, whereas she did so when PW2 “claimed” the pots as hers – All she could say was that at the time she was being assaulted but later the assaults stopped after the chief had intervened.

EVIDENCE IN CHIEF OF DW2 –MANTOA MOKOALELI

[78] DW2 (‘Mantoa Mokoaleli) deposed that her home is at Ha-Potsane in the Mohale’s Hoek district. She confirms that during the period under review, namely in August, 2009 she was staying with the Deceased herein, the latter having requested to stay with her free of charge. At the material time DW2 was self-employed running a saloon at the Offices of BCP in the Maseru Township. DW2 further testified that at the material time her relations with the Deceased were cordial, and that up until her death they had been staying together for a period of three to four months. She testified however, that the Deceased and PW2 did not see eye to eye on account of PW2’s behavior as the latter would not pay for water, electricity bill nor even buy food or groceries. As at August, 2009 DW2 had known both A1 & A2 before she could volunteer to stay with the Deceased. DW2 testified that on the 11th August, 2009 (Tuesday) she went to work as usual and when she knocked off she went to a friend’s place at Roma whereat her friend Atinoah had invited her to a farewell party.

[79] On the 12th August, 2009 when she knocked off from duty she proceeded to the home of the Deceased and this was on a Wednesday. On arrival there at she found the door to the Deceased’s home unlocked. According to her nothing was amiss and she proceeded to her bed room. When she went out she met up with PW2 at the door. The duo merely greeted each other without an incident. DW2 deposed that she momentarily sat down awaiting the arrival of a friend from Roma whose party she had attended the previous day. The friend ultimately arrived. It was at this juncture that DW2 informed PW2 that the property she had been using had been removed from her bedroom, to the adjacent outer store room by a certain Gentleman who used to assist the Deceased; and this was at the instructions of the Deceased. DW2 testified that at the material time PW2 did not inquire into the reasons why the property was removed, but only did so at a later stage. DW2

explained that the Deceased instructed that the property be removed for she wanted to renovate the bedroom in preparation for using same. Not all the property was removed. DW2 deposed that the Deceased had said she was free to choose the property she had interest in, and remove the rest to the store-room. It is worth mentioning that DW2 did not say which property she chose if at all she did. DW2 further testified that on the 12th August, 2009, she accompanied her friend and came back to put up in her room. She did not know where PW2 slept because PW2 had her own key and so did DW2.

[80] On the 13th August, 2009, DW2 went to work as usual and was preparing to go to Mohale's Hoek when she knocked off duty which she did. When leaving DW2 did not know the whereabouts of the Deceased as there was no response on knocking at the Deceased's bedroom. DW2 thought the Deceased had gone to Hospital (Ladybrand) as she had fallen ill on the evening of the 11th August, 2009. DW2 testified that when she left she never thought and or had any premonition about the Deceased. Thus DW2 went to Mohale's Hoek attending the grandmother's funeral, Alice Mokoaleli. DW2 testified that both the Deceased and PW2 knew that she would be attending the grandmother's funeral and would be in Mohale's Hoek effective from Thursday to leave on Tuesday of the following week. DW2 deposed that from Mohale's Hoek (after the funeral) she came to Maseru at the instance of one Tshabalala, the prosecutor at the Maseru Magistrates' Court, who had informed her that she was being sought by the police. Asked by her lawyer if from the 13th August, 2009 to Tuesday she had heard anything in relation to the deceased DW2 said:

“I got the first message from one of her sons, Mr. Thabiso Mahase asking me about the whereabouts of the deceased and her relation with PW2”I later received another call from PW4.... She called me on 14\08\2009 asking if I had heard about the passing on of the deceased – That's how I got to know about the death of the deceased”.

[81] The upshot of DW2's evidence is that Tshabalala handed her over to the police, the Mabote police after which she spent a night at police cells and was interviewed by a group of four police officers including PW6. DW2 testified that on Wednesday she was awoken very early, only to be told they were proceeding to the home of the deceased at Khubetsoana. She did not know the purpose of going there. On arrival thereat PW2 emerged in one of the rooms with her daughter.

They started scolding and shouting at her and as they did so villagers filed in. Police asked where the utensils were. She then pointed out the bucket and left with the police for Mabote police station. DW2 testified that on Thursday they proceeded to Mohale's Hoek at the instance of the police very early in the morning so that they could come back in time for her remand. On arrival at Mohale's Hoek the police said they were to confiscate things that were not hers. At her homestead the police took utensils, three jars and some Tupperware dishes. These were items the deceased had said she could choose for her use. DW2 deposed that from Mohale's Hoek they proceeded to the Mabote police post and was ultimately taken before Court for remand and has since been in custody.

[83] DW2 testified that she did not know anything about the death of the deceased, for her death occurred in her absence. She further deposed that she had informed both the deceased and PW2 that she was to attend her next of kin's funeral; and that is PW2 denied this she was not telling the truth. She denied ever discussing about ATM cards belonging to the deceased. DW2 denied the evidence by PW3 and PW4 concerning her participation in the death of the deceased or any conspiracy to kill and or rob of the deceased any property during the period under review.

[84] Under cross-examination DW2's attention was drawn to her failure, under cross-examination of the Crown witnesses that she was self-employed as saloon owner in town – To this DW2 agreed without much ado. DW2 was taken to task regarding her behaviour that is, going to the party at Roma when she knew the Deceased was not feeling well – All DW2 could say was that she went to the party after she had been home. The Deceased was not present; and she thought the Deceased had gone to see the doctor. DW2 was confronted with PW1's evidence which was undisputed that she (PW1) parted company with DW2 with a specific plea that should there be need to transport the Deceased to seeing the Doctor she was ready to assist – All DW2 could say was that the Deceased was still fine. DW2 attempts to deny that PW1 had been at Deceased's homestead three times on that day, and was met with a response from DW2 that the Deceased had not yet come back from Ladybrand. DW2 denied that PW2 asked her about the key to the Deceased's bedroom, yet DW2 did not challenge PW2 on this aspect under cross-examination. She conceded that it was the first time in her evidence that she (DW2) denied this. DW2 denied without success that the property kept in PW2's room was hers, yet she was unable to say which property in particular was not PW2's. She however, admitted that the sewing machine belonged to PW2.

84.1 In an attempt to demonstrate that DW2 was not honest with the court regarding how the property came to be in her possession she had this to say under question and answer:

Q: “The five fabric material (suit cloths) were also found in your possession”?

A: “Yes”.

Q: “Whose were they”?

A: “They were mine”

Q: “How did you acquire them”?

A: “I bought them”

Q: “Where”?

A: “From shops that sell clothes”

Q: “Which one in particular”?

A: “Indian shop called Woolwagon”

Q: “Where is it?”

A: “Here in Maseru”

Q: “When you told PW2 that deceased said you should choose the property of your choice, how did PW2 react?”

A: “I cannot recall”

Q: “Are you honest to this Court?”

A: “I am”

Q: “Are you aware of the seriousness of the charge you are facing?”

A: “I am”

Q: “Are you aware that it is the first time you say deceased had instructed you to choose the property found in your possession?”

A: “I am aware”.

Q: “You only say this to distance yourself from the charges you are facing?”

A: “I am not.”

[85] DW2 admitted saying to both PW1 and PW2 that the deceased had gone to Ladybrand and yet on the other hand A1 said in her evidence DW2 had told her that the deceased had gone to Vereeniging. All DW2 could say in response was that “I said she would go there during the course of the week so when she did not see her she took it that she had gone already.” She however, conceded that she never corrected A1 on this aspect in her evidence. It is worth noting that in her evidence in chief DW2 among others makes reference to the evidence of PW3,

PW4 and PW9 – In so doing she attempts to suggest that these witnesses falsely implicate her in this case. Surprisingly though, DW2 in her evidence in chief appears not to make reference to the evidence of PW7, which directly implicated DW2 with particular reference to the pointings out and other pieces of evidence. In sum DW2 indirectly suggests that on the 11th August, 2009, the day the Deceased is alleged to have been robbed of items of property listed in the indictment and murdered, she could not have been anywhere near the scene of crime as she had “visited” a friend at Roma. The issue whether or not DW2 was complicit in the crimes covered by the indictment will turn on the collateral issue, whether or not her story could reasonably possibly be true as will fully be ventilated hereunder.

[86] As intimated earlier the Crown relies on circumstantial evidence in this case, there being no eye-witnesses to the charges covered by the indictment. That notwithstanding the sole and overall issue that falls for determination by this Honourable Court is whether on the totality of the evidence led thus far, the Crown has proved its case beyond a reasonable doubt. It is common cause that A1 and A3 elected to take the witness stand at the close of the Crown’s case, having pleaded not guilty at the commencement of this trial. A2 elected to exercise his constitutional right to silence. Collateral to the issue whether or not the Prosecution has proved its case as postulated in para 39.2 (above), is the issue whether or not the defence explanation is reasonably possibly true.

[87] In light of absence of direct evidence in, the prosecution is faced with a challenge relating to the motive for the killing of the deceased herein. Albeit failure to prove one may not necessarily render the case for the prosecution insurmountable. As was stated in the case of *RV Kumalo & Nkosi, 1918 AD 500* at 504 (Per June CJ)

“The ordinary man does not perpetrate a grave criminal offence without a motive; and although it is not essential, nor always possible, to ascertain what it was, the matter is often of considerable importance.”

Following its forerunner, the case of *R V Mlambo 1957 (4) SA* at 737 laid down (per Malan J.A.) the principle thus:

“proof of motive for committing a crime is always highly desirable, more especially where the question of intention is in issue”.

87.1 In the instant case motive for committing the fatal assault by the deceased’s assailants can be inferred from the surrounding circumstances as will fully be demonstrated hereunder. The issue whether or not the prosecution has proved its case or rather discharged its onus should be viewed in the light of trite law thus:

“It is for the crown to establish the guilt of the accused not for the accused to establish his innocence.”

87.2 It is common cause in this case that the evidence adduced by the prosecution is wholly circumstantial. In the premises and as enjoined by the law the prosecutions:

“can discharge the onus.....by proof of facts from which a necessary inference may be drawn.”

In the case of *R V Difford, 1937 AD 370* at 373 Greenberg J had this to say:

“...the Court is not entitled to convict unless it is satisfied not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, he is entitled to his acquittal.”

Conversely, there is authority for the proposition that:

“...proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt..”

Vide: *R V Minister of Pensions 1947 2 ALL ER 372* at 375

[88] In the instant the accused persons deny complicity in the commission of the charges they are facing. However, it is worth noting that their denial of complicity is but a bare denial unsubstantiated by clear evidential material upon which this court is to hold in their favour. It is common cause in cases of this nature, for an accused person to raise a defence commonly referred to as an *alibi*. DW2 remotely attempts to raise a similar defence indirectly. DW1 on the other hand remotely attempts to suggest that the property found in her possession traceable to

the deceased's homestead had been innocently acquired. On the contrary the prosecution has placed some credible evidential material from which this court is invited to draw the necessary inference(s) regard being had to the surrounding circumstances in this case. To this end the prosecution hereunder deals with facts which are common cause.

[89] The issue for determination by this court given the evidence led thus far both for the prosecution and the defence is who of the three accused persons can be held complicit in the charges covered by the indictment. *In Maboso & Another V Rex, LAC [1980-1984] 256 at 258-259*, the following dictum in *S V Madlala, 1962 (2) SA 637 (A) a 640* was quoted and approved by the Court of Appeal:

“It is sometimes difficult to decide, when two Accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither...., an accused may be convicted of murder if the killing was unlawful and there is proof:

- (a) That he individually killed the Deceased, with the required dolus, e.g. by shooting him, or
- (b) That he was a party to a common purpose to commit some other crime, and he saw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequences, and it occurred;
- (c) That the Accused must fall within (a) or (b) or (c) – it does not matter which, for in each event he would be guilty of murder.”

[90] Against this backdrop therefore, it is necessary to interrogate and consider the proven conduct and/or participation of each accused in order to establish whether the particular accused is guilty of the charges against him. As stated earlier it is common cause that the accused stand arraigned with the murder and robbery offences. As postulated earlier owing to lack of direct evidence herein establishment of motive for killing of the Deceased herein is of considerable importance. That said however, there is authority for the proposition that “failure to furnish absolutely convincing proof thereof, does not present an insurmountable obstacle...” In the instant case, the inference is inescapable that the assailants of the Deceased herein perpetrated the act upon the Deceased for the sole purpose of stealing her property by using violence (as they did) resulting in the death of the Deceased herein.

PARTICIPATION OF A1: CASE AGAINST A1

[91] The issue whether or not the prosecution has established overwhelmingly strong evidence against A1 calling for a reasonably possibly true explanation should be viewed in the light of the evidence adduced both for the crown and the defence. The case against A1 and her participation in the commission of the offences charged largely hinges on circumstantial evidence and other pieces of evidence as deposed by prosecution witnesses. The prosecution case Against A1 among others being that on the same day as the deceased was discovered dead, some items of property missing from PW2's room were found in the possession of A1 at her homestead – Such being: a 48 kg gas cylinder, a cadac gas cylinder, a 5kg cobra floor polish. Not only did PW2 identify the property as hers, A1 also proffered an explanation to the effect that she had bought the items of property from her co-accused, 'Mantoa Moakoaleli. What remains to be decided however, is whether her explanation is reasonably possible true regard being had to the totality of evidence adduced. On the 15th August, A1 gave PW6 and PW7 an explanation following which she took the police to her homestead whereat in the presence of the Chief A1 pointed out Exhibit 1, which property was identified by PW2 as hers. Both A1 and A2 confirmed that Exhibit 1 was PW2's property.

[92] There is evidence by PW10, "Malerato Mpete that sometime in August, 2009 A1 sold her Exhibit 3, alleging that same was being sold at the request of a friend who was to migrate for good to the United States of America. Exhibit 3 was subsequently positively identified as PW2's property. It is noteworthy that at no stage did she dispute PW2's identification of Exhibit 3 except to indirectly suggest that she might have come by same innocently (through the agency of a friend).

[93] There is evidence that at a certain lady's homestead at Sea-Point PW2 identified Exhibit 4 as items of property traceable to her homestead. The lady claimed to have bought the property from A1. Indeed A1 confirms this in her evidence, but insists she had sold same on behalf of a friend proceeding to Kimberly in the RSA.

[94] There is evidence that shortly prior to the death of the Deceased A1, A2 and A3 conspired to steal ATMs Bank cards belonging to the Deceased, which conduct clearly pointed to the accused persons motive during the period under review – It

was no accident therefore, that a few days thereafter the Deceased was found dead at her homestead and certain of her personal belongings went missing from the house.

[95] Most significantly, after the alleged conspiracy, A1 strongly warned A3 to “dare not disclose” and or talk about what he had heard during this conspiratorial meeting held under the tree. A2 did not, as it turned out in his turn say anything.

[96] There is evidence pointing to A1’s conduct in her refusal to take part in force opening the deceased’s bedroom, suggesting instead the name of one Matsina as a person best suited to get involved in the exercise – A1’s conduct in this regard left much to be desired.

[97] There is evidence that a certain ‘Malimpho Ncholu produced Exhibit “2” alleged to have been brought by A1 to her which property was identified by PW2 as hers forming part of the property missing from PW2’s homestead during the period under review.

[98] There is evidence that twice during the cross-examination of crown witnesses, the court did inquire whether the accused persons “would say the property was theirs” whereupon the court was merely told the property was “not PW2’s property, ...were never asked to comment even PW2.” These vague responses to such crucial questions are not to be taken lightly. This court thought this was very significant.

[99] There is evidence that during the desperate search for the Deceased by PW2, ‘Makhotso voluntarily broke the news to PW2 that A3 said Deceased had strongly advised against revealing her whereabouts to PW2. This is in stark contrast to A1’s evidence at a later stage that A3 had told her the Deceased had gone to Vereeniging in the R.S.A. A1’s conduct in this regard leaves much to be desired.

[100] There is evidence that, a little while after consoling the sobbing PW2 (after the discovery of the Deceased) A1 for some inexplicable reasons unceremoniously

disappeared only to say she had been to submitting her applications for a Job in Town, A1 's behaviour in this regard "raises eye brows".

[101] There is evidence that A1 had been informed by A3 that the latter would be proceeding to Mohale's – Hoek for the grand-mother's funeral when in fact this was not conveyed to PW2, a person who ought to have had first hand information about A3's movements and whereabouts. A1's and A3's conduct leaves much to be desired on this aspect.

[102] There is evidence that A1 made mention of Lerato Sentle as a person she sold some items of property at her behest for the first time under cross-examination of PW10. This aspect ought to have been put to PW2 at the very least-similarly A1's conduct leaves much to be desired on this aspect.

[103] There is evidence by A1 (DW1) that she strongly objected to PW2 claiming that the pots at DW1's homestead belonged to PW2 whereas initially she had not objected to PW2 claiming that the gas cylinders were hers. A1's conduct in this regard leaves much to be desired. On the whole the evidence against A1 became overwhelming.

PARTICIPATION OF A3: CASE AGAINST A3

[104] As earlier postulated, the issue whether or not the prosecution has proved its case against the accused should be viewed in the light of the evidence adduced both for the Prosecution and the defence. The Crown had established a very strong case against A3, who has elected to take the witness stand. The issue that falls for determination by the court being whether A3's story is reasonably possible true.

[105] As in paragraph (above), similarly participation of A3 in the commission of the offences charged hinges on circumstantial evidence, coupled with other pieces of evidence as deposed by various witnesses for the Prosecution. A3's participation and or conduct should be looked at in the light of the totality of the evidence led, pointing to among others the role she played in the present case. There is evidence adduced by PW1, Mrs. Kolobe to the effect that on the morning of the 12th August, 2009, A3 informed her that the Deceased had gone to see the

doctor. at Ladybrand Hospital. This turned out to have been a ploy intended to mislead the people who wanted to know where the Deceased was at the material time.

[106] There is evidence by PW1 that upon parting ways with A3 on the 11th August, 2009, she had requested to be informed, should the Deceased fall sick again as PW1 was willing to assist in the transportation of the Deceased – It turned out that A3 acted contrary to PW2’s request because at no stage did the Deceased go to Ladybrand during the period under review. A3’s conduct on this aspect leaves much to be desired.

[107] Similarly, there is evidence that A3 repeated the same story to PW2 concerning the whereabouts of the Deceased during the period under review. Yet again A3 on being asked about the key to the Deceased’s bedroom, she said the Deceased took the key with her when proceeding to Ladybrand- A3’s conduct on this aspect speaks volumes.

[108] Pricked by guilty conscience, A3 uninvited decided to inform PW2 that at the instructions of the Deceased PW2’s bedroom had been forced open and the property therein removed to the adjacent store room outside the main house. Most interestingly, A3 “forgets” to further inform PW2 that the Deceased had further instructed that she could choose and pick any property that could be of interest to her for permanent use. A million dollar question is: why not mention this important aspect to PW2 and not defer same until the stage of her evidence in Chief?!!

[109] There is evidence that shortly after the arrival of PW2, A3 disappeared and only surfaced on the 18th August, when a certain Mr. Tshabalala handed her to the Mabote Police. For some inexplicable reasons A1 happened to have known about the whereabouts of A3. A million dollar question is: Why not inform PW2 that she was to attend the grand-mother’s funeral at the time when all and sundry were tirelessly looking for the Deceased who was last “seen” by A3 when proceeding to Ladybrand on the 12th 08\2009?!! The only explicable reason could be none other than that A3 was gnawed by guilty conscience – A3 knew it was inevitable that the Deceased would finally be discovered.

[110] There is evidence that A3 was present at the meeting attended by A1 and A2, at which meeting a conspiracy was planned to steal the Deceased's bank cards, and that at the material time the Deceased was still alive. This was followed by a robust warning that the witness "dare not disclose this to anybody". Notably, a few days thereafter the Deceased who had supposedly gone to see the doctor at Ladybrand Hospital is discovered dead in her bedroom with serious fatal injuries.

[111] There is evidence that A3 uninvited voluntarily made an admission "we killed Sisi by suffocating her with a pillow." It would appear that during the period under review PW4 singularly noticed frequent visits paid by A3 by A2 and *vice-versa*.

[112] There is evidence that prior to the death of the deceased A3 was seen in the company of both A1 and A2 seated under a tree, whereafter A2 called PW9 only for the latter to be informed by A1 that PW9 should secure a customer for them for buying a drilling machine. The question is whose machine?

[113] There is evidence that A3 did identify "**Exhibit 3**" produced by a Ms. Ncholu at Ha Mabote as belonging to PW2 which property had allegedly been left at Ncholu's place by A3. It is significant to note that A3 claimed the "hold-all-bag" in which "**Exhibit 3**" was contained as hers, and PW2 did not dispute the fact. This leads to the conclusion that A1 and A3 at all material times, shared a common intention in pursuit of the unlawful purpose to commit the crimes covered by the indictment.

[114] There is evidence that whilst in the custody of the police at Ha Mabote (and following her surrender by a Mr. Tshabalala), A3 proffered an explanation leading to Mohale's Hoek whereat A3 pointed out "**Exhibit 5**" which was subsequently identified by PW2 as hers. It is noteworthy that in particular A3 admitted that the sewing machine belonged to PW2, albeit she denied that the fabric materials belong to PW2. Of great significance though, is how she came by the sewing machine, whether her story in regard thereto be reasonably possibly true.

[115] There is evidence that it was the first time and only in her evidence in chief that she alleges to have taken possession of “**Exhibit 5**” at the instructions of the deceased – This fact she admitted.

[116] There is evidence that it was the first time in her evidence in chief that A3, made mention of her being self-employed, running a saloon in Town, a fact she never disclosed and or failed to put to the Crown witnesses under cross-examination .

CONCLUSION OR INFERENCE TO BE DRAWN FROM THE EVIDENCE

[117] The Crown correctly demonstrated that the circumstantial nature of the evidence led by the Prosecution, this court was invited to have regard to the cardinal rules of logic governing circumstantial evidence in the celebrated case of *R V Blom, 1939 AD 188 at 202-3*. The rules were laid down thus:

1. The inference sought to be drawn must be consistent with all the proved facts; if not, the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn; if these proved facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[118] The Court of Appeal (per Browde J.A) in *Veddie Sello Nkosi V Rex, 1993-1994 LLR 39* at 44 quoted with approval the following from Best, Evidence (5th Edition, sec. 298):

“Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather – Join them together, you find them pressing on the delinquent with the weight of a millstone...”

[119] In the case of *Frank Lebeta & Another, 1993-94 LLR 473* it was held that where circumstantial evidence is involved, the test is not whether individual

circumstances are sufficient weight, but whether when taken together circumstances justify a conclusion that an accused person's guilt has been proved beyond a reasonable doubt.

[120] In the present case, the question that arises is whether the circumstantial evidence alluded to herein proves the guilt of the Accused beyond doubt. Put differently, could it be said the evidence led thus far irresistibly points to the accused persons as guilty parties?

[121] In the present case, the prosecutions evidence points to the guilt of the Accused with the following facts:

1. First, that the deceased did not die of natural causes permits of no doubts she was murdered.
2. Second, the motive for the killing of the deceased was none other than robbery – The removal of various items of property (exhibited before Court) from PW2's bedroom by the assailants of the deceased bears clear testimony to the motive for the fatal assault upon the deceased.
3. Third, the identity of deceased's assailants could be none other than 'Makhotso Molise (A1) and 'Mantoa Mokoaleli (A3) in whose possession was found items of property traceable to the deceased's homestead. Most significantly, the exhibited items were not only positively identified by PW2, but the accused did at some point or other, admit that such items had been taken from the Deceased's homestead.
4. Fourth, both A1 & A3 failed to proffer plausible explanations how each came by the said items of property, recently removed and or stolen from the Deceased's home stead, under circumstances indicative of violence having preceded their taking or acquisition.

WHETHER ACCUSED EXPLANATIONS ARE RESONABLY POSSIBLY TRUE

[122] As I observed, the guilt or otherwise of the Accused in the present case should be decided in the light of the issue whether their explanations or stories could reasonably possible be true. This court is respectfully invited to approach this case holistically bearing in mind *inter-alia* the versions presented by both the Crown and the defence. In *S V Chabalala, 2003(1) SACR 134 at 139 – 140* the Court had this to say:

“The correct approach is to weigh up all the elements which points towards the guilt of the Accused against all those which are indicative of his innocence taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs heavily in favour of the state as to exclude any reasonable doubt of the accused’s guilt.”

[123] The upshot of A1’s explanation is simply that she innocently acquired “**Exhibit 3 & 4**” collectively through the agency of one Lerato Sentle on behalf of whom she sold “**Exhibit 3**”, and another friend of hers staying at Sea-Point in the Maseru district. A million dollar question is: why did A1 not call Lerato as defence witness in support of her version “indicative “of her “innocent” acquisition of “**Exhibit 3**?”

123.1 Yet another question to pose is: Why did A1 say she bought “**Exhibit 1**” from A3 when confronted by PW2 as to how she came by the property?

123.2 In so far as “**Exhibit 2**” is concerned, why would A1 deposit same at a friend’s place at the crucial period when the Deceased had been discovered dead; and certain items of property had gone missing from Deceased homestead? Wasn’t this intended to hide the origin of the property until the dusk would have settled?

[124] As the Crown correctly submitted, there appears to be two conflicting versions about the Deceased’s whereabouts. A1 said the Deceased had gone to the Ladybrand Hospital to PW1 and later to PW2. A1 for the first time in her evidence in chief said A3 told her the Deceased had gone to Vereeniging - RSA: Why should there be these conflicting versions on so “**colourless**” a fact? The most striking fact being A3 never mention this to PW2 – All she could say to PW2 being that A3 said the Deceased had advised that PW2 be not told about the latter’s whereabouts.

124.1 Why should A3 fail to inform PW2 about her journey to Mohale's Hoek for a relative's funeral, and yet without fail informed A1. Was this not a veiled ploy by both that A3 should be nowhere near the homestead of the Deceased in case she was discovered?

124.2 Why should A1 be so evasive in assisting PW2 in carrying out the exercise of force opening the deceased's bedroom?.....A1's conduct was clearly consistent with someone with guilty knowledge!!

124.3 A1's abrupt disappearance shortly after the discovery of the deceased leaves much to be desired. The excuse for having not stayed longer as a close neighbor neighbour is far from convincing!!.

124.4 In sum, it is submitted that the conduct of A1 points towards her guilt in the commission of the offences charged.

ACCUSED NUMBER TWO (A2'S) EXPLANATION

[125] As the Crown correctly submitted, the evidence adduced by A2 could be dubbed the most convoluted evidence ever to be led before a Court of law. A2 attempts without success though to advance the defence of *alibi* in an indirect manner. In doing so she ends up telling a pack of lies from beginning to end.

[126] According to the correct submission of the Crown, the entire evidence adduced by A3 should be viewed in the light of the following, which strongly militate against her evidence being, reasonably possibly true:

1. Why would A3 paint the relations between the Deceased and PW2 as not being cordial during the period under review? Was this not a veiled attempt to insinuate that PW2 might have been responsible for the death of the Deceased? After all, what is the relevance of this piece of evidence?
2. Incidental thereto, if the duo were not on the best of terms, why did PW2 take the liberty of presenting the Deceased's great grand-child to the latter for farewell bidding?

3. If on the 12th August, 2009 the Deceased had gone to Ladybrand to see the doctor as alleged by A3, why wouldn't she inform PW1, who had earlier demonstrated unwavering willingness to assist in the transportation of the Deceased in case she fell sick yet again?
4. What prompted A3 to spontaneously inform PW2 shortly after her arrival that at the instructions of the Deceased her bedroom had been broken into and the property contained therein removed to the adjacent store-room? The answer is simply that her conscience gnawed her.
5. Furthermore, why did A3 hide from PW2 the "fact" that the Deceased had given further instructions that she could pick and choose any items of property from PW2's bedroom that could be of interest to her, and that she (A3) did? This aspect exposes A3 as a consummate liar bent on misleading this court. It be noted that A3 only makes mention of this for the first time in her evidence in chief. This goes contrary to the principle that a party should put to each opposing witness so much of his own case or defence. See *Small V Smith, 1954(3) SA 434 (SWA)* at 438 per (Claasen J).
6. Yet again, why would A3 deny the fact that PW2 did ask her at some stage about the Deceased's bedroom's key, and yet this fact was not denied by A3 under cross-examination of PW2?
7. Why would A3 opt for attending a friend's party when she knew the deceased (someone she had been specifically engaged to look after) was not feeling well or rather that her health was not satisfactory during the period under review?
8. Why would A3 disappear in the midst of a diligent search for the deceased whom A3 had last seen on the 12th August, 2009 when "proceeding" to Ladybrand to see the Doctor?!! Most significantly, why would A3 not inform PW2 about her intention to proceeded to Mohale's Hoek for a relative's funeral? It is clear that A3 was bent on removing herself from the murder scene (the deceased's homestead).

9. A3's explanation is that whilst in police custody they took her to Mohale's Hoek not knowing what was to happen there. The police on the other hand say it was following her explanation that they proceed thereto - Is A3's explanation in this regard reasonably possibly true? It is not for, at her homestead A3 pointed "**Exhibit 5**" traceable to the home of the deceased. These items of property having been positively identified by PW2 as hers.
10. A3 positively identified and confirmed that "**Exhibit 2**" handed over to the police by Mabote lady was PW2's property with the exception of the hold-all bag. Why wouldn't she explain how her own bag landed in the hands of A1 and the Mabote Lady respectively? The inference is irresistible that A3 acted in collusion with A1 in illegally acquiring the property in issue.
11. Why would the following witnesses, namely PW4, PW5 implicate A3 falsely in their evidence in the absence of any animosity existing between and among them during the period under review.

[127] The above listed scenarios clearly point to A3's explanation as not being reasonably possibly true. Indeed her entire evidence goes contrary to the well established principle enunciated in *Mlambo* (supra) at 738 thus:

"An accused's claim to the benefit of a doubt.... must not be derived from speculation but must rest upon a reasonable and solid foundation either created by positive evidence or gathered from reasonable inferences which are not in conflict with, or out neighbour by the proved facts of the case"

[128] In the case of *R V Matamo Sehlabaka*, CRI\T\22\88 (unreported) at page 65 Lehohla J quoted with approval the principle (dictum) per Lord Doblin in *Broadhurst Vs Rex, 1964 AC44 at 457* wherein it was said: "save in one respect, a case in which an accused gives untruthful evidence is not different from one in which he gives no evidence at all." The same could be said of accused number three in the present case. As earlier argued her evidence is riddled with improbabilities rendering her evidence false from beginning to end.

EXISTENCE OF COMMON PURPOSE BETWEEN THE ACCUSED

[129] Against the backdrop set out above, there remains the issue whether there exists a common purpose between the accused herein. It is to be noted that albeit the indictment does not in the present case specifically allege common purpose between the accused, both the evidence and probabilities strongly point to the existence of same.

[130] Judicial authorities describe a common purpose as “**a purpose shared by two or more persons who act in concert towards the accomplishment of a common aim**” Vide: *Magmoed V Janse Van Rensburg & others , 1993(1) SACR 67 at 95(i)*. Decided cases have gone further to observe that: “**A common purpose may arise by prior agreement between the parties...It is seldom that there is direct evidence of such an agreement. Usually the Court is asked by the prosecution to infer it from the proven facts**” Vide: Rensburg case (supra) (96 e-f). In the instant case this Honourable Court is respectfully invited to pay regard to the following pieces of evidence hitherto constituting proved facts:

1. That a few days prior to the death of the deceased herein, both A1 and A3 (in the presence of poor A2) were seen and found seated under the tree, whereat in the ensuing meeting there was some discussion around stealing ATM bank cards belonging to the deceased.
2. That consequent upon the said discussion one of the witnesses for the prosecution was strongly warned to “**dare not**” disclose the import of the discussion to anybody.
3. That some time after the aforesaid meeting the deceased was discovered dead under circumstances indicative of robbery as a prime motive for killing her.
4. That A1 living in the same neighbourhood as the deceased was found in possession of items of property which had recently gone missing from the house of the deceased. A3 on the other hand was found in possession of the property traceable to the deceased homestead. Most importantly, her explanation regarding possession of same is demonstrably false.

[131] Given the state of affairs referred to herein the inference is irresistible that A1 and A2 acting in concert were responsible for the fatal killing of the deceased the motive for which was robbery. I agreed.

PARTICIPATION OF A2, KHOTSO MOLISE

[132] It is common cause that A2 elected not to adduce evidence in the present case, despite the Court dismissing his application for discharge at the close of the Crown's case. The issue that falls for determination by the court is whether or not the evidence adduced by the prosecution hitherto is conclusive against the second accused. The issue pertaining to the participation of A2, it is submitted should be viewed in the light of the evidence led against him necessarily calling upon him to proffer an explanation. In the instant case the role played by A2 in the whole scenario, seems to have been peripheral, perhaps it may be said owing to his tender age during the period under review.

[133] That said however, there is evidence that A2 was present at a meeting at which there was discussion around the ATM bank cards. Albeit it is not clear the role A2 played, his mere presence could be inferred as associating himself with the resolutions that might have been reached in the ensuing meeting. There is evidence that both A1 & A2 confirmed that the property found at the home of A1, namely a gas cylinder and a five kg floor polish belonged to the deceased.

[134] There is further evidence that at some stage A2 solicited participation of PW9 in securing a prospective customer for purposes of buying a drilling machine. There is evidence that suspicious of the frequency of the daily meetings held by A1, A2 & A3, Lehlohonolo Moahloli confronted A2 about same; and the latter responded by saying those were strictly family issues in regard to which PW3 should not border to involve himself. The question that could legitimately be posed is: Were these not the same meetings at which a conspiracy was initiated to rob the deceased of the property found in the possession of each of the accused?

[135] There is authority for the proposition that where the evidence led by the prosecution is such that an explanation ought in the circumstances to be given by

the accused in Court, he should give it, and if he fails to do so, what had hitherto been a prima-facie case may thus become a conclusive one. vide: May – *South African cases and Statute on Evidence* (4th ed.) p. 27. Mindful that the mere fact that the accused failed to give evidence does not in any manner supply proof, but merely strengthens the evidence adduced, it is submitted that in the present case the following remain unanswered:

1. Was A2 merely innocently dragged into these criminal acts without knowledge of what was happening owing to his tender age?
2. Was A2's confirmation of the property found at his parent's home as PW2's based on his prior knowledge thereof by virtue of having seen same at the home of the deceased?
3. Could A2 have been falsely implicated by PW3 in his evidence. If yes, why would he falsely implicate him?

[136] In sum it was submitted that participation of A2 was not by any strength of imagination, innocent. In the premises it is submitted that his participation at the very least could be limited to being an accessory after the fact, as his association with A1 and A3 could not have been an innocent one.

[137] It was submitted in sum that the Crown has successfully discharged its onus and that the A1 and A3 herein ought to be found guilty on both charges (murder and robbery). As intimated, A2 ought to be found guilty as an accessory after the fact, on account of the role he appears to have played in the present case. I agreed in toto.

T. E. MONAPATHI
ACTING CHIEF JUSTICE

For Crown : **Adv. L Thetsane assisted by Adv. Fuma**
For Accused : **Mr. Nteso**

CRI/T/39/2010

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

REX Crown

And

‘MAKHOTSO MOLISE 1st Accused

KHOTSO MOLISE 2nd Accused

’MANTOA MOKOALELI 3rd Accused

JUDGEMENT ON EXTENUATION

Coram : Hon. Acting Chief Justice T. E. Monapathi
Date of Hearing : 27th June, 2014
Delivery Date : 22nd July, 2014

SUMMARY

The court is enjoined to spell out extenuating factors in terms of section 296 (1) of the Criminal Procedure and Evidence Act 1981, which is the “second” phase in criminal proceedings and in charges like the present. It is mandatory. There is supposed to be a distinction between extenuating factors and mitigating factors. The latter belongs to the third phase of the proceedings. There is aggravation where a robbery resulted in murder as in the present on the two co-existed. Youth and immaturity taken as extenuation in favour of Accused 2 and 3. No extenuation was found in favour of Accused 1.

CITED CASES

Letuka v R LAC (1995 – 1999) 405 at 419 – 420 (A)
Matsoai and Others v ex 1967 – 1970 LLR 70 at 75 (D)
DPP v Marabe, 2000 – 2004 LAC 385
Mona and Another v R 1985 – 1989 LAC 364 at 367-68 (J-A)
Molata v R 1985-1989 LAC 229
Rex v Biyana, 1938 E.D.L. 310 at 311
R v Fundakubi and Others 1948 (3) SA 810 at 818
S v Let’solo 1970 (3) SA 476(A)
Lekoloane v the State, (1985) B.L.R. 245 at 249
Lefaso v Rex, LAC (1990-1994) 44

STATUTES

Criminal Procedure and Evidence Act, 1981

BOOKS

Commentary on the Criminal Procedure Act of South Africa

[1] The three (3) accused persons before this court were facing the charges of:

Count 1 – Murder

Count 2 – Robbery

[2] The Accused pleaded not guilty to the charges covered by the indictment at the commencement of this trial. Crown then led viva-voce evidence of no less than ten (10) witnesses at the end of which Accused 2 who is 24 years of age applied without success for his discharge. It was only Accused 1 who is 47 years of age and Accused 3 who is 30 years of age who took the witness stand in defence of their case. A2 on the other hand elected to exercise his constitutional right to remain silent.

[3] It is common cause that at the end of the trial and after the closing submissions both by the Crown and defence, Accused 1 and Accused 3 were found guilty as charged on both the murder and robbery charges as principal perpetrators. Accused 2 on the other hand was given the benefit of doubt by this court as a result of which the court only found him guilty as an accessory after the fact on account of the role he appeared to have played in the commission of the crime in this case.

[4] This court has pronounced its verdict of guilty as charged as aforesaid. The court is enjoined by the law at this stage of the trial, to proceed to the mandatory “second phase enquiry”. Indeed judicial authorities are unanimous thus:

“... there is an over-riding responsibility on the court and its officers counsel – to ensure that the second phase of the (sic) true process – the enquiry as to the presence or absence of extenuating circumstances – is conducted with diligence and with an anxiously enquiring mind: per Steyn P in *Letuka v R LAC (1995 – 1999) 405 at 419 – 420 (A)*.

[5] The learned judge further articulated on the issue of extenuation thus:

“the purpose of the inquiry is inter-alia to probe into whether or not any factor is present that can be considered to extenuate an accused’s guilt...at the same time the state may, both in argument or by way of evidence, canvass the presence of aggravating circumstances” *R v Letuka, supra* 420 (B).”

[6] I finally referred Counsel to the work of Du Toit and others in *Commentary on the Criminal Procedure* at 28-14F where extenuating factors (including important mitigating factors) were extensively listed.

[7] In deciding whether or not there are extenuating circumstances, the court in its approach is guided by section 296(1) of the *Criminal Procedure and Evidence Act, No. 7 of 1981* which provides as follows:

“whether the High Court convicts a person of murder, it shall state whether in its opinion there are any extenuating circumstances and if it is of the

opinion that there are such circumstances, it may specify them.” (My underlining).

[8] Over the years the courts have interpreted the second under reference as mandating them (courts) to determine whether or not extenuating circumstances exist if the accused is convicted of murder. See *Matsoai and Others v ex 1967 – 1970 LLR 70 at 75 (D)* and *DPP v Marabe, 2000 – 2004 LAC 385*. The court at page 75 (D) of the Matsoai judgment cited above had this to say:

“...we are bound to say that in our opinion when extenuating circumstances are found it is advisable that (these should be specified. The nature of extenuating circumstances may have a bearing on the proper sentence to be imposed...moreover on the grounds of public policy it seems desirable that the public should be informed what the extenuating circumstances are.”
(My underlining).

[9] It would be a fundamental gross irregularity if a court fails to deal with the issue of extenuating circumstances as held in *Mokete Mokhobo v Rex C of A (CRI) no. 3 of 292* at page 3 at (5) citing *Director of Public Prosecutions v Marabe 2000-2004 LAC 385*. That is an integral part of criminal proceedings in murder cases.

[10] Furthermore, the courts have interpreted the section as conferring discretion on a court to impose a sentence other than a death sentence, when extenuating circumstances are found to exist. See *Letuka v R*, (supra) 416 at (F) There is

authority for the proposition that where the trial court postulates that extenuating circumstances exist the duty devolves upon court to state such extenuating circumstances. See *Mona and Another v R 1985 – 1989 LAC 364 at 367-68 (J-A)*. In *Molato v R 1985-1989 LAC 229* the Lesotho court of Appeal held as follows:

“...whichever happens there should be a proper record of the second stage, whether new evidence, or agreed facts, or both, and there should be a clear finding by the court.” (page 232 E).”

[11] It is worth revisiting judicial authorities on the meaning and definition ascribed by same to what an extenuating circumstance is. In *Rex v Biyana, 1938 E.D.L. 310 at 311* Landsdowne J. P had this to say:

“...an extenuating circumstances is a fact associated with a crime which serves in the mind of reasonable men to diminish morally, albeit not legally, the degree of a prisoner’s guilt.”

Next to follow in that distant past was the case of *R v Fundakubi and Others 1948 (3) SA 810 at 818* wherein Schreiner J. A added the following celebrated observation:

“But it is at least clear that the subjective side is of very great importance, and that no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused’s moral blameworthiness in committing it, can be ruled out from consideration.”

[12] In the case of *Letuka* (*supra*) Steyn P at page 357 cited in extensor the words of Holmes J. A in *S v Let'solo 1970 (3) SA 476(A)* where the learned judge said the following in defining what extenuating circumstances are:

“...Extenuating circumstances have been defined by this court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial court has to consider: Whether there are any facts which might be relevant to extenuation, such as immaturity, intoxicating or provocation (the list is not exhaustive); whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did; whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did the trial court exercises a moral judgment. If the answer is yes, it expresses its opinion that there are extenuating circumstances.”

[13] Notably the court considers that not only extenuating features but also any aggravating features and considers them cumulatively in arriving at its value judgement. In making the moral judgement whether extenuating circumstances exist the court considers and weighs all the features of the case, both extenuating and aggravating. See *Lekoloane v the State, (1985) B.L.R. 245* at 249 per Maisels, J. P.

[14] The paramount issue that falls for determination by this court is whether or not there are extenuating circumstances in this case. The onus of proving extenuating circumstances rests on the accused. He can discharge that by means of

his own evidence or by reliance on the other facts proved in the course of the case. See *Thebe v R, LLR (1985- 1990) 523 at 532*. Authorities abound that “in some cases extenuating circumstances may become apparent in the course of the trial” ... where there is a verdict of guilty of murder, the accused should be permitted to lead evidence and to address the court in extenuation or merely if he so desires to address the court in extenuation”. See *Letuka v Rex*, (supra) page 418 (G-H).

[15] In the case of *Lefaso v Rex, LAC (1990-1994) 44*, the appellant had been convicted of murder in the High Court. The high court had held that no extenuating circumstances had been proved by the appellant who bore the onus the proved facts that any extenuating circumstances existed. The Court of Appeal in the above cited matter did in *extenso* address the issue of existence or otherwise of extenuating circumstances as follows:

“it had been open to the appellant at the extenuation stage to give evidence again, contradict his former evidence of that extenuating circumstances existed” (per Schutz P.) at page 50 (B).”

[16] The learned Judge President further said the following at page 50 (C-D):

“He cannot have it both ways. If he had given evidence a new, admitted guilt and sought to prove extenuating circumstances, he would have been

subject to cross – examination, in which his subjective state of mind, a matter of great importance, could have been tested.”

[17] The learned judge went on to say at (G-H) page 50:

“I would stress that in a matter as vitally important as extenuation, if the defence counsel wishes to rely on an ex-parte statement not based n sworn evidence, he should ascertain clearly whether the Crown admits its factual correctness. If the Crown does not, defence counsel must consider whether he will lead evidence or not.”

The Court of Appeal in the matter under reference and based on the surrounding circumstances and facts, held that extenuating circumstances had not been proved. In the result the appeal was dismissed.

[18] By way of repetition, in the course of leading evidence in the present case the prosecution established inter-alia:

That a few days prior to the death of the Deceased, both A1 and A3 in the presence of A2 were seen and found seated under the tree whereat in the ensuing meeting there was some discussion around stealing ATM bank cards belonging to the Deceased. That consequently upon the said discussion one of the witnesses for the prosecution was strongly warned to “dare not” disclose the import of the discussion to anybody. That sometime after the aforesaid meeting the Deceased was discovered dead under circumstances indicative of robbery as a prime motive for killing. That a living in the same vicinity as the Deceased was subsequently found in possession of property which had recently gone missing from the house of

the Deceased. A3 on the other hand was found in possession of the property similarly traceable to the Deceased's homestead. Most importantly, this court has made a finding that her explanation regarding possession of the same was false from the start to the end. It is crystal clear that the motive for the brutal killing of the Deceased was none other than robbery. Indeed this court basing itself on the evidence led in the course of the trial, has made a definitive finding that the killing of the Deceased was actuated by robbery. That when the Deceased was subsequently discovered dead in her bedroom, she appeared to have been fatally assaulted as revealed by the post-mortem report.

[19] For the reasons stated above there appear to be aggravating circumstances as opposed to extenuating circumstances with particular reference to A1 and A3 who have been found guilty of the main charges namely, murder and robbery as principal perpetrators. The killing of the Deceased was not only riddled with brutality but was premeditated as revealed in the course of leading evidence for prosecution.

[20] The above are factors which tend to demonstrate that the accused persons' (A1 and A3) deeds were promoted by greed couple with "inherent wickedness". It has been held that murder is always wicked deed, and that not only must the nature of the act be considered, but also the motive with which the crime was committed. See *Thebe v Rex (supra)* page 536. In sum it was submitted that there could not, (as regards A1) by any stretch of imagination be any extenuating circumstances in respect of the death of the Deceased.

[21] In the premises, the issue whether or not there re extenuating circumstances with regard to A2, bearing in mind his participation, this court is invited to give A2 benefit of doubt and rule that there are extenuating circumstances. This is all the *moreso* bearing in mind that at the time of commission of these offences, A2 was of very tender age.

T. E. MONAPATHI
ACTING CHIEF JUSTICE

For Crown : Adv. Thetsane KC
For Accused : Mr. Nteso

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between

REX

Crown

Vs

‘MAKHOTSO MOLISE

1st Accused

KHOTSO MOLISE

2nd Accused

‘MANTOA MOKOALELI

3rd Accused

JUDGEMENT ON SENTENCE

Coram : Hon. Acting Chief Justice T. E. Monapathi
Date of Hearing : 23rd July 2014
Date of Judgement : 20th August, 2014

SUMMARY

In this case where the Accused were convicted of a brutal and pre-planned murder and a robbery committed to facilitate the murder; which emphasizes the trial of the crime, the offender and interest of the brutality of the perpetrators was paramount.

Extenuation was found based on age and lack of maturity in favour of Accused 2 and 3 and none in favour of Accused 1.

Mitigation of sentence depended on the above most specifically that which all deserved long sentence for the two crimes A1 because of absence of extenuation had to face the ultimate sentence in terms of section 297 (1) of the Criminal Procedure and Evidence Act 1981, as indicative of the seriousness of the crimes committed by the Accused.

CITED CASES

S v Sobandla 1992 (2) SACR at 862 (G)

S v Zondi 1992 (2) SACR 706(A)

R v Karg 1961 (1) SA 231 (A) at 236 (A-B)

S v Makwanyane & Another 1995 (2) SACR 1 (cc) at 48

STATUTES

Criminal Procedure and Evidence Act, 1981 (CP&E)

BOOKS

[1] This court has already dealt with the mandatory “second phase” of the trial, that is: the existence or otherwise of extenuating circumstances, in terms of section 206 of the *Criminal Procedure and Evidence Act, 1981* (CP&E).

[2] The court as enjoined by the law is to proceed to the third stage of the trial, which is referred to as the “sentencing phase” a last stage or third stage of the proceedings. This so having convicted these Accused of the murder and Robbery of Deceased Mrs “Sisi” Mahase.

[3] The court now has to enter into the unenviable duty of meting out suitable sentence(s) to the accused persons as the Crown submitted. The task is not made any easier by section 297 (1) of the CP&E which stipulates that where an accused

person has been convicted of murder the High Court shall pass a sentence of death if no extenuating circumstances exist.

[4] The prosecution has assisted the court in arriving at a suitable sentence by addressing the court on all relevant aspects. So has the defence. I agreed that in determining appropriate sentences, the court will no doubt observe the following guidelines. It will first consider the triad “consisting of the crime, the offender and the interests of society.”

[5] And furthermore, that the sentences to be passed should be exemplary in the sense that they will be an example to others; they should deter others from committing the same offence and other sensible concerns. In other situations issues of rehabilitation are paramount. See *S v Sobandla 1992 (2) SACR at 862 (G)* and *S v Zondi 1992 (2) SACR 706(A)*. I Noted that Accused were first offenders.

[6] The court also has a duty to the community in passing sentence to guide the community and but not to please the community. The object of sentencing however, is not to satisfy public opinion but to serve the public interest. Obviously the communities sensibilities cannot be ignored. At the same time courts would not be harsh.

[7] A sentence that is too lenient will tend to bring the administration of justice into disrepute. It will encourage injured persons to take the law into their own hands and will act as an incentive to like-minded people to commit the same or similar offences. Such sentences are therefore discouraged. See *R v Karg 1961 (1) SA 231 (A) at 236 (A-B)*. Sentences must be reasonable.

[8] It was common cause that this court had already made a ruling on existence or otherwise of extenuating circumstances. The court has *inter-alia* ruled that there are no extenuating circumstances in respect of A1. It was further common cause that the court on the other hand ruled that there are extenuating circumstances in respect of A2 owing among others to his tender age at the time of commission of the crimes he has been found guilty of. This court has on the other hand, ruled that owing to immaturity of A3 at the time of the commission of the offences A3 has been found guilty of, there are extenuating circumstances. The court in this regard had in mind the provisions of 296 (2) of the CP&E stipulating *inter-alia* that:

“In deciding whether or not there are any extenuating circumstances, the court shall take into consideration the standards of behaviour of any ordinary persons of the class of the community to which the accused belongs.”

This observation was about the immaturity of both A2 and A3.

[9] That said however, there remains the issue of mitigating factors in respect of all accused persons. It was submitted that there are aggravating factors and compelling reasons in inviting this court to impose sentences indicative of the

seriousness of the crimes committed by the accused. Indeed I found that there was a panoply of aggravating factors, namely:

- a) The brutal killing of the Deceased, was without doubt premeditated, a conduct elevating the offence to the most heinous and senseless crime as much as the killing and/or motive therefore was none other than robbery;
- b) The fatal assault meted out by the Accused on the deceased was effected on a defenceless person already in her advanced age, reputedly in her late eighties. That was cruelty of an extreme kind;
- c) I found that the accused persons have demonstrated no iota of remorse by *inter alia* failing “to make a clean breast of it” by resiling from their previous positions as permitted by law. Instead the accused elected to remain silent in this regard, in the face of such serious crimes they have been found by this court to have committed. I ascertained from Counsel that the Accused appreciated that they had as option to testify in mitigation.
- d) Both A1 and A3 elected to take the witness stand in which they portrayed themselves as consummate liars from beginning to end, both in the course of their evidence in chief and under cross-examination. This, the court viewed adversely against the accused in as much as they wasted this court’s time resulting in a protracted trial in the face of such overwhelming evidence against them;
- e) As for A2, he elected to remain silent in the face of such overwhelming evidence against him, calling for an explanation of some sort from him. His plea when asking this court to temper justice with mercy accordingly amounts to nothing but “blowing hot and cold”. He was asking the court to regard him as a fallen angel on the one hand whereas on the

other hand he was reticent and seemed to be playing his cards too close to his chest by remaining silent;

f) Lastly, the very crimes of murder and robbery fall under the schedule, of offences on conviction whereof the offender cannot be dealt with under section 314 of the CP&E suspension and postponement. Indeed crimes involving violence as does robbery are viewed by courts in serious light. In the celebrated case of *S v Makwanyane & Another 1995 (2) SACR 1 (cc) at 48*, “(g-h) the Constitutional Court has this to say:

“The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The state is clearly entitled, indeed obliged, to take action to protect human life against violation by others. In all societies there are laws which regulate the behaviour of people and which authorize the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society.”

[10] As earlier postulated, the accused in this case remotely or otherwise taken this court into their confidence by proffering an explanation why they so brutally and fatally assaulted the Deceased for mere worldly possessions. It would have been enough for them to have just taken the Deceased’s property without fatally assaulting her in the manner they did. The accused have had direct intent (*dolus directus*) in the killing of the Deceased. The killing was unprovoked, senseless and most importantly actuated by greed, if not the desire to cover their own tracks by ending the Deceased’s life who would have been a potential witness in the ensuing robbery case. If not so the Accused ought to have attempted to explain things.

[11] In the premises this court was invited to invoke the provisions of section 297 (1) of CP&E with respect of A1. The section stipulates thus:

“Subject to subsection 2 or 3 sentence of death by hanging- (a) shall be passed by the High Court upon an accused convicted before or by it of murder....”

The court having decided that no extenuating circumstances exist with respect to A1, it was submit that this court was obliged to invoke the mandatory provisions of section 297 (1) (a) cited hereinabove.

[12] In this country in this period there are reported killings over radios or papers every day. Most killings are brutal and wanton. This is a great concern to this court and our courts.

[13] In sum court was respectfully invited to pronounce sentences as follows:

Count II – Robbery

- a) Lengthy custodial sentence in respect of all accused persons;

Count I – Murder

- b) Life imprisonment in respect of A3;
- c) A lengthy custodial sentence in respect of A2;

- d) Death penalty in accordance with the provisions of section 297 (1) (a) of the CP&E Act 1981 read with section 298 (1) of the CP&E Act 1981 in respect of A1.

I am persuaded that severe sentences are called for against these Accused as follows:

In the charge of Robbery

- a) A1 - To Fifteen (15) years imprisonment without option of a fine
- b) A2 - To Ten (10) years imprisonment without option of a fine
- c) A3 - To Twenty (20) years imprisonment without option of a fine

In the charge of Murder

- d) A1 - To death by hanging
- e) A2 - To Twenty (20) years imprisonment without option of a fine
- f) A3 - To Twenty-Five (25) years imprisonment without option of a fine

Sentences to which imprisonment has been imposed are to run concurrently in each case.

T. E. MONAPATHI
ACTING CHIEF JUSTICE

For Crown : Adv. Thetsane KC
For Accused : Mr. Nteso
My Assessors agreed (as in the previous findings)