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INSTITUTE OF ADVANCED
LEGAL STUDIES

IN THE HIGH COURT OF BASUTOLAND.

CRIMINAL SESSIONS

2nd NOVEMBER 1948.

BEFORE:

Mr Acting Justice Sutton.

ASSESSORS:

J. Elliot.
F. I. Parnell.

AFRICAN ASSESSORS:

George D. Makhehle.
Moramang Jonathan.

R E X vs. (1) Bereng Griffith Lerothola.
(2) Gabashane Masupha.
(3) Mojautu Nonyana.
(4) Makione Mphiko.
(5) Sankatane Masupha.
(6) Mosiuoa Masupha.
(7) Kemaketse Masupha
(8) Fusi Rakakali.
(9) Saferi Ntsoso.
(10) Ramabanta Mahleke.
(11) Moloi Ntai.
(12) Titimus Ramashamole

VOLUME: 9.

Reported by:
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INSTITUTE OF ADVANCED
LEGAL STUDIES,
25, RUSSELL SQUARE,
LONDON,
W.C.1.

TENTH DAY
12th NOVEMBER, 1948. UNIVERSITY OF LONDON
W.C.1.

MR. THOMPSON: As regards the witness Walter, he went out with a representative of the Defence and Mr. Castle yesterday and my learned friends and I have agreed that the following be placed on record:

He started his employment with this firm on February 23rd of this year. He produced some documents but was unable to produce a receipt for the work that was done by him at a garage in Ficksburg. The gear box casing was sent in to the Caledon Engineering Works of Ficksburg for welding on March 12th,

Those are the only relevant factors.

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THE DEFENCE CALLS:

SITOTONJANE, sworn states,

EXAMINED BY MR. GORDON:

Sitotonjane, did you know Tlatsoenyane, in his lifetime? -- Yes, I knew him.

Were you present at his funeral? -- Yes, I was present.

The night previous to his funeral where did you sleep? -- I slept at the shop at Mamathe's.

And when you went to his funeral were you accompanied by anybody? -- I was accompanied by Ramabanta.

How did you go to the funeral? Were you on horses or on foot? -- We were both on foot.

When you say Ramabanta, are you referring to accused No. 10? -- Yes.

Were you given any particular duties at this funeral? -- Yes.

/What

What were they? -- I was given the duty of writing down the people who contributed towards the funeral.

Did you see Maloi at the funeral, accused No. 11?

-- Yes, I saw him at the funeral.

Can you tell His Lordship with whom Maloi was? -- I know Meleke whom I knew previously. The other two who were with him I didn't know.

Did you see them leave for their home? -- Yes, I saw them. (Q) And did you see Ramabanta go home? -- Yes I saw him.

With whom did Ramabanta go home? -- He left with Tsiu and Mahlaha and they greeted me.

With whom did Maloi go home? -- I saw him going away with Meleke and the other two men whom I didn't know.

Can you tell the Court who left first, Maloi and his party or Ramabanta? -- Maloi and those of his party left first.

Now you say that you saw Ramabanta go home? -- Yes.

When did you see Ramabanta again? -- I saw him early the next day.

Where did you see him? -- I saw him at his house. I went there.

Where is his house? -- Mahleke's.

Where did you go and what did you do, you and Ramabanta, when you saw him the next morning? -- I told him there was beer at my grandmother's house, and I asked him to follow me to that place.

And did you go? -- We went there.

/CROSS-EXAMINED

CROSS-EXAMINED BY MR. THOMPSON:

You are speaking to events which took place on March 4th? Eight months ago? -- Yes, I buried Tlatsoenyane on the 4th March.

When were you first asked to recollect about the movements of No. 10 accused on that afternoon? -- I have never been asked.

That is nonsense. When was a statement taken from you? -- No statement has been taken from me.

Don't stand there talking a lot of nonsense, and wasting my time. Some gentleman representing the Defence interviewed you and asked you what you knew? -- (No reply)

When was that? -- I only know that I was questioned about this when I came down here.

When was that? Last week, this week? -- Two weeks ago.

For eight months you were not called to remember anything about no. 10's movements? That is so, isn't it? -- Yes.

And when you were asked you immediately recollected almost the exact time you had seen No. 10 on the afternoon and evening of the 4th March? -- Yes, I was asked and was told that Ramabanta wanted me to give evidence on his behalf.

And you were told that Ramabanta wanted you to say ...

HIS LORDSHIP: No, no. That is surely privileged.

MR. THOMPSON: M'lord my learned friend was allowed to cross-examine accomplice witnesses as to whether questions were put to them by the Police, what was the nature of the questions and so forth.

/HIS LORDSHIP

HIS LORDSHIP: Perhaps if an objection had been taken I might have ruled otherwise. Anyway what passes between them is privileged, you can't go into it.

MR. THOMPSON: I can suggest, m'lord, that the nature of the questions was such as to suggest the answers.

HIS LORDSHIP: No, you can't do it. Not at all. It is privileged.

MR. THOMPSON: M'lord if necessary I would argue with Your Lordship that it is permissible, but it is of not very great importance. I want to get this perfectly clear, at the beginning of August, when No. 10 knew precisely for the first time that he was called upon to account for his movements on March 4th, no approach was made to you then? -- I was not at home.

NO RE-EXAMINATION.

ASSESSOR MAKHEHLE: What is the distance from your home to Ramabanta's - from your place to Mahleke's? -- It is about two miles away.

When you left the funeral, where did you go? -- I went to my home.

The next day in the morning? -- I came to Ramabanta and told him there was beer. I didn't specially go there to see Ramabanta; I came there for some other purpose.

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THE DEFENCE CALLS:

TSIU, sworn states,

EXAMINED BY MR. GORDON:

Tsiu, you knew Tlatsoenyane? -- Yes.

In which village do you live? -- Mahleke's village.

Were you present at Tlatsoenyane's funeral? -- Yes.

At the end of the funeral, when you went home
can you remember whether you went home with anybody?

With whom did you go home? -- I went home with Ramabanta, No.10.

Where did you sleep that night? -- I slept at my
usual place of sleeping, which is at Ramabanta's.

And with whom did you share a hut? With anybody?
-- Yes.

With whom? -- Ramabanta.

No further questions m'lord.

CROSS-EXAMINED BY MR. THOMPSON:

Tsiu, you were brought down to Maseru last week?
-- No, I have never come to Maseru.

You are here now! -- Yes, I am here. I didn't
quite understand the question.

HIS LORDSHIP: I suppose he means he has never come to
Maseru before this present occasion.

MR. THOMPSON: You came to Maseru last week? -- Yes.

You were listening at the window while the last
witness gave evidence weren't you? -- No.

Well, that is my information.

HIS LORDSHIP: Surely there is somebody in charge of the
witnesses preventing them doing that.

MR. THOMPSON: M'lord the Police are to be blamed, because
if a Defence witness misbehaves himself then the Police
are to blame!

/HIS LORDSHIP:

HIS LORDSHIP: Surely, the witnesses don't hear what's going on. They are supposed to be kept away.

MR. GORDON: M'lord I purposely asked that this witness be kept just outside the door so that there would be no delay when he was called. This, however, comes as news to me. As a matter of fact the witness denies it. There were five policemen standing there.

MR. THOMPSON: I don't think they knew he was a Defence witness! M'lord my learned friend said that the Police saw the Defence witness being interviewed, and he came with a complaint to me last week that the Police were always "hanging around" when he was interviewing his witnesses.

HIS LORDSHIP: Well, I am not making any suggestions to the Police, but I have always understood that there was somebody in charge of the witnesses and that they see that they don't hear what's going on.

MR. THOMPSON: The Police are very careful with the Crown witnesses, m'lord.

HIS LORDSHIP: I am not making any allegations against the Police...

MR. THOMPSON: As a matter of fact, m'lord, even if he did listen at the window it doesn't matter very much.

HIS LORDSHIP: Well, he says he wasn't anyway.

MR. THOMPSON: It wasn't until you came to Maseru last week that you were asked to make a statement about March 4th? -- No, this is the first time that I have come in here and have been asked questions.

One of these gentlemen sitting in Court here - I don't know which - talked to you last week - this week, was it? --Yes.

/And that was

And that was the firsttime since March 4th that you were asked to remember what time No. 10 left the funeral that afternoon? -- Yes.

And you immediately recollected it without straining yourmemory at all? -- Yes, I remembered at once what time he left.

Are you a particular friend of No. 10's? -- I live with him at home.

He was living for three months at Mamathe's? -- Yes.

You didn't live with him ^{for} / those three months?
-- He was at Mamathe's at that time.

And you saw him by chance at the funeral on March 4th? -- I saw him at the place where we live together on that day.

On March 4th? -- Yes.

For the first time for months? -- Yes.

And you didn't have any particular interest in his movements? -- I didn't know his movements.

NO RE-EXAMINATION.

HIS LORDSHIP: When did he leave? -- That morning we went for a beer drink with him.

Go on? -- In a village on the plateau.

Yes. -- They found me at that place and he arrived there accompanied by a man called Sitotonjane.

You didn't go together? -- No, we didn't go together.

And did you see him come to the beer drink? -- Yes, I saw him in the company of Sitotonjane.

And was that the day after the funeral? -- The

/day

day after the funeral.

The day before the funeral where was he? -- Yes, he was at home.

The day before the funeral? -- Yes.

But he said that he walked to the funeral ... oh, yes, he said he was at home the day before the funeral. Now, this is what I want to get. The day before the funeral where was he? -- He was still at Mamathe's.

He says that he left to go to the funeral on the morning of Thursday, - I take it that is from Mamathe's? -- Yes. He went on foot.

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CASE FOR Nos. 2, 4, 5, 6, 7, 8, 9, 10 & 11 ACCUSED

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MR. GROBELAAR: Your Lordship will remember that I said that this record of the inspection in loco has omitted to refer to one important aspect, viz. to the ledge or the bank on which the party that carried the body of the deceased walked on the evening in question. I showed this passage to my learned friend, and I gathered that he does not consider that the facts are put fairly, and this is what I want to read out. I understand that he will probably agree with them.

This is the addition my Lord, which I think should be inserted before the last four lines of the report as drawn up by the stenographer. Namely, these words, my Lord. (If Your Lordship has comment to make, then I'll correct them).

"The witness Mapeshoane pointed out that the party who carried the body of the deceased proceeded along

/a bank

a bank or ledge between two branches of the donga for a distance of about 40 yards. This bank has a sheer drop of 35 feet on the left and on the right there is a drop of from about 8 to 10 feet which is not as steep as on the left, but one false step to the right by a person walking on it would probably result in his losing his balance and falling. The bank or ledge is at some places two to three paces wide."

My learned friend points out that it is 2 to 3 feet. What is said here, "2 to 3 paces" is in the record of the stenographer. Your Lordship will remember that it was pointed out in some places where it is wider.

HIS LORDSHIP: I have a vivid picture of that sort of peninsula in my mind, and there were two places which are extremely narrow and one side is extremely steep. Two to three feet wide.

MR. GROBELAAR: Two to three feet wide, yes.

HIS LORDSHIP: On the left hand side it is sheer down for about 25 feet.

MR. GROBELAAR: I take it then my Lord that there is no objection to this being inserted.

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ADDRESSES TO COURT.

MR. THOMPSON:

May it please Your Lordship.

In my address I propose to deal at the outset with certain legal aspects of this case, more particularly our law relating to accomplices. I then propose to pass to the issues of fact and make some general submissions on how the evidence should be approached and more particularly submissions on the more detailed aspects of the evidence. Having done that I propose to pass to the Crown witnesses and deal with them one by one in whatever detail which may appear to be necessary, and then of course deal with the Defence case and make my submission to Your Lordship on the whole of the case.

Now, m'lord, on the legal aspects, there remain one is of course the question as to what reliance is to be placed on the evidence of accomplices. The section of our Criminal Procedure and Evidence Proclamation dealing with accomplices is precisely the same as the section in the Union Procedure Act; it is section 231 of the Proclamation 59 of 1938, as amended by Proclamation 12 of 1944, which made the section conform with the Union section, and it will be well within Your Lordship's memory as to how the section reads, the relevant wording being, "Any Court may convict on the single evidence of an accomplice, provided the Offence has by competent evidence other than the single and unconfirmed evidence of the accomplice been proved to the satisfaction of the Court to have been actually committed".

Strictly speaking, of course, the section does

/not

not come into play in this case because the Crown is not asking for a conviction on the unconfirmed evidence of an accomplice - it is asking for a conviction on the evidence of four accomplices, and the submission, of course, is that the accomplices corroborate each other.

HIS LORDSHIP: The authorities are perfectly clear. In this particular case it is not merely evidence which may lead me to believe that the accomplice is speaking the truth, but the evidence identifying the accused.

MR. THOMPSON: The four accomplices give direct evidence identifying all the accused my Lord.

The starting point of course in the evidence today is Thielke's case (1918, A.D. - 373). M'lord unfortunately that is not in the library of this Court, I thought it was, and therefore I have not the report here, but it is perfectly clear from the Judgment in that case that the evidence of one accomplice may be taken as corroboration of the evidence of another accomplice. As I have not the report here, m'lord, I might refer Your Lordship to the reference in Gardner and Lansdowne (Fifth edition, Vol. I, p. 520).

I think it would be useful to refer Your Lordship to the latest decision of the Appellate Division which has only just been published, and that is the case of Rex vs Ncanana, (S.A. Law Reports, November 1948, p. 399) The headnote, which is more or less an extract from the Judgment of His Lordship Mr. Justice Shreiner reads, "Where accomplice evidence is the basis of the Crown's case, grave error, to the disadvantage of the accused person may be caused by treating Section 285 : of the Criminal

/Procedure

Procedure Act as covering the whole field, while similar error, to the disadvantage of the Crown, may be caused by insisting before there can be a conviction that save where the accused gives no evidence or false evidence, there must be corroboration in a respect implicating the accused", and His Lordship Mr. Justice Shreiner starts dealing with the authorities on page 404 and sums up the matter at the foot of page 405 and the top of page 406, and having referred to the risk of a wrong conviction, my Lord, he says "That risk will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact ..." (in this case Your Lordship), "... understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

That, of course, deals again with the evidence of a single accomplice. So on the authorities, may I say, the basic principles are as follows:- firstly one accomplice may corroborate another. Secondly, the corroborating evidence need not directly implicate the accused, (In this case it does), but the corroborating evidence must tend to show that the accomplice is a reliable witness. Thirdly, it is not necessary that an accomplice's evidence be accepted 100%. A portion of the evidence may be accepted and a portion rejected. Finally, my Lord, if, as His

/Lordship

Lordship Mr. Justice Shreiner says, the danger of accepting accomplices' evidence is always borne in mind, there is really no difference, particularly where there are three or four accomplices, between an accomplice's evidence and any other witness.

HIS LORDSHIP: I have first got to decide whether this man Mapeshoane is a reliable witness, and if we find that he is reliable, - it may be that the evidence of another accomplice will show that he is a reliable witness.

Isn't that so?

MR. THOMPSON: Whether he is a reliable witness on his own evidence and in the light of other evidence, and all the circumstances. Naturally, my Lord. If the principal witness be Mapeshoane or somebody else, if that is to be rejected, then all the corroborating evidence in the world will not reinstate it.

HIS LORDSHIP: Also somebody else may corroborate Molemohi, and so forth ... You go on.

MR. THOMPSON: They are all four principal witnesses, m'lord.

HIS LORDSHIP: Yes.

MR. THOMPSON: With respect I do not accept the position that if Mapeshoane goes the whole case goes.

HIS LORDSHIP: No. This is an important feature, and it may be that if Mapeshoane's evidence goes we must say the other three support one another.

MR. THOMPSON: Might I give Your Lordship an example. The accomplice Molemohi. Molemohi has been proved to be an unsatisfactory witness, and I am frankly going to make that submission to Your Lordship. Because, at one

/stage

stage of the case Molemohi made a statement to Mr. Castle about an insertion of an umbrella stay in order to obtain blood which has been proved to have been complete imagination. Now if he were the only accomplice my Lord, and that were a fact, I would have no Crown Case to argue, because he would have been shown to be unreliable, so one of these accomplices is, in one respect, unreliable, and I shall not ask Your Lordship to accept his evidence, - save insofar as it is corroborated by the other three. If there were any point, and I don't think there is, but if there were any point to which Molemohi alone speaks, because of the unsatisfactory feature of his evidence, Your Lordship would not be justified in accepting it. And that is an example of the principle Your Lordship was just enunciating.

So the proper approach to this evidence, my Lord, bearing this danger in mind, is to approach the evidence in the same way as any other witness's evidence. Look at the inherent probability of the story, surrounding circumstances, demeanour of the witness, his conduct under cross-examination and so forth. If the Court is satisfied with that, the Court will accept the evidence, despite the known danger of accepting the evidence of accomplices.

The only other legal aspect of the case is the well known doctrine of common purpose, with which it is unnecessary for me to trouble Your Lordship, - if a number of persons are present with the object of achieving or committing a crime, and even if one or two of them did not play any active part at all they are liable in law for the acts of the others.

/That, I submit,

That, I submit, is the position here. It really doesn't matter what part any particular accused played if the conclusion of the Court be that the murder was committed as cited by the Crown witnesses.

Now, passing to the evidence, m'lord. I wish to make some general submissions. The Crown, of course, must prove two things. The Crown must prove that there has been a criminal homicide, i.e. a homicide other than justifiable or accidental; a criminal homicide, and the Crown must prove of course that these accused, one or more or all of them are responsible for that homicide. On the first point the Crown must prove there is a criminal homicide, that raises the question of the cause of the deceased's death.

In this case the medical evidence is not of any great assistance. The only definite point in the evidence of Dr. Ogg is that the deceased died of drowning, and his evidence is that he comes to that conclusion because he found river sand in the lungs, and as a medical man he was driven to the conclusion that that must have been breathed in while the deceased was still alive and therefore he died of asphyxiation due to drowning. The balance of Dr. Ogg's evidence is entirely negative. It can be summed up in his evidence in re-examination, there is nothing in his observations which would lead him, as a medical man, to reject a story such as that told by the accomplices. Much play has been made about the absence of bruising and no sign of throttling and no sign of blood. Those three factors, it seems to me, would be more convenient for me to deal with at a later stage in my argument. I am not
/overlooking

over looking them; I will deal with those three factors in detail later on, when I come to the actual evidence of the murder itself.

Sir, we pass away from the medical evidence to the surrounding circumstances, and we find, what I submit is conclusive evidence of a criminal homicide, and those factors are these:- Firstly the position of the body in the donga, as testified to by Trooper Hamilton, supported by the witness who found the body. Secondly the distance from the road to that spot. Thirdly the difficult approach to that spot. Fourthly the place where the saddle, saddle cloth, sjambok, and so on, were lying on the veld; the saddle itself undamaged; and fifthly the position of the boot and hat as found by Trooper Hamilton.

All these factors, in my submission, lead one to the irresistible conclusion that that body was carried and placed in the position in which it was found. Even by stretching one's imagination as far as possible, one cannot conceive any reason whatsoever why the deceased should voluntarily have dismounted his horse, unsaddled it, removed the reins, and then gone down this steep, almost precipitous slope, wandered around that donga, and suddenly collapsed and died at the place where his body was found.

I do not think I am using the language of exaggeration when I say it is beyond the bounds of human imagination to conceive any reason whatsoever why that extraordinary set of circumstances should exist. If that be the conclusion the only other alternative is that the body was placed there by human agency, and if it was placed there by human agency, the human or humans who placed it there

/must have

must have been responsible for its death, the death of the deceased. So that apart from the medical evidence, and apart from the accomplices' evidence, there is clear circumstantial evidence pointing to a death by foul means. Of course the Crown rely for the actual cause of death on the evidence of the accomplices, but even without that there is a prima facie case as I say m'lord, that this is a death for which some criminal is responsible.

In passing I might say, m'lord, that it seems rather curious that the saddle was found where it was, and there seems no obvious reason for that fact. I throw out the suggestion merely as a suggestion - it is not of any great importance - that possibly the accused, some of them, may have had a crude idea of staging an accident, and that is why they placed the saddle where they did, to suggest that the saddle came off the horse and the accused fell off or something like that. However that may be m'lord, one can be certain that the deceased himself did not do it.

As to the boot and hat, it seems not unlikely that they fell off while the body was being carried and that that was unobserved in the darkness. That again is only a suggestion, which doesn't have any real bearing on the case, but it does perhaps help to clear up what is a curious fact, that one boot and the hat were found where they were.

Now on the general aspects of the evidence of the accomplices and the other Crown witnesses may I be permitted to throw out this, if I may call it so, caution. The evidence of witnesses such as these cannot be approached in the way one would approach the evidence of European witnesses in a civilized community who are charged with

/committing

committing a normal crime. All the surrounding circumstances are abnormal, the mentality is abnormal, the state of education in 90% of the witnesses is low, and of course their evidence is given through the medium of an interpreter, and interpretation, however good, - and I do not wish for one moment to be taken to criticise the interpretation in this case, which has been excellent - but the interpretation however good cannot convey to the mind the real sense of what the witness is trying to convey. I have said that the witnesses are uneducated. In one or two cases, the case of Mapeshoane, and one of the accused, they have a veneer of education, they have a veneer of civilization, and if any of this story which has been placed before Your Lordship is true, that veneer is very thin indeed. Underneath it is mere rank barbarism, believing in the grossest superstition, and that is the type of witness whose evidence one has to consider, and I submit the Court would be slow to come to the conclusion that any particular witness, be he Crown or be he Defence, is evasive and contradictory merely because it has been difficult to get a direct answer to what to the European mind appears to be a direct question.

I will give an example to Your Lordship in the case of a Defence witness, whom I asked when he first made a statement about the movements of No. 10 accused. Well, m'lord, to the European that question is perfectly clear and should have been met with an immediate answer. The witness first of all said that he had not made a statement to anybody. What was conveyed to his mind, I don't know, but I certainly don't suggest that by making that answer

/he was

he was trying to lie or mislead the Court. He merely was misunderstanding the position, and that is a typical example of the difficulties with which we are faced. If those difficulties are so great that it compels the Court to say the onus of proof has not been discharged by the Crown, that is a different matter altogether. It has been argued in Courts, the Crown finds it difficult in the circumstances to prove something, that the Crown should be allowed a certain amount of leniency. That is an argument, m'lord, which in many years' Counsel for the Defence I have strenuously combatted, and I certainly, now that I appear for the Crown, do not intend to advance it. In the same way one must remember the danger of convicting on accomplice's evidence, one must remember the danger of jumping to the conclusion that witnesses of this class are evasive, contradictory, or lying when one considers the nature of their evidence in the circumstances in which they are giving it.

Now m'lord, I go on to the story - which I do not propose to recite in detail - and each step follows logically to the last until the final fatal scene of the killing and the disposal of the body. On that story there are four possibilities. The first possibility is that the whole story has been concocted by the Police. (That needs only to be put forward to be rejected. I have to put it forward, m'lord, because it is there). Secondly, there is the possibility that it has been concocted by the Crown witnesses themselves, in this particular case, probably under the tuition of Mapeshoane. The third possibility is that the story is in substance true, but

/that

that the accomplices have substituted other persons for the real criminals. That, as Your Lordship will recollect, is the common caution given about accomplices. That is given by His Lordship Mr. Justice Shreiner in Rex vs John (A.D.) The fourth possibility m'lord, is that the story is fundamentally true in fact and absolutely true on identification, and that is the possibility which I shall ask your Lordship to accept.

Now m'lord I go back to the second possibility. (The first possibility does not have to be considered; I merely made it in order to make the alternatives complete). We go to the second alternative that the story has been concocted by the witnesses. That also, m'lord, considering the story as a whole and in detail, is so extremely improbable that it cannot carry credence. It would suggest Mapeshoane, the more probable one, at some stage between March and June first of all thought out a detailed story for himself ...

HIS LORDSHIP: There is another possibility, that it wasn't a ritual murder at all, and that these men did kill the deceased in a fracas.

MR. THOMPSON: Frankly my Lord, I have not considered that possibility because it has not been suggested by the Defence.

HIS LORDSHIP: There is no real proof that any portion of the body was removed.

MR. THOMPSON: Save for the accomplices' evidence - no.

HIS LORDSHIP: No, save for their evidence, and the medical evidence which is negative.

MR. THOMPSON: Well, m'lord, if the death was the result of

/some

some fracas in which the accused and other persons were involved, it seems absolutely beyond the bounds of comprehension why the accomplices should come along with the story they tell at all.

HIS LORDSHIP: Yes, but what I meant is this, the question of the blood. It seems to me that there must have been blood.

MR. THOMPSON: I shall endeavour to show Your Lordship ^a in/few moments that there are very strong reasons why there was no blood. On the medical evidence in this Court . Now, I am dealing with the second possibility, that the story was concocted by the witnesses. I was suggesting, m'lord, if it was, it was concocted by Mapeshoane, and I suppose it would be suggested that somewhere between March and June Mapeshoane, finding that he had, so to speak a dead body available, concocted a detailed story for himself involving the second most important chief in Basutoland, another most important chief, No. 2 accused, his own half-brother, involving three other relatives, Nos. 5, 6, and 7 accused, and throwing in, for good measure some odd persons round about the district, whom he thinks he would like to get rid of - for some reason unknown to us. That would be the suggestion. He then, having decided on his own story, approaches his bosom friends, the other three accomplices, and tells them what to say, but with diabolical cleverness, m'lord, he says, "You mustn't say exactly the same as I do, because they'll believe that I have been coaching you; you must say something slightly different. You must not all identify the same persons. You must not all say the same persons did the same

/thing

thing, otherwise that clever judge in the High Court will catch you out. No, you mustn't do anything like that ...". This is what Mapeshoane is supposed to be doing m'lord. He then goes to other people. He goes to the two relatives of Maloi and he says, "Now, I want you to give false evidence against Maloi so that your relative can be hanged." And without any demur they agree! He goes to the witnesses who give evidence against No. 8, for what it is worth, about No. 8's movements.

Finally he comes to Mr. Castle of the Police with his own story and a host of witnesses, diabolically coached and carefully coached in order to meet all the difficulties of legal criticism and any difficulties that might be raised by legal authority. That is what would be suggested m'lord, and that of course, put that way, cannot be accepted for a moment. Mapeshoane never did anything of the sort - or anything approaching it, so that the suggestion that the story was concocted by the witnesses themselves, more particularly Mapeshoane, falls away when examined, and I would add that we can find no motive whatsoever for Mapeshoane or either the other three accomplices having gone through this involved procedure in order to get rid of people whom they disliked; relatives of Mapeshoane. Some motive is suggested by Gabashane and his, so to speak, entourage, that Mapeshoane had been a naughty boy in the past and had had to be corrected.

HIS LORDSHIP: If I might use the expression, he says that these four people are the "scurry morry" of his village. Is that what it comes to?

MR. THOMPSON: I'm afraid I don't know that expression m'lord! I am always willing to learn m'lord. Yes, the

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suggestion is that they are the bad lads of the village. And in the case of Mapeshoane himself, perhaps when he has trouble with his wife, he was very rightly and properly flogged for it ... or flogged for using a knife.

HIS LORDSHIP: No, no, he was not flogged for that.

MR. THOMPSON: For fighting in Court. Very right and proper, m'lord. That incident of the flogging took place three or four years ago, since when, if Mapeshoane had been seeking an opportunity to wreak his vengeance, he must have had a number of opportunities. So that the question of motive falls away completely in the case of Mapeshoane and in the case of the other accomplices it doesn't exist at all, and in the case of the Crown witnesses who are not accomplices it is again entirely absent.

So we come to the third possibility, m'lord, that Mapeshoane and his fellow gangsters are telling a substantially correct story, but that, for reasons of their own, they have substituted other persons for the real criminals. Well, m'lord, before we even consider that suggestion, there must be some idea as to who the real criminals were. Who was there in this District who had a motive for getting rid of Meleke? There was no suggestion from anybody that anyone other than Chief Bereng and Chief Gabashane had such a motive. No other name has been mentioned. And, m'lord, if this be a ritual murder, - and I suggest all the evidence shows that it was - we know and Your Lordship can take judiciary experience of the fact, it has actually been stated by Chief Bereng in the witness box, it is common talk in Basutoland, that if there is a

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ritual murder there is a Chief in the background. In the background in the sense that he instigates, conspires, and collects the murderers, and very seldom actually performs the foul deed himself.

Then m'lord, the ingenuity of Mapeshoane and the others in picking out these accused. The ingenuity of Mapeshoane speaking to the conspiracy on Wednesday night, selecting the very persons whom one would expect to be let into the secret, Chief Gabashane and those who are living within his own skerm. During the course of the case there was a suggestion, if I may call it so, thrown out by Your Lordship, that they were all tarred with the same brush.

HIS LORDSHIP: No, no - don't criticise. It cuts both ways.

MR. THOMPSON: Yes, m'lord, I was going to say: it cuts both ways. If he is concocting something, he has got an isolated group ready to his mind, whether he is concocting or whether he is not concocting. That is so, as I was about to say to Your Lordship, and as an argument by itself, that is the answer to it. But when one takes it together with the unlikelihood of having chosen his own relatives in order to shield other persons, then it makes it much more likely that the story of the people within the skerm being in the inner secret is true, rather than that he has taken that group, his own relatives and personal companions to make false accusations against, and in Mapeshoane's own evidence in the Preparatory Examination, very much criticised in this Court, and in my submission, very unfairly criticised, we find that Mapeshoane did not go to the Preparatory Examination with a view to

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incriminating anybody, whether they were guilty or not, because at the close of his evidence at the Preparatory Examination Your Lordship will remember, as elicited in this Court, he went out of his way to impress upon the District Commissioner that two of the accused in front of the Court were not implicated in the murder itself, Nos. 11 and 12. That, m'lord is the final argument to prove that Mapeshoane is not trying to involve innocent persons, because if he were, he would not have committed this complete volte face and when having given his evidence, having said that No. 12 was present on the Wednesday, and that No. 11 had promised to sell his brother for £100, turn completely round and said, "Although I have given all this evidence I want to impress upon you that so far as I am concerned Nos. 11 and 12 were not present at the murder, and took no part in the killing," which, in fact, they didn't. That, m'lord, is the final and conclusive argument to show that Mapeshoane has not substituted other persons.

That leaves one, then, only on the general aspects of the case, the last possibility that the story is fundamentally true and that the identification of the accused is a true identification, resting on the memories and not the invention of the accomplices.

And now, if Your Lordship pleases, I wish to pass on to a general observation on discrepancies between witnesses.

M'lord one does get rather tired in cases of this nature of the argument being put forward, one day it is "Oh, these people all agree with each other; therefore they have been coached and they are not telling the truth. This witness gives his evidence exactly the same

way as he gave it at the Preparatory Examination therefore he has been learning it up, and he has been refreshing his memory, and he has been doing everything that is wrong, and you can't believe a word he says." The next day, they come along with the argument, "Look at this witness. He doesn't say exactly what he said at the Preparatory Examination; he disagrees with his fellow accomplices on various points and therefore you can't believe a word he says."

And we had a wonderful example of the futility, if I might use that expression, in this Court when Mapeshoane was cross-examined. My learned friend Mr. Maisels gets up to cross-examine Mapeshoane, he makes Mapeshoane recite who was present on Wednesday, who was present on Thursday, who was in the first group, who was in the second group, and makes great play of the fact that Mapeshoane repeats them in precisely the same order, and there was only one accused whom he put in a different order a little while later. Obviously, to found an argument, this man has learned this story off by heart. And my learned friend Mr. Maisels, after a brilliant cross-examination, sits down. And Mr. Grobelaar gets up to conduct an equally brilliant cross-examination, and he says, "Mapeshoane at the Preparatory Examination you said so-and-so and in this Court you said something else", in other words my learned friends are having it both ways. If Your Lordship accepts my learned friend Mr. Maisels, Mapeshoane is word perfect therefore he is a liar; if Your Lordship accepts my learned friend Mr. Grobelaar Mapeshoane has made mistakes and he has disagreed, he is also a liar! M'lord that just shows the futility of such an argument.

/Discrepancies

Discrepancies are there, and one must find out why they are there.

The test is, what is the nature of the discrepancies. There are two classes of discrepancies, the witness contradicting himself and the witnesses contradicting each other. In each case one must look to the nature of the discrepancy to see whether it is vital or not. If it is a discrepancy on something absolutely fundamental to the Crown case then it founds a fair criticism. If, on the other hand, it is a discrepancy on a matter of detail, it has no implication whatsoever whether in favour of or against the witness.

I hope I have made that clear to your Lordship. That is my submission, with respect, and I go on, and shall endeavour to show Your Lordship later in my address, and say that in this case there is not the slightest discrepancy, no witness has contradicted himself or contradicted the other witnesses on any of these fundamentals of the Crown story, leaving out the Wednesday evening gathering to which Mapeshoane alone speaks. They do not contradict each other on the fact of the gathering together before setting out to commit the murder. They do not contradict each other on the travelling in two groups, some of the party travelling by motor car. (The contradiction on the motor car of course, comes from the Defence, not from the Crown case). They do not contradict each other on the actual manner of the murder, as apart from the details, i.e. seizure of the deceased, throwing to the ground, holding by the throat and mouth, cutting of the lip. Those

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are the fundamental portions of the story, none of which are contradicted. And finally, on the disposal of the body, - on that we have very few details as a matter of fact - they all agree that the body was carried down a steep slope, and thrown into the donga.

So that, if the test which I have suggested to Your Lordship is correct, the test on discrepancies, be applied to the Crown witnesses in this case, I submit the Crown witnesses pass that test with flying colours. In no single case can it be said that in any one of those fundamental parts of the story, the accomplices have contradicted each other or contradicted themselves.

M'lord I am coming back to those four, what I call fundamentals to deal with what discrepancies there are in that connection, not on the fundamentals, but on the details of the fundamentals.

On the gathering together three of them say they gathered behind No. 4's house, (which is marked on the plan); Sothi says he joined the party at David's, which is a fair distance further along; that is such a matter of detail that it does not matter in considering the story.

M'lord perhaps I should have repeated before going on, some details about these fundamentals, - I should have repeated what I said to Your Lordship earlier when I was talking about the law relating to accomplices. I concede that Molemohi of the four accomplices has had his credibility injured. He did make an unprovable statement on a vital fact to Mr. Castle in the very early days of this case. Whenever I ask Your Lordship to accept anything that Molemohi says it is subject to this, provided

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he is confirmed by the other three accomplices.

HIS LORDSHIP: There is a great deal involved as far as he is concerned. (From page 20 of the Preparatory Examination).

MR. THOMPSON: I am not attempting to put Molemohi back on his horse again my Lord, - not by any means.

M'lord I shall be doing the Crown case a grave disadvantage if I attempted to rely on Molemohi. I should be destroying what I submit to Your Lordship is a sound case by trying to overstep it.

My learned friend Mr. Maisels has just assured me - and I needed no assurance at all, my Lord - that he will draw Your Lordship's attention to every one of these discrepancies, and I have no doubt that he will!

HIS LORDSHIP: You mean in regard to Molemohi.

MR. THOMPSON: All the accomplices, I expect m'lord.

We shall hear a long recital of petty discrepancies - that is why I am dealing with them in this way. The Crown has no right to reply, and that is why I must anticipate what the Defence might be going to argue, and I am going to say in advance that any discrepancy - the many discrepancies that he may find - not a single one is fundamental - they are all on petty detail.

TEA ADJOURNMENT.

ON RESUMING:

MR. THOMPSON (Continued):

On this question of discrepancies I would draw the Court's attention to all the surrounding circumstances of this murder. The party are gathered together, some of

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them apparently without any notice at all, on a dark and rainy night, and are informed that they are to take part in a killing. It is obvious that their untutored minds are concentrated on that main fact. Then it would be surprising if they started looking round to make a note as to who was present, where each man was standing, what each man was doing. Similarly on the journey. The party ahead are pressing forward, led possibly by No. 1, possibly by No. 4, pressing forward in order to meet their victim. The party behind are following up in order, literally, to be "in at the kill" or "in at the death". At the scene itself they are all concentrated on the victim, holding him on the ground, not looking round to see what part each man is playing, each man playing his own part, watching the victim, but concentrating on the one thing one would expect them to concentrate on - the cutting of the lip. And so with the disposal of the body, they must have been anxious to dispose of that body as quickly as possible, they didn't wait to take measurements, estimate distances, estimate times, see what their fellow murderers were doing, they were concentrated on disposing of the body. So that any observation of detail, however important it may sound now, is not to be expected from any of these people.

I was dealing with the gathering, and Sothi alone of the four accomplices, places the scene of the gathering further along the path. That is the main, if not the only discrepancy, as to the gathering. They agree as to the persons who were present and they agree

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as to the instructions given and they agree as to Sothi's attempt to disassociate himself from this wicked scheme.

HIS LORDSHIP: I am just going to make this observation about Mapeshoane, that he made this observation about Sothi in the Court below but he didn't make it in his evidence.

MR. THOMPSON: Sothi's attempt to run away?

HIS LORDSHIP: Yes. I think I am correct. I have a very good memory.

MR. THOMPSON: Yes, I had overlooked that. I accept Your Lordship's recollection. Will your Lordship just refresh my memory? There was a piece of evidence given in the Preparatory Examination which was put to him in cross-examination by my learned friend Mr. Grobelaar, and he frankly said, "If that is so, I have forgotten it." He didn't attempt to explain it away. He gave a very frank explanation.

HIS LORDSHIP: Yes.

MR. THOMPSON: That, in my submission, is most convincing.

HIS LORDSHIP: I may be wrong. Would Counsel remember?

MR. MAISELS: There was such an incident, but it was not Mapeshoane.

MR THOMPSON: My learned friend is suggesting that it was Molemohi.

HIS LORDSHIP: Well at any rate he didn't say anything in this Court about Sothi wanting to leave, Mapeshoane didn't. Not in this Court.

MR. THOMPSON: Of course he may not have heard it m'lord. That would pass for an explanation. The mere fact that he doesn't say it shows that he is trying to tell the story
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to the best of his recollection, and there Your Lordship will remember, there was a party of fifteen persons gathered there by then. It is not at all unlikely that one of them failed to hear one casual although important observation. But they do agree on the persons who were present, and that is what one would expect. They would look around, having been told they had to associate themselves with a murder, to see who their fellow murderers were going to be. That is only a natural thing for anybody to do, but to observe where everybody was standing and how exactly everybody behaved is a different matter altogether. Then I come to the moving off. They do not agree precisely on the persons who were in the first group and the persons who were in the second group or the persons who were in the motor car, the reason being, once again, this is a detail not a fundamental, each man, as I have already put it, was pressing forward on his own behoof, and that of course applies particularly to the members of the first group. It would be surprising indeed if they kept on looking over their shoulders to see what was happening to the second group. They were instructed to go ahead, and go ahead they did. They paid no attention to other persons.

That, m'lord, brings me to the question of the motor car. I propose here to deal with the Defence evidence, although it is not a discrepancy. It seems to be a convenient point at which to deal with the evidence of the motor car.

At the outset I point out that it is only Mapeshoane who identifies it as No. 2's motor car by

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the number plate, B.D.2. The others merely say there was a car there, and there is always room for a genuine mistake on Mapeshoane's part. He saw a motor car and he jumped to the conclusion because it was in appearance like No. 2's motor car that it was No. 2's, and he has got it fixed in the mind now that he saw the number plate. That is a possibility which in no way detracts from the value of Mapeshoane's evidence. But there is the evidence of Ntsane and Makhetha, two persons who accompanied Maloi and who did not see a motor car. That fact alone, m'lord, if I may go off at a tangent for a moment, that fact alone suggests that there is no conspiracy. If there had been a conspiracy these two men would have been told "Fix this in your minds, that you saw Gabashane's motor car", instead of which they have said all the time they did not see a car at all. It is a possibility, and I can't put it higher than that, that the motor car was drawn into the side of the road or off the road when the horsemen were seen coming, and the lights were put out, because the occupants did not wish to draw attention to themselves. That is a possibility that cannot be disregarded. There is a discrepancy on the motor car, the very sort of thing one would expect - one man says there is a bright light and the other man says there was a dim light. That is the sort of discrepancy in detail to which I have already referred.

But on the affirmative side, we have the evidence of the four accomplices that there was a car there, and we have the evidence of Trooper Hamilton who saw the spoor of a car. My learned friend Mr. Maisels has poured scorn on that evidence. I ask the Court on the

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contrary to attach great weight to that evidence, and to accept it. Trooper Hamilton, in chief, described the spoor that he saw, and he gave this detail, that the tracks must have been more than two days old because they had been made when the ground was wet, and there had been no rain for two days. And it is easy to visualize that spoor in the light of that evidence. In a dusty road, dirt road, when wet semi-mud, motor car tyres leave very identifiable impressions. Dry dirt roads, they leave very "unclear" impressions. Trooper Hamilton saw clear impressions made in mud which had not been effaced by other traffic passing over them, which remained, as all of us must have seen on innumerable occasions, on the road days afterwards, because no traffic had come along to disturb them. Trooper Hamilton had no particular reason to notice spoor at that time, and that also makes his evidence the more acceptable. He was looking round to find anything, any signs of a struggle, boot marks, and that sort of thing, and almost casually he noticed that a motor car had turned at that spot. It cannot be suggested that Trooper Hamilton has invented this evidence in order to bolster up the Crown case! In point of fact, when Trooper Hamilton gave evidence in this Court, and I'll go further back, when Trooper Hamilton gave evidence at the Preparatory Examination he had no reason to believe that it was going to be denied at all that the car was there - or that a car was there. He had no reason to believe that evidence as to the wheel marks of a motor car would be of the slightest value to the Crown one way or the other. That was his

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observation and he included it as a good Policeman in his evidence. He was closely cross-examined by my learned friend as to whether there were two wheel marks, one wheel mark, or four wheel marks. That is a typical example of the type of cross-examination which I referred to earlier on of witnesses of this kind, in which there is room for every kind of misunderstanding. We all know that native witnesses, even including experienced Policemen are unable to read plans, and what is even more surprising they are unable to recognize photographs when they see them. May be 1 in 100 recognize a photograph of a scene. (They recognize a photograph of a person, of course). That is a common experience in these Courts, and to ask a witness of that mentality to describe precisely whether there were four wheel marks, how they turned and how they turned away again, to describe it is asking him to do the impossible.

The fact I ask the Court to accept is that Trooper Hamilton did see the spoor of a car there - and if that is accepted, then the evidence of the accomplices that a car was on the scene that night, is fully corroborated. We have the evidence of the Defence that the car was not in action; it had gone out of action on February 27th. That evidence, in my submission, is open to the very gravest suspicion, particularly in view of what we heard this morning. The car was supposed to have gone out of action on February 27th and yet it was not until March 12th, eight days after the murder, that steps were taken to repair the injured part of the engine, the gear box. Why this delay of over a fortnight

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if the car had gone out of action on February 27th? There can be no possible explanation; and we know that there is some peculiar association between Walters and No. 2 accused, by this fact, admitted by Walters, that he was doing this work for No. 2 for nothing! He must have some duty, have some sense of duty towards No. 2, be under some obligation to No. 2, otherwise he would not be prepared to put his spare time and his skill at No. 2's disposal without any reward. I ask the Court that on Trooper Hamilton's positive evidence as to spoor, the accomplices' positive evidence that they saw a car there, and the grave doubt raised by the fact that repairs were not undertaken until March 12th, to accept that there was a car, and to say that a story so convincing and so well told will not be rejected merely because Ntsane and Makhetha did not see the car, for some reason completely unknown. It is positive evidence, and may I repeat myself, which their negative evidence alone cannot upset.

M'lord there is a discrepancy as to who travelled in the car. It is the very sort of discrepancy to which I have already referred. When the parties are moving off they do not all look round to see who was going which way, who was travelling in the car. The party varies from No. 2 accused and No. 6 alone, to No. 1, No. 2, and No. 6 and one or two others.

HIS LORDSHIP: We haven't yet got the distance from Chief Gabashane's house to point J.

MR. THOMPSON: I think Mr. Castle gave that, as approximately 2 miles.

/HIS LORDSHIP:

HIS LORDSHIP: I was wanting the distance from A to J. A. is where the two people stood, that is the Chief's residence, and J. That is two miles. I am asking this at this stage because these witnesses say that Bereng travelled with the first party. It seems to me that is the essence of this case and not a matter of detail. That is why I asked you what the distance is.

MR. THOMPSON: It is just over two miles m'lord. I am contending that as a matter of detail, m'lord. I am contending that once their instructions have been received it is of no importance to the individual members who travelled by car and who travelled by foot.

HIS LORDSHIP: Well, it may not have been a matter of importance to them, but so far as the case is concerned, it is, whether Bereng did travel ...

MR. THOMPSON: I don't follow Your Lordship. Three of them say that he travelled on foot.

HIS LORDSHIP: Yes. Well, at any rate, you say it is a matter of detail.

MR. THOMPSON: I say, m'lord, that once the instructions have been issued it was of no importance to them as to how Bereng travelled. What they observed was how they travelled themselves, and who the men in their immediate vicinity were. Somebody went to the motor car. They all agree No. 2 did, but whether No. 1 did or didn't would not have been a matter of importance to them.

On the journey, m'lord, if the Court is prepared to accept my contention that how Bereng travelled is not a matter of fundamental importance but merely a matter of detail, there is no contradiction,

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save on detail.

Then at the scene of the murder - and I would repeat what I have already said. The first group arrived on the scene and came into action immediately. The second group arrived on the scene, and came into action immediately. No man paused to look around, to observe, to count the people present, to see what each man was doing. Mapeshoane says there were two torches used, and Sothi I think it is, says there was one. That is a matter of no importance. Each man was engaged in his own particular gruesome task. It was a moment of great excitement, mental perturbation, concentration on the task immediately and literally in hand, holding the man down. Here one cannot expect minute observations of everything that happened. Now the discrepancy here, m'lord. Who was the person that pulled the deceased off the horse? to start off with. There are varying stories, and I needn't refresh Your Lordship's memory as to those varying stories. In the unlikely event of Your Lordship ever having been in this position ... imagine, somebody comes along and pulls the man off the horse, you don't do it yourself; you don't stop to make a mental note, "Now I must remember that it was No. 10, or No. 7, or No. 6, or Mapeshoane who pulled the man off. I remember (a) somebody seized him and pulled him off, immediately." It all took place in a moment. There was no time to pause and think, and so that is a matter of detail.

On the arrival of the two groups, it is true a short interval of time, which I would place at a few seconds, elapsed between the arrival of the two groups.

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They were both anxious to get to the scene as soon as possible, and I might just throw out the suggestion - I don't know if it has any bearing on the case - that the object of splitting into two groups was to avoid any unnecessary attention - there is no evidence about it. And of the two groups, the second group must have arrived immediately after the first on any conceivable reconstruction of the situation. There was the riderless horse. As soon as the man was on the ground all eyes were focussed on him. The second group arrived, the man being off the horse, and all eyes were focussed on the victim. Nobody was interested in the horse. Possibly, or probably somebody - this is pure theory on my part - caught hold of the horse and pushed it out of the way. It was a nuisance on the scene of the murder, started shying and getting restive and interfering with it. It is quite probable that somebody got hold of that horse by the bridle and led it away a few paces to get it out of the way. It is pure theory on my part, but nobody would have observed that. I repeat myself, but I do wish to emphasise this as strongly as I possibly can, from the moment that man came off the horse all eyes were focussed on him and him alone, - not on the horse, not on their companions, up to the moment when Ntoane produced the knife and started cutting, so that any discrepancy as to what happened to the horse, whether it was held, whether it came out of the group on its own, or was driven away, is only what is to be expected and is a matter of detail.

The witnesses do not purport to inform the Court as to who held precisely what part of the body.

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Each man speaks for himself and says "I held the legs" or whatever part it might be, "I don't know what the others were doing; I was intent on my job". So that we have no discrepancies there because there is no attempt to give details.

Then we have the order to cut, and that is not a matter of detail, it is a matter on which they agree. The order to cut was given by No. 2 to Ntoane. We come back to a matter that is vital and they agree in every detail. That the order to cut was given by that accused. And we come to something else that is vital - the cutting of the lip. The attention which had been focussed, as I have urged upon Your Lordship, on the man on the ground, so to speak generally, was now concentrated on the lip, and was concentrated on Ntoane, the butcher, who is about to make the incision. When we come back to something fundamental we get agreement; that Ntoane cut that lip. The actual method of cutting, the precise method, is not absolutely in agreement between these four men, and the reason for that is that each man was seeing the operation from a different angle, and therefore each man has a different mental picture of what was going on, but the upper lip and the lower lip, starting on the upper lip and ending on the lower lip, a sort of circular motion of the cut, - on these things they agree. Much criticism has been levelled at the Crown case because the gums were not cut. If that be the only criticism that can be levelled on this part of the evidence, I say it is completely insufficient, to upset such a clear and positive story as told by these four men. The operator may have been particularly skilful, he might have been

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particularly lucky! He might have held the lips up, he might not have held the lips up. He was in a hurry to cut, we don't know the size of the knife. If it were a very small knife the chances of touching the gums become increasingly remote. All we know is, four men saw this thing happen, describe it, and everything that is of importance in the same way. The torch light was focussed to enable the man to cut and the cutting, and it must have taken a matter of not more than four or five seconds. Four or five seconds is a very long time when things like this are going on. For those four or five seconds those people are watching, and they told Your Lordship what they saw.

Again in my argument m'lord, we come back to fundamentals and we come back to complete corroboration.

Then, m'lord, the carrying of the body. We have no details whatsoever of the carrying of the body, save that it was taken and it was dumped in the donga. If my memory serves me right, one of the accomplices says the body was carried shoulder high, another says it was carried at arm's length. It is extremely probable that at one stage it was carried shoulder high and at another stage it was carried at arm's length, depending entirely upon the nature of the ground which is being traversed. Here again m'lord, we get back to details, and not to fundamentals. That it was carried is a fundamental, that all these men did take part in the carrying is a fundamental, who actually remained behind is not a fundamental - that is a detail. They all agree that the two chiefs, and No. 4, the headman, remained

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behind. One of them, I think it was Molemohi again, in whom, as I have already said to Your Lordship, I am not really interested, said some other persons remained behind. If it were Molemohi it has no bearing on the argument at all because I have rejected him as a witness on his own merits.

I beg Your Lordship's pardon. I have left out three most important points on the killing, on which I promised to address Your Lordship, i.e. the bleeding, throttling, and the lack of bruising on the body.

Now the bleeding. We have it from Dr. Ogg, and we have it from Dr. Whitworth, if the carotid artery was being pressed, that, for the time being, would stop bleeding. We have the demonstration by Mapeshoane in which, obviously by pure coincidence, he places his hands actually on - according to Dr. Ogg - the carotid artery of the sergeant who was selected for the demonstration. M'lord we have the most extraordinary confirmation of the witnesses' evidence that there was little bleeding, if the rest of their evidence is to be accepted. I refer to the remark of Chief Bereng himself: "This man is no good; he is sickly; he hasn't got sufficient blood". That cannot have been invented. There is an Afrikaans expression which when translated into English, means, "It cannot have been sucked out of their thumbs". It is a very vivid expression. One can picture the situation: Chief Bereng standing there, by a coincidence, and not an extraordinary coincidence, the very artery has been pressed which prevents the blood flowing, and Bereng expressing his disappointment of the result, not knowing the reason. I don't know whether it will be urged upon Your Lordship that that evidence should be totally

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disregarded, that Chief Bereng made this remark, but for what reasons it should be disregarded I confess I myself fail to apprehend.

There is the corroboration, that something did happen to prevent that lip bleeding, - the complaint of the arch-conspirator and villain. The very purpose for which this foul crime was committed had failed because the victim would not bleed!

That, in my submission to Your Lordship, is very strong corroboration that there was little bleeding. The man was unconscious but not dead. Bleeding probably took place on the journey down to the donga. Whether that blood fell on to the blankets, whether it missed the blankets and fell on to the ground, would depend entirely on the way in which the body was being carried. If the body was being carried any way except face upwards, blood in all probability would not have got on to the blankets. If it was being carried face downwards it would have dripped directly on to the ground. If it was being carried sideways, that is its right side lower or its left side lower, the blood would have run, in the case of the right side, directly on to the ground, and in the case of the left side it would have run across the left side of the face and then dripped on to the ground. It would not have run on to the blankets. The body is thrown into the donga, and blood is not seen on it when it is found two days later. Trooper Hamilton, (to his evidence we now come back), has described how he formed the impression that the body had dammed up the water when the donga was not in flood, but flowing owing to the rain two days before. The body had dammed up the water, and therefore

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the mouth and nose would have been under water for a time, and the cold water would have removed the blood. Whether it had congealed or not, it would have washed the blood away from the mouth, and that explains precisely why no blood was found when the body was found.

Reverting to the question of blood at the time of the operation, I would say this, my argument will not be pressed too far, but it is an argument which I will submit for what it is worth, that everybody knows, including the natives, that if a man is hit on the nose or cut on the face, considerable amount of bleeding takes place . That is the sort of thing that a native knows, it is common in his daily life, more than amongst Europeans it is much more common; cuts and blows on the face. He knows how that portion of the body bleeds. If a story is being invented, recollecting that face he would say, "Oh, yes, I saw lots of blood; volumes of blood rushing forth". Instead of that he says, "I saw little blood", which is contrary to his own natural expectation.

M'lord on the throttling much play has been made of the fact that Dr. Ogg found no signs of throttling. Of course the man didn't die by throttling. The hyoid bone was not broken, therefore he didn't die by throttling. So that the pressure was not extreme. Whether or not marks would have been left, depends ., according to both Dr. Ogg and Dr. Whitworth, entirely on a factor which is unknown to this Court and that is the extent of the pressure put on the throat. The Court may well come to the conclusion that it was never the intention of these people to kill the man by throttling. It was put to

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Mapeshoane, at any rate, that in a ritual murder the mutilation must take place in life. I don't think that was conceded by Mapeshoane, who professed to be entirely ignorant of ritual murders, but if that be so then there is a strong reason for believing that the pressure on the throat was sufficient only to keep the man quiet and under control, to prevent him from struggling. However that may be, as I have already stated, whether or not the throttling would have left any marks is dependent on a factor which is completely unknown, and therefore the absence of marks cannot be held to be a fatal answer to a case which depends, not on theories, not on unknown factors, but on the observations of onlookers and persons who were playing their part in the murder. Similarly with the bruising.

It was strongly contended that if the man had been thrown off his horse on to the ground, held down on the ground, and the body afterwards, while still alive, though unconscious, hurled 13 feet into a donga with stones in it would have shown marks of bruising. Neither Dr. Ogg nor Dr. Whitworth expressed any surprise that there were no marks of bruising when they learned that the body was clothed in two thick blankets, and trousers. That was the cushion between the body and whatever surface the clothing came in contact with, and of course, I repeat my argument as an unknown factor here, were there stones at that particular spot? There is no part of Basutoland in which there are not rocks of some sort or stones of some sort, but were there rocks and stones at that particular place where the body was thrown to the ground, sufficiently

large to cause bruising.

Here I would draw to Your Lordship's attention the evidence of Dr. Whitworth that flat rocks, such as my learned friend Mr. Grobelaar was so eager to point out at the inspection, would not be expected to cause bruising. Sharp stones or rocks of some size - not just little stones.

But Dr. Whitworth was at pains to say that he would not expect bruising from a flat rock embedded in the ground - and those are the only rocks we saw. So that the absence of bruising, absence of bleeding, absence of throttling, all depend - and I must impress this upon Your Lordship as strongly as I can - all depend on unknown factors and are not sufficient to negative a positive case put before Your Lordship so clearly by the eye witnesses.

HIS LORDSHIP: I would like to put a question to you in regard to the blood. Dr. Whitworth said that as long as a man's heart was beating there would be blood pumped through the body and therefore there would be bleeding. The hands were not on the carotid artery the whole time. They took it away after his lip had been cut. Then, even if it is so, that there was no bleeding at that stage, these witnesses may be correct, but after they had to move their hands, and they thought he was dead, and he was being carried away, but he was only unconscious, even in that condition he would bleed. The blankets were round his neck, and the blood must have gone on the blanket.

MR. THOMPSON: I suggested, m'lord, that that would depend entirely on how the body was carried. I am assuming this, and I think I am justified in assuming it, m'lord ...

HIS LORDSHIP: But even before they carried the body away

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there must have been some interval of time after the artery was released.

MR. THOMPSON: Practically none.

HIS LORDSHIP: But however the body was carried there must have been blood on the blanket.

MR. THOMPSON: That I submit m'lord, was washed off by the water.

HIS LORDSHIP: As one of the assessors said, if he was lying on his back there would have been blood on the back of his head, and the back of his head was not in the water.

MR. THOMPSON: The back of the head was washed by rain. It still rained for some time, and probably the back of the head got more moisture than the front.

HIS LORDSHIP: You would have been in a much stronger position if the blankets had been submitted for examination.

MR. THOMPSON: That I concede my Lord.

HIS LORDSHIP: It ought to have been done. There may, even now, be blood marks on the blanket.

MR. THOMPSON: Might I say this, m'lord. It would have been extremely difficult to submit these blankets because the analysts, - and I rely upon my own experience - are very loth to examine anything except specified marks, but to undergo a roaming exploration over a large garment to see if there is a spot of blood ...

HIS LORDSHIP: They could look at it with a microscope and then take something out you see. This witness Trooper Hamilton said that it was covered in mud, and he also gave the evidence that the blankets were away from the head, and there was rain that night.

/MR. THOMPSON:

MR. THOMPSON: How the blankets got away from the head is obvious m'lord.

HIS LORDSHIP: Well they must have fallen away when he was thrown down. But there was rain that night, and your suggestion is-that if there was any blood it would have been washed out by the rain.

MR. THOMPSON: Either by the water in the donga, the river, or by the rain which was consistent all through that night. That the blankets have not been submitted for examination is, I won't say unfortunate m'lord, but possibly this might have been cleared up if they had been. They have not and one cannot state what would have happened if they had.

HIS LORDSHIP: Well, I must take it that there is no blood on the blankets.

MR. THOMPSON: With respect, m'lord, I submit Your Lordship is not driven to the conclusion that there is no blood because there is no analytical proof.

HIS LORDSHIP: Trooper Hamilton says there was no blood on the blankets.

MR. THOMPSON: He says there was mud, m'lord.

HIS LORDSHIP: He says there was no blood. You asked him that specifically. Nobody had asked him that before, and you asked him in re-examination.

MR. THOMPSON: I don't remember that I asked him m'lord.

HIS LORDSHIP: Yes, you did.

MR. THOMPSON: It was very silly of me if I did.

HIS LORDSHIP: If you like I'll refer you to it. It was at the end.

/MR. THOMPSON:

MR. THOMPSON: I think Your Lordship has unduly promoted me! According to my learned junior it was in answer to the Court. "I examined it for blood but I did not find blood".

HIS LORDSHIP: Yes, oh! yes, that's right. "I examined both blankets. I unpinned the blankets and examined them. I did not find blood stains". One of the assessors also asked. "I examined the back of his head for blood stains. There was no blood on the hair".

MR. THOMPSON: I would have invited trouble upon myself by putting the question myself.

HIS LORDSHIP: Yes, that is a mistake I made.

MR. THOMPSON: M'lord on Trooper Hamilton's observations I have invited the Court to place extreme reliance on his observation of motor car spoor, and his observations of how the body was lying, but his observations of the examination of a muddy blanket as to whether there was anything that looks like bloodstains is a very different matter indeed. It is obvious, if I may say so m'lord, that an analytical examination of the blankets might or might not have been of assistance. I have already suggested to Your Lordship that it is not inevitable that blood would have got on the blankets when the body was being carried. To go back a step earlier, I invite the Court to say that the removal of the hand from the throat was practically simultaneously with the lifting of the body to carry it away. All these things happened very quickly. They didn't stand around and pause and ponder and debate Chief Bereng found that his object was defeated and in a fit

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of pique, anger, disappointment, immediately he issued the order to take him away; when Bereng said it was no good, Gabashane said "Take him away". It all happened in a matter of moments, m'lord. They weren't going to stand round a public road unnecessarily, even if it was the middle of the night, over a corpse, with the risk of somebody coming on them. So the probabilities are that the hands were removed simultaneously with the up-lifting of the body.

HIS LORDSHIP: Then there was another witness who gave evidence of a motor car being there that night.

MR. THOMPSON: That was the witness No. 8 is alleged to have tried to get out of his hut on the excuse that there was a drunken man on the road.

HIS LORDSHIP: Oh, no, no.

MR. THOMPSON: Oh, yes, I am obliged to Your Lordship. That was Moliko, (page 30 of the Preparatory), I had overlooked that. He was the fourth witness for the Crown after the accomplices finished.

HIS LORDSHIP: He is important, because he purports to be an independent witness.

MR. THOMPSON: Yes, I am very much obliged to Your Lordship for reminding me. I had overlooked that. I ask Your Lordship to accept that witness. There is one point on which Mr. Castle very properly and very rightly has said that Moliko is not correct, and that is that when he was standing at the corner of the garden, at night time at any rate, and one thing and another, he could not have seen the car actually standing at the cross-roads where he says it was, but the answer to that is the

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man may have seen the light of a motor car there; that Mr. Castle said he might have seen, a light shining through the trees; and, in his native way, he assumed because he saw the light of a car that means he saw the car itself. It is a very ordinary line of reasoning, not only amongst the Bantu people m'lord, but amongst Europeans. He did say, right from the outset, that he could only see part of the car. The part he may have had in mind were the lights, which were in fact a part of the car. Except for that there can be no criticism of this witness. He is absolutely independent. HIS LORDSHIP: It was suggested, I think, that his evidence was a fabrication.

MR. THOMPSON: A fabrication, yes, m'lord. That is the suggestion, but my remarks on fabrication apply to him as well. This witness is prepared to fall in with a fabricated story, which incidentally is not completed as fabricated, - very cleverly partially fabricated, if that's true - against two of the most important chiefs in Basutoland, at serious risk to himself and his family. It is incomprehensible that he would do it against his own Chief and Chief Bereng. It is incomprehensible that a man, any man in Basutoland in his sound and sober senses, would agree to take part in such a scheme. And he gives his reason for coming out, the barking of his dogs. He describes having seen a group. If this is a fabricated story, why wasn't he told to say, "Oh, yes, I saw Bereng striding along there, as large as life"? Or "I saw No. 2 go down to his car. He is my chief. I recognized him." "I saw this and that. I saw that person doing so-and-so; that person was in the first group; there were two groups. I saw Maloi - " apart from hearing him. If this is a fabricated story all those things
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would have been features of it; all that I have suggested would have been features of the story. It is not a fabricated story. He was called out of the house by the barking of the dogs, he saw a group of people - a very unusual thing at that time of night - he didn't recognize them, and his curiosity was so aroused that he moved further down to his garden in order to see what these people were doing, and as Mr. Castle has told us, if he went down to the garden he would have had a better chance of observation than when he was standing up at the stable by the house. And while he was watching this group of people he heard Maloi's voice and he saw the car move along the road. That is very strong evidence, m'lord, in support of the motor car, and in support of the accomplices' story that Maloi got off his horse and went up to the first group.

I come back just to finish this question of the murder and the bleeding, m'lord. I have already said, I think twice, but may I say it again: that the Court has before it a positive story, and a positive story should not be rejected solely because there is some negative criticism resting on unknown factors. If that negative criticism is joined up with other positive criticisms such as contradictions, contrary evidence, unlikelihood, discrepancies, that is a different matter, but it must not be rejected merely on negative evidence, absenae of evidence. That, I submit, is an entirely illogical approach to the problem which is before Your Lordship for decision. I am going to deal with Maloi and the two Ntais together, m'lord.

/HIS LORDSHIP:

HIS LORDSHIP: Now, what do you say about Fusi? He produced one witness. And also, there was no evidence that he was in the conspiracy.

MR THOMPSON: The evidence is that he came on the scene in the middle of the night contemporaneously with the deceased.

HIS LORDSHIP: Yes, but there is no evidence that he was present at the conspiracy meeting. One person says that he saw him holding. That is only one, and there is no evidence that he did anything.

MR. THOMPSON: Basuto do not go walking about in the middle of the night and come on scenes of murders by accident; that is very improbable. It seems likely that he was posted there as some sort of a sentry to observe the approach of the victim, and if necessary, shepherd the victim to his doom. Because, Your Lordship will remember, one of the accomplices said that No. 8 came up just behind the deceased. That was Sothi, who says he came up just behind the horse, which distinctly suggests that No. 8 was on the road to keep an eye open for Meleke when he was coming along, and posted either by Maloi or on previous instructions from No. 1 or No. 2 to observe the approach of the victim and if necessary shepherd him too. If it was Molemohi then that argument has practically no weight at all m'lord, because he is the only man who says so. But we have this suspicious circumstance. He was there, where no innocent person would be likely to be, and he denies it, and on the authorities a false denial is corroboration.

/HIS LORDSHIP:

HIS LORDSHIP: You see, we have got it that he is not all there! '

MR. THOMPSON: Well to what extent he is not all there we don't know. He is weak-minded.

HIS LORDSHIP: You have got the evidence of the man to whose hut he came. That shows that he is not all there.

MR. THOMPSON: On the contrary, m'lord. It shows that he is ~~very~~ much there! It shows that he was trying to entice another victim out when the first one wasn't satisfactory. That is how I read that evidence m'lord. That is what I ask Your lordship to read into that evidence. While the corpse was being disposed of, the three Chiefs sent this poor, weak-minded individual to entice somebody else out. That is a conclusion to which the Court is entitled to come on that evidence. There is no other reason why they wanted that man to leave his hut that night, if it is accepted that he did go and try to get the man out of his hut. Weak-minded as No. 8 may be, m'lord, he was not too weak-minded to play the part that was allotted to him in this conspiracy.

As I was saying, m'lord, if No. 8 came into the Witness Box and said, "Yes, I was there. It was near myhuts, I heard a noise in the middle of the night, I went out to see, and there to my surprise was a group of people with somebody else on the ground, they were cutting him, and I stood around and watched what was going on," I would have been the first to concede m'lord. The complete answer to the Crown case would be that he should be discharged. But he doesn't elect to say so. His

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denial of presence is corroboration of the allegations of the accomplices, if it is false. Of course if the accomplices are accepted on the other identifications, there seems no reason why they should not be accepted on this. Why do they bring No. 8 on the scene unnecessarily if he was not with them. That is the case against No. 8 m'lord. He played a far greater part than appears from the evidence.

Now for No. 11. No. 11's activities of course start on the previous evening, the Wednesday evening. No. 11, who is the (I don't want to be dramatic), the Judas Iscariot of the team. The two Ntais, Ntsane and Makhetha give evidence against him. The same argument applies to them as applies to all the other non-accomplices' evidence. Why should they join in a fabricated story? Why should they implicate their own relatives? Why should they join in a conspiracy against two of the most powerful chiefs in Basutoland? To none of those questions, I respectfully submit, can the Defence give any answer, - any answer which will bear a moment's scrutiny. They gave their evidence, these two men, very well. Their demeanour was good, cross-examination showed no weaknesses in their story, and I ask the Court unhesitatingly to accept their evidence. If that is so then we know that Maloi went to Gabashane's on the Wednesday night on no lawful occasion. The reason why he took these two men we don't know - it may beve been for escort, and it may have been with the idea that if extra persons were wanted they would be dragged into the scheme as well. Whatever the reason they were taken, they were left out-

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side the Court House. He came back and on his way back home he disclosed to them that somebody was to be killed to please these chiefs, or to please Chief Gabashane anyway. That is the fullest corroboration of Mapeshoane that could be obtained, short of another eye witness, of Maloi's entry into the house and agreement to take his relative to the scene of the crime. The corroborative part of the Wednesday night story is the fact that he was at Gabashane's village - where he says he was not. That is the general corroboration against all the accused m'lord, that Maloi was at Gabashane's village on Wednesday evening.

M'lord I have submitted that there seems to be no reason for rejecting the evidence of these two Ntais, the relatives of No. 11 accused, but the argument that will be advanced, doubtless will be advanced, is that they didn't tell this story in March when Mr. Castle first interviewed them. Naturally I presume they were the first two people to be approached? Why? Because they were the last persons known to be in the company of the deceased - they and Maloi - and at that time they gave no information to the Police about their visit to Gabashane on the Wednesday night, or the abandoning of the deceased on the Thursday night, and criticism will be levelled against them on those grounds, but I ask the Court to place itself in their place. They are ordinary commoners, living under No. 2 accused. If they, on their own, at that stage, had come forward implicating No. 2, their Chief, and no other evidence had been obtained to corroborate them, their position, not only in that village, /in that

in that area, but in any part of Basutoland would have been intolerable. Not very courageous, I know, but very understandable and very human, that at that time they should keep quiet. But, as soon as they conceived themselves to be safe, i.e. as soon as the Chief was arrested, then they come forward with the full facts. That is my answer to the criticism which I have no doubt will be levelled against them - the only criticism which can be levelled against them. Then there is the evidence of the Thursday night.

Might I revert to this question of keeping their mouths closed and not saying anything to the Police originally, that of course suggests that there has been no fabrication, because it is difficult to see, when, between March and June, perhaps not difficult to see, but it contemplates that some time between March and June, Mapeshoane presumably got hold of these two men and fabricated the story that I have already submitted to Your Lordship. That is so fantastic as to be rejected.

Now on the events of the Thursday night the evidence of these two Ntais is clear, and here again, I think this is evidence against all the accused; of the abandonment of the deceased, because that was part of the conspiracy as originally laid the evening before; that the waylaying and killing of the brother should take place on the return from the funeral. So their evidence about abandoning the deceased on the Thursday night is evidence against all the accused, it is strong corroboration of the accomplices' story and confirms the case against the accused as to the method in which this murder was

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plotted and carried out, and I have already dealt with the question of their not seeing the motor car. I dealt with that under the evidence on the motor car.

I think, m'lord, that brings me to the end of my resume of the Crown evidence, various criticisms that may be levelled, and it has been my endeavour, which I hope has been successful, to assure Your Lordship - convince Your Lordship - that whatever discrepancies there are are not discrepancies in fundamentals but in details.

I want to revert for one moment m'lord, to the question of Bereng walking. I don't know to what extent Your Lordship is prepared to accept the evidence of Bereng that he suffers from gout. His own words were, and his followers, that he suffers from gout; even if he does suffer from gout we have no evidence that he is unable to walk two miles if he considers it important enough! If he was there he must have considered this very important. On the other hand, he may have travelled in the car. It is not impossible, however, that he went on foot. There is no evidence before the Court to show Bereng's gout, if it exists at all, is such as to prevent his walking two miles, if he so wishes.

So m'lord that completes my resume of the Crown evidence, and the reasons why I ask the Court to accept it: I say in substance it is true, and that the identification of the accused is correct.

I do not propose to delay Your Lordship at any length on the Defence evidence. With the exception of No. 10 the Defence is a bald denial.

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Now m'lord there are circumstances, of course, in which an accusdd cannot say anything except, "No, I know nothing about it". One has to examine all the surrounding circumstances to see whether one can expect anything more. In this case, surely in a village the size of Mamathe's somebody must have seen these two important chiefs on the night of Thursday March 4th if they had been there. Somebody must have heard a wireless playing, somebody must have gone in and taken them food, other than Titimus or No. 3 accused. Somebody must have heard them, seen them if they had been in the village on the Thursday evening. This is not a case where an accused can say, "I was alone, miles from anywhere, nobody was about and nobody could speak to my movements". This is a case where the men are in the middle of a populated and busy village. It would have been the easiest thing in the world for them to have found witnesses if they were there.

HIS LORDSHIP: They are corroborated by the other accused, the members of their household.

MR. THOMPSON: I suggest there should be others, m'lord. There are women around that village, women who prepare food and brew beer and so forth. Surely one would expect some woman, or some person, some youngster to have seen them, some independent person.

I come back to this of course, m'lord, that if the Crown's story, the accomplices' story is accepted up to this point, then a mere bald denial is not sufficient to upset it. That applies to Nos. 1, 2, 3, (I leave No. 4 for the moment), No. 5, 6, 7, and 9 m'lord. That argument

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applies to them, they meet the case only with a bald denial. Those are what has been described as the "intimate group". As to the others, No. 4, who did not live within the skerm, he lived a little distance away, he also has a bald denial, coupled with a very suspicious attitude. Suddenly he says, in cross-examination, that he was too ill to move out, and that must have been an afterthought on his part, a pure invention. He might have been not in the best of health, but too ill to move out is an invention, and I say that because if that had been so, that Defence would have been put to all four accomplices particularly Mapeshoane, "Wasn't your headman too ill to move? Had he not been too ill to move the previous fortnight?" It would certainly have been put to these people had it not been an afterthought by No. 4 in the witness box under cross-examination. And it would have come from the accused who gave evidence before him, No. 2 accused would have known about it, No. 3 is a follower of No. 1 so it doesn't necessarily follow that he would have known about it. No. 2 accused would have known about it, and he makes no mention of the illness of No. 4. Then the accused No. 7, also suddenly, at the last moment, came forward with the story that he was ill, too ill to move, he was confined to his hut, and his trouble was a rash, which confined him to his hut for a long time. Of course that also was an afterthought and was not put to any of the Crown witnesses, was not mentioned by the previous Defence witnesses, and is palpably false.

Then No. 10 and his alibi. Alibis such as these are always suspect, in my submission. Somebody comes along

six months later and without a moment's hesitation, and if I may be allowed the expression, without the flickering of an eyelash, he says, "Oh, yes I remember what happened 8 months ago. It was precisely sunset when so-and-so left. I remember it very well. I have got no reason for remembering it. He is not a particular friend of mine. We were not doing anything together in particular. There was a crowd of people at the funeral, but I do remember it." M'lord such an alibi must always be suspect. If at the time of his arrest, No. 10 had said, "When am I supposed to have done this thing?" and when told, immediately answered, "Well, go to my village and they'll tell you that I was there that night," then this alibi would be a good one, m'lord. A stale alibi, it has been said, is always a bad alibi. An innocent man who knows that he can prove he was elsewhere says so immediately. If he hadn't said so to the Police, being a raw native, he would have said so to his Counsel at the Preparatory Examination. I remember well, m'lord, His Lordship Mr. Justice Tindall making the very comment on an important case in Johannesburg where an accused had an alibi of important events, the accused having been legally represented at the Preparatory Examination, His Lordship said "If this had come forward at the Preparatory I would have paid much more attention to it. An innocent man with an alibi does not wait until his trial. He does not wait until he has heard everything the Crown witnesses have to say against him before coming forward with his alibi, and that is the argument that I address to Your Lordship on these two alibis. He might have been at the funeral on the Thursday, I do

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not deny that. It is quite easy for him to have been at the funeral and return to the murder, and even to have gone back home that day if he wished to, to his own home. That is what I submit to Your Lordship on the defence of No. 10.

No. 11 is really the same as the others. He says his relatives are lying about him. The reason why he left the deceased behind was because it was raining and he wanted to get back to his cattle. There may be some truth in that, to this extent, it was the excuse that he made, or was prepared to make, either in his own mind or when he was challenged when asked, "Why did you leave this man behind?" He would have said, "Oh, but it was raining and I wanted to look after my cattle". He was always prepared with that excuse. He went out prepared with that excuse, anticipating that his fellow Basuto would challenge him as indeed Kocha Kocha did. He said, "Why did you leave this man alone in the middle of the night? Now see what has happened." That was the answer he was prepared with, and that is the answer which he gives in this Court, and I ask Your Lordship to reject it.

My Lord for the reasons that I have advanced Your Lordship, I ask Your Lordship to find these accused guilty.

HIS LORDSHIP: And I want you to give me the case of that Portuguese Gardener Johannesburg - the latest case in the question of the intention to kill. Butelize case used to be the top case on the subject, 1925 A.D. but this one is the latest, Appellate Division, Mr. Justice Greenberg.

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It is on this point, that the man was not dead when his body was removed, and the people though thinking him to be dead, threw him into a place where he met his death, and they were responsible for it.

MR. THOMPSON: I will try to trace that m'lord. I don't recognize it under the Portuguese Gardener description, but I will try to trace it for Your Lordship.

May I have Your Lordship's permission, and with my learned friend's concurrence this afternoon when I find it, merely to give Your Lordship the reference?

HIS LORDSHIP: Yes.

MR. THOMPSON: Of course the Crown have a right to reply on legal questions, so I can cite it to Your Lordship in the form of a reply.

I am asking Your Lordship to find all these accused guilty of murder, and to find that Nos. 1 and 2 conceived the plan, hatched the conspiracy, gave the instructions. The remainder are merely tools in their hands. That accused Nos. 3, 4, 5, 6, 7, 8, 9, and 10 were present, and played a greater or lesser part on the instructions of their chiefs, in the foul murder of one of their fellow Basuto. I ask Your Lordship to find that No. 11 played the most contemptuous part that any man could have played, and deliberately, for monetary reward, enticed a victim to his death, merely on the instructions of two chiefs, about whom I prefer to make no comment.

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