

C.F.8.61

36, 1949

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IN THE HIGH COURT OF BASUTOLAND.

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CRIMINAL SESSIONS

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 Lerotholi.
(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:10.

Reported by:
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MR. MAISELS:

May it please Your Lordship.

M'lord the first question as I see it in this case is

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whether it has been established, quite apart from the evidence of the accomplices, that the deceased Meleke was murdered. M'lord I think it is fair to say, in my submission, that the medical evidence does not by any means establish this fact - the contrary is rather the case. The highest at which I think the medical evidence can be put in favour of the Crown is that it cannot be said to be impossible, and I underline the word impossible m'lord, for the deceased to have been assaulted in the manner testified to by the Crown witnesses. But the submission is that there are present in this case, again putting my argument as low in my favour as possible, there are present in this case certain features which make it extremely improbable that the death was due to an unlawful killing in the manner described.

HIS LORDSHIP: If the Crown case is established then you would not contend that it was not murder?

MR. MAISELS: No.

HIS LORDSHIP: Because it seems to me that if people intend to kill a man and think they have killed him, and then throw his body down into a donga and leave him, that is murder just the same.

MR. MAISELS: That is no issue in this case m'lord.

Your Lordship will appreciate that even if death was caused in the manner described by the Crown witnesses, that is only the beginning of the case.

It must be borne in mind, in my submission, in

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evaluating the medical evidence in this case, that it is not a case where a post mortem examination was conducted in vacuo without any idea that the deceased met his death by some foul play or another. The evidence is quite clear, m'lord, Dr. Ogg says that he conducted the post mortem after he had been informed that foul play was suspected, and his examination was conducted with a view particularly to ascertaining whether there was any evidence whatsoever of foul play and, as he said himself m'lord in answer to a question that I put to him, he looked particularly for this, for evidence of foul play, evidence of an assault, and, moreover, m'lord, Your Lordship, did not have the evidence of an inexperienced medical practitioner in Dr. Ogg, Your Lordship had the evidence of a person who has had considerable experience of post mortem examinations, who has been in this district for many, many years - I think he said he had been in this Territory for over 20 years - and a person who has had fair experience of the so-called ritual murders.

My learned friend said that the attack on the Crown case by reason of the absence of injuries to the body is of no value because it is based on theory and can't stand in the face of positive facts. My submission to Your Lordship is briefly this: it is impossible to square the evidence of the accomplices with ^{the} medical evidence. Perhaps impossible is a bit too high I say that it is improbable, and I say m'lord that if Your Lordship gets an improbable story in the light of the medical evidence told by one person, the mere fact that all people

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tell the same improbable story does not take the matter any further at all.

Now let us examine, if Your Lordship pleases. What was the evidence of the accomplices in relation to the assault on the deceased, and compare that with what the doctor found. Now these are the facts as deposed to by the Crown witnesses. The deceased was pulled violently off his horse. He was then dragged a distance of at least six yards. He was then throttled with as much force as possible. My learned friend said, somewhat airily, one doesn't know how much force was used. Well, ofcourse, if he says that, he rejects the evidence of his own Crown witnesses, every one of whom said that "we were doing our job and this man was being throttled with as much force as possible." The question was specifically put to each one of them. They throttled him to do the job properly, with as much force as possible.

HIS LORDSHIP: When they had throttled him they thought he was dead.

MR. MAISELS: Then m'lord, having throttled him, and the operation having been performed on him, he is then carried down this cliff and I hope I am not overstating the position when I say that the terrain there was one where falls could, and in fact according to the evidence, did take place, and then having been carried down the cliff, the deceased was thrown down a donga, not carefully placed, as my learned friend has almost suggested in his argument, but thrown down - and I think the fair way of putting it, was hurled over a precipice. The body

/was

was hurled over this precipice, this cliff, which is of a height of either 15 to 20 feet, or 10 to 20 feet. I am taking the two possible cliffs for the moment. I don't care which one it is. Your Lordship will bear in mind, of course, that one of the witnesses pointed out one, and another pointed out two. I don't care which one it is. The Crown can have any one of them, but in fact this person was thrown down this cliff, yet - what is the fact? Would it be probable, making due allowance for the fact that the deceased was wearing blankets, making due allowance for the fact that the deceased had got trousers on, making due allowance for all those things, - what is the probability m'lord? What would one expect to happen?

I suggest that one would obviously expect there to be some mark, some tear in the blanket, and if not an injury to the body and injury to the clothes. What is there? Absolutely nothing. Not a single cut, not a single bruise. The only thing Your Lordship has are slight abrasions on the body caused, admittedly by the Crown, by crabs. Admittedly! And the marks around the lips. Now what did Dr. Ogg say with regard to those marks around the lips. In considering Dr. Ogg's evidence on this point, it is important, in my submission, to remember that normally crabs attack that part of the anatomy first. That was his evidence. They go first for the nostrils and the lips. They also go first for the part where there is a wound, and if the deceased had fallen on his face and there had been a slight wound - and I suggest that that theory can't be said to be half as fanciful as some as those advanced

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by my learned friend in argument, - they would have gone for that place as well.

Dr. Ogg formed the opinion that those injuries to the lips were caused by crabs. He can't rule out the possibility that they might have been caused by a knife, but what is the probability. As I understand the case m'lord, and all cases in fact, they are decided in the Union at all events, and I hope here, on probabilities and not ~~on~~ fanciful theories. The doctor said they were probably caused by crab marks, possibly - and I emphasise possibly - caused by some other agency. And this opinion is given by a Doctor who is examining the body with a view to ascertaining whether there has been foul play and this evidence is given by a doctor who knows about ritual murders. There were crabs there, that was testified to by Trooper Hamilton. The doctor arrived at this conclusion quite independently of Trooper Hamilton's information, and I suggest that the probability is on the medical evidence alone, that the injury was ^{not} caused by a knife wound.

Would it not be remarkable, or is it not remarkable, that with the handling that this body is alleged to have received, there is no external evidence of it? The first point I want to deal with is the question of the blood.

HIS LORDSHIP: That seems to me from your point of view the most important thing in the case.

MR MAISELS: As Your Lordship pleases. I want to deal with the reason which is suggested by my learned friend why there are no blood marks. Because, if one

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applies one's ordinary common sense ...

HIS LORDSHIP: We must take it that there are no blood marks.

MR. MAISELS: As Your Lordship pleases. That is the evidence of Hamilton, and I am entitled to say that if there was a suspicion of blood marks on the blanket, the Police in Basutoland know their duty. This is really a most remarkable case. By a lucky chance, in the middle of the evidence of Dr. Whitworth I think it was, who was called on some other point - or possibly when Dr. Ogg was recalled, but certainly not when he was first called - it appeared that if a certain artery in the throat were held it would have the effect of stopping bleeding.

We know that m'lord, but we also know, I suggest to Your Lordship, that when the artery is released blood gushes forth. Now is it suggested seriously by my learned friend, (a) that the whole time that the deceased's lip was being cut this particular artery was being held so tightly that no blood could gush forth? Is that seriously contended m'lord? Could it seriously be contended by my learned friend that in this excitement and this bustle and in this hustle of which he talks, in the circumstances of which the witnesses are quite unable to depose to what one or other did, that the person holding the deceased by the throat held him in such a significant manner, m'lord, that no blood escaped. M'lord there would be blood, I suggest, at the first cut. One of two situations arose M'lord, either the throat was being held while the deceased's lips were being cut, in which event the deceased was not unconscious - Your Lordship appreciates that, and if he

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was conscious he would have struggled or moved in some way - or they would have ceased holding his throat the moment he became unconscious, if only to give the butcher, as my learned friend called him, (he can call him whatever he likes, "surgeon"), more room to operate. But in either event there must be blood. Now that is blood at the time of the operation I am talking about, but what is the position when the body is going to be moved. What is the position there? -- My learned friend said very easily and smoothly, one doesn't know how the body was carried, but one does know the following thing. m'lord, that the body was lifted up from the ground one does know that the body was taken down hill. One does know that it was over uneven ground, and yet there is no blood on the blankets.

Is that conceivable? It is not merely a question now of probabilities. I suggest to Your Lordship that it would be impossible for there to have been no blood anywhere in this case if the evidence of the Crown witnesses is true. The matter doesn't end there. I have dealt with the situation of the body on the ground, I have dealt with the situation of the body being taken down this precipitous cliff, this uneven ground, and I deal with the question of the body lying in that donga. We know, on the evidence of the Crown witnesses again, that there was never much water in that donga, at any time. As a matter of fact one or two of them said that they heard no splash at all when the body fell. They said they merely heard a thud. Now the body was lying there, and the question was put by one of the African assessors which seems to me to clinch

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the matter in regard to the question of blood, because it is not a question of the water washing a bloodstain off, it is the question of the water removing a matting of the hair which would inevitably take place. If there was blood and the quantity of blood that there should have been if the lips were cut, my learned friend said this holding of the artery stopped the bleeding. But the doctors said clearly and unequivocally that the moment that artery is released the bleeding starts again. How can the absence of blood be explained by the Crown in this case. I suggest to Your Lordship that the evidence is against the absence of blood, and my learned friend has in no way suggested a reasonable theory, a theory which can stand the test of examination, and which would account for the total absence of blood in this case.

Your Lordship will remember that Hamilton said when he found the body that the blankets were still pinned up. It is possible that there shouldn't have been blood at that very spot where the pin is? Isn't that the place where one would expect it? No blood at all! Now if the absence of blood by itself were all that was wrong in this case, well, there might or there might not be a theory. If the absence of injuries as a result of being thrown from a horse were absent, that in itself might not be sufficient. If the absence of injuries as a result of being held on the ground with considerable force for some time, the absence of injuries to the clothing, and absence of injuries to the body were by itself, that again might not be sufficient.

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If there were no injuries as a result of the body being thrown into the donga, taken by itself again, that again might not be sufficient for my argument. Isn't this a case where co-incidence has followed upon co-incidence with such regularity that it is beyond the realms of human imagination or comprehension that there should be no blood marks, no marks on the body after all the deceased's body had been subjected to?

Normally when one is dealing with a case of this description, Your Lordship knows this from Your Lordship's experience, medical evidence is always put forward to show that the cause of death, as testified to by the Crown witnesses, is probably the cause of ^{the} death. In this case, Your Lordship has an unusual spectacle. The medical evidence probably points to death not having been caused in the manner suggested, the medical evidence probably points to the deceased not having been injured in the manner suggested, and the Crown is forced to rely m'lord, on what I suggest to Your Lordship are mere fanciful possibilities.

To sum up on this aspect of the case

HIS LORDSHIP: What about the gums?

MR. MAISELS: I am obliged to Your Lordship, I had forgotten about that. That was a point elicited by my learned friend Mr. Grobelaar m'lord, and it is again a point of significance. My learned friend Mr. Thompson says, "Oh, well if that's the only thing, it doesn't matter".

I quite agree. If the gums stood by themselves m'lord, all right, but the gums are another one of these things that happens, which would normally happen, which would

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probably happen, which hasn't happened in this case. But it doesn't stop there. Would Your Lordship picture the deceased, the injured man, as deposed to by the Crown witnesses being held on the ground, a mass of them crowding round, there is faint torchlight, so faint that one of the witnesses couldn't even recognize who was being killed, and the surgeon is operating. Under those conditions wouldn't the gums be injured? Probably, normally, ordinarily? Or is this again one of those impossible things that happen in ritual murders?

Your Lordship will appreciate that in this case Dr. Ogg's evidence was confirmed by Dr. Whitworth. There was a violent throttling in this case - it wasn't a gentle holding of the neck. It was a violent throttling by men out to murder - that is the evidence of the Crown witnesses, and here again ~~is this~~ remarkable co-incidence, no marks external or internal. Now I hope I am not doing the Crown case any injustice if I say this: that the medical evidence by no means corroborates, by no means, the evidence of the accomplices, and if anything, is directly opposed to that evidence.

My learned friend quoted a passage from one of the doctors where he said it was possible that the body might be in this condition, even though it had been subjected to the assault, but what does a doctor ordinarily expect? Not what the possibilities are. M'lord it is the probabilities. You would probably get your injuries, you might, in the exceptional case, not get your injuries. You might, such as the case quoted in the book to which Your Lordship has referred me, get a case where there are

no external injuries. Does my learned friend suggest a case where there are no internal injuries? My learned friend did not ask the doctor whether, if the deceased was throttled with as much force as possible, there would be no injuries. My learned friend could not ask that question because he knew the answer.

HIS LORDSHIP: The doctor said that external wounds in the form of bruises and abrasions of the skin are usually found on both sides of the neck. Usually.

MR. MAISELS: My argument really amounts to this, m'lord, usually you would have an injury to the throat. Usually you would have an injury to the body. Usually you would have blood. But in this case you have none. None of these are here. But ofcourse there may be some mysterious way of doing things in Basutoland about which evidence has not been given. What is the sum total of all this? It is this m'lord; The medical evidence does not corroborate the accomplices at all, and if anything, and I hope I am not putting my argument too strongly at this stage, if anything tends to throw doubt on the credibility of the accomplices. The medical evidence in my submission should in a case of this nature furnish the strongest corroboration of the method in which the deceased was done to death. In this case it plays exactly the opposite role.

My submission is that that is a hurdle which the Crown has to overcome before it can convince Your Lordship, if I may use the term "convince", that the deceased was done to death in the manner described.

I now pass on to deal with the evidence of the

/accomplices.

accomplices. My learned friend correctly said in the course of his remarks that there was no conflict between himself and myself as to the legal position of accepting the evidence of accomplices, but m'lord I do want to draw Your Lordship's attention to certain well-recognized facts, well-recognized thinking followed by the Courts in considering accomplices' evidence. Firstly, m'lord, ex hypothesi the accomplice has full knowledge of the circumstances of the crime and is thus able to furnish the Court with a convincing mass of detail which is apt to give the Court the impression that he is in every respect a satisfactory witness.

The convincing mass of detail m'lord, which I speak about is the type of evidence on which my learned friend grew almost lyrical. The evidence that there was no blood in the man, throw him away he is useless. That little bit of detail m'lord, which makes it look as though he is telling the truth. In the case of Rex vs. John His Lordship Mr. Justice Shreiner (1943. T.P.D. - p. 300). "Where one is dealing with the rule of practice," (I am dealing ^{m'lord} now/~~with~~ the rule of practice which required corroboration), "corroboration in a material particular which does not connect or tend to connect the accused with the crime would seem to provide no safeguard at all for the accused to meet the risk that the accomplice may be implicating the accused in order to furnish protection for some friend of his who is actually concerned in the crime, or possibly to mitigate the seriousness of the offence so far as he himself is concerned, that is the real risk in regard to accomplices' evidence, because

/ ex hypothesi

on hypothesis the accomplice has full knowledge of the circumstances of the crime and is so able to furnish the Court with a convincing mass of detail which is apt to give the Court the impression that he is in every respect a satisfactory witness."

M'lord in the most recent case of the Appellate Division, to which my learned friend referred Your Lordship this morning, the Rex vs. Ncanana (1948, 4. S.A.L.R. P.399) - at page 405 m'lord. His Lordship says this, after dealing with all the cases, including his own judgment of Johnson, in the Appellate Division, "What is required is that the trier of fact should warn himself, or if the trier is a Jury, that it should be warned of the special danger of convicting on the evidence of an accomplice, for an accomplice is not merely a witness with a positive motive to tell lies about an innocent accused, but is such a witness, peculiarly equipped, by reason of his inside knowledge of the crime to convince the unwary that his lies are the truth."

That is the danger m'lord of accepting accomplices' evidence, and that, if Your Lordship pleases, is the manner in which the evidence has been given in this case.

HIS LORDSHIP: That may be so, but in this particular case I don't think it directly applies. These people are not denying that they have inside knowledge.

MR. MAISELS: No, M'lord, I am obliged to Your Lordship - I should have put my position clearly. The position, my submission is, that the evidence has to be disregarded, has to be rejected, but I can put my argument and I do put it on the alternative, namely that if in fact this man

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was murdered in the manner described by the accomplices, that that is only the beginning of the case as against the accused.

The linking up of the accused is the feature. The accomplices may well have taken part in this murder, but they may be implicating other persons than the accused for reasons best known to themselves. That is why M'lord, I quoted the particular case.

HIS LORDSHIP: There is another alternative to that, that they did kill this man, but that it wasn't ritual murder at all. The accomplices are in it up to their necks, and they have every reason for telling a false story.

MR. MAISELS: That was why I quoted John's case and that was why I quoted Neanana's case, I should have made it clear that this argument is addressed on the basis that Your Lordship finds that in fact, notwithstanding the medical evidence, the deceased was murdered, in a way described by the accomplices. Then the question remains should Your Lordship accept the evidence of the accomplices because of the circumstantial mass of detail, the convincing mass of detail, or should Your Lordship not regard their evidence with suspicion because of the very fact that they are, as it is said in the case, implicated up to the hilt.

M'Lord Gardner and Lansdowne in Volume 1 page 525 the learned authors put it this way: "Although the evidence which in terms of Section 285 is sufficient to enable it to be said that the accomplices' evidence does not stand alone and unconfirmed, it need not necessarily be such as to convey assurance to the Court or Jury of the

/truthfulness

truthfulness of an accomplice's story insofar as it connects the accused with the crime. It must always be borne in mind that his account may successfully stand the test of close criticism and indeed be entirely truthful insofar as the commission of a crime in many of its circumstances are concerned, and thus appear acceptable in its entirety, and yet in its crucial point may need the linking up of the accused for which it may be difficult to find applicable tests may be fictitious and possibly designed to shield the real offender or gain immunity for himself." (Page 525), Volume 1.)

My submission to Your Lordship is that Your Lordship will approach this case, bearing in mind those recognized principles, bearing in mind, in my submission, that the Court should not be misled by this apparently convincing mass of detail. I have used the words advisedly: "convincing mass of detail" because any person who reads this story thinks to himself, "Well, how could this person have possibly concocted the whole thing?". My lord it is possible that this happened; it is by no means fatal to my case that Meleke was murdered, by no means fatal to my case. But the crucial question is, is Your Lordship satisfied, having regard to the well known motives of accomplices, having regard to the fact that they are out to save their own necks primarily, that they have not put the blame on persons who have nothing to do with it.

My learned friend said, "What a dangerous thing to do, to put the blame on Chiefs", but in the same breath my learned friend told Your Lordship as a probability in

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this case, that we all know that in Basutoland chiefs are blamed for ritual murders. My learned friend relied on an answer given by Chief Bereng, and what easier way out, what more welcome way out, I might say, not only to the accomplices but to other persons would there be, to say that the persons who committed this crime are Chiefs? What a beautifully easy way out! How it squares with what has been written in the newspapers and the theories advanced by my learned friend. My learned friend himself supplied the motive which he was searching for.

But what is the true legal position with regard to motives? What is the true legal position with regard to my position in this case? Have I to explain to Your Lordship why the accomplices and why other persons who are not accomplices have implicated me? Is there any onus in law on me to do so? Your Lordship I think yesterday it was pointed out to my learned friend in cross-examination that there was no such onus on an accused person. The matter was dealt with in the Transvaal by His Lordship Mr. Justice Tindall in a case of Rex vs. Roga (1935, T.P.D. - p 101). That was a case where an accused person was charged with illicitly supplying liquor to two native traps. The Magistrate gave as one of his reasons for convicting the accused the fact that she gave no explanation as to why the traps should have implicated her if she had nothing whatsoever to do with the supplying of the liquor. The same kind of argument, if I may say so, with respect to my learned friend, as my learned friend used, not only to Your Lordship but to the witnesses. "why should these
/people

people implicate you if you had nothing to do with the killing of Meleke?" What does His Lordship Mr. Justice Tindall say about this? His Lordship quotes from the Magistrate's judgment, page 102, - "The Defence put up by accused No.2 was just a total denial but she gave no explanation as to why the trap should have implicated her if she had nothing whatsoever to do with the supplying of the liquor. If the Magistrate had merely said that he considered it was unlikely that the traps would have implicated the second accused without any reason at all the point now made would not have been available to the Appellant but it is clear from this passage in his judgment that he regarded the fact that she could not give any explanation as to why the trap should have implicated her as a factor which weighed against the appellant. It does not seem to me that the Magistrate was justified in that. He was not entitled to expect the appellant to give an explanation why the trap should have implicated her if she had nothing whatsoever to do with the supplying of the liquor."

HIS LORDSHIP: Go a little bit further. Do you or do you not give an explanation why they are implicated in it?

MR MAISELS: If Your Lordship pleases, the way in which the case has to be approached, is on the lines suggested,

"Is it likely that the traps would have implicated." Now I have given a reason, in argument, certain reasons were advanced by the accused, we have a possible motive, - and m'lord may I emphasise the word "possible" motive?

Because we don't know what really is in Mapeshoane's heart.

/Witnesses

Witnesses put it that way M'lord, they don't know what is in his mind, we don't know what is motivating these unfortunate beings, we don't know what influences are brought to bear on them, we don't know anything of those things. We suggested a possible motive, Mapeshoane in regard to his relationship with accused No. 2. It may be an insufficient motive that we have suggested. It may be that the mere fact that this matter of the nobility, because he is after all a Chief's brother, was publicly flogged is not sufficient humiliation for him to bear any grudge and resentment. It may be that the fact that the chief had to intervene in a struggle between his wife and himself and take away his knife is again not sufficient humiliation for him to bear any grudge. It may be that the evidence that this is one of the "bad lads" is not true. It may be m'lord, but the true approach is: have we to suggest a motive or has the Crown to prove that the evidence of the Crown is true? Surely the latter alternative is the correct one, viz. that the Crown has to satisfy Your Lordship as to the truth of the witness's statements. The absence of a motive to implicate may be a feature; it is a feature in many cases, so I suggest to Your Lordship that the absence of an apparent motive is not a feature in this case in the light of what my learned friend extracted from Chief Bereng in cross-examination. The fashion, if I may use that phrase, the fashion in Basutoland apparently of imputing ritual murders to Chiefs.

Now m'lord I pass on to deal with the evidence, and I want to say at the outset with a view to preventing a duplication of addresses in this case, my learned friend

/Mr.

Mr. Grobelaar will deal in some greater detail with the differences in the evidence of the various witnesses. I hope to confine myself to what my learned friend called fundamental issues, to fundamental discrepancies, to fundamental differences, although I do wish to suggest that where you get an accomplice who can furnish a convincing mass of detail that he can be believed. It is only by a careful and thorough examination of his evidence that you are sometimes able to show that his evidence is not true and that the so-called minor discrepancies and minor contradictions, may have considerable weight.

My learned friend said that the Defence wished to have it both ways. He said that on the one hand I was trying to show that the witness was telling exactly the same story and that he therefore was a parrot, and had learnt the story off by heart and wasn't telling what he knew, really, and on the other hand my learned friend Mr. Grobelaar was trying to show contradictions. Apparently m'lord it is not permissible for the Defence to have it both ways, but my learned friend's whole argument was directed to show that the Crown can have it both ways. The Crown can have it both ways in this way; if the witnesses agree with one another on fundamentals, says my learned friend, then their story must be true, although one of the fundamental agreeers, Mr. Molemohi, was thrown overboard. But if they differ from one another in certain respects, then, of course, says my learned friend, that shows that they are truthful and that there has been no conspiracy. M'lord arguments of that nature take the case no further at all, and the matter has to be looked at on a careful examination, in my submission, of the evidence of the witnesses.

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Now the first witness m'lord to which I wish to refer is Mapeshoane. It is not my function, and I trust Your Lordship will forgive me if I mention this point, to deal with matters of demeanour, and I know that it is difficult to judge the demeanour particularly of an African, to judge whether he is telling the truth, but m'lord do I put the case too highly if I suggest to Your Lordship that this witness had a most unfortunate manner and a hang-dog look about him, and an inability to look at anybody who was asking him a question. My learned friend said, and I remember it well, that it was because he was giving evidence through an interpreter and he had to look at the interpreter. Now, m'lord, I took particular note of the other witnesses who gave evidence, and I think almost without exception, whilst they looked at the interpreter whilst the interpreter was interpreting they answered the questioner by looking at him. Mapeshoane was apparently unable to do that. But Mapeshoane was a man with what one might call a photographic memory. M'lord I invite Your Lordship to read Your Lordship's note of Mapeshoane's evidence-in-chief, and in cross examination in certain passages and compare that with the evidence given at the Preparatory Examination, and Your Lordship will find that, word for word, number for number, the story is the same. Now it is quite true that it may well be, again one of these possibilities, it may well be that Mapeshoane is gifted with such a remarkable memory that not only can he recite the facts but he can recite the facts in exactly the same order word for word. I suggest

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to Your Lordship that that is not a probability. It is much more likely that that has happened in the case of a person who has learned off a story. Once you have learned off your story you can repeat it word for word, but if you are asked, if any person is asked, to give an account ...

HIS LORDSHIP: That is what he said that he did do. He says that the whole time he was think^{ing}/of what he had said in his statement at the Preparatory Examination so that he could tell the same story. That is what he says.

MR. MAISELS: That is my argument, m'lord.

HIS LORDSHIP: And then you tested him and it was quite obvious that he was telling the same story.

MR. MAISELS: Subject to a word here and there, m'lord to a nuance in interpretation possibly, there was a slight difference.

HIS LORDSHIP: The Attorney General says that Mr. Grobelaar submitted him to long cross-examination to find these differences.

MR. MAISELS: And he couldn't. I think my learned friend will admit it. He found variations between Mapeshoane and other witnesses, but Mapeshoane is the most remarkably consistent witness that it has ever been my fortune - or misfortune - to hear in a Court of law. He really was something quite

HIS LORDSHIP: I wouldn't say that. You see he first said that he understood very little English, and then he was cross-examined and he had to admit that he knew it very well, and not only that, but he could read it perfectly, but he started off by saying that he knew

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very little English, and he was not entirely truthful.

MR. MAISELS: That was where he was a little bit untruthful because that was an untruth told with an object. Mapeshoane is by no means a simple, ignorant African such as my learned friend would have Your Lordship believe. Mapeshoane is a cunning individual, who is perfectly capable of learning off a story by heart and of lying when it suits him to do so. That, m'lord, in my submission, is a fair summing up of Mapeshoane's character. But, m'lord, Mapeshoane was asked a question by my learned friend Mr. Grobelaar, and the question was this: "Did you think you were taking part in a ritual murder?" Here is the truthful witness upon whom the Crown is relying. There was no reply to that question. One asks oneself why?

I just want to compare Mapeshoane's evidence on a few points with the evidence of some of the other accomplices. He was ... there was a distance of 15 yards, as pointed out by the witness, between the two groups of people. He was, according to his evidence, in the second group, (some say in the first group, but the second group was only 15 yards behind the first group) as I understood it, practically from the time they set off. Another witness said they started off from a different place, but this witness, I am only taking what he says for the moment, says 15 yards, and Your Lordship will remember the picture.

The group, the car, and the group at the end, because if one tries to make the story hang together, presumably the groups went by some side path and the motor car went on the Main Road, but at some stage or another Your Lordship

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had the picture of the group, the car, and the group. We'll leave the car out for the purpose of this argument. There was a distance of 15 yards between the two groups. A horseman is alleged to have come there; Mapeshaone doesn't say anything about that, but other accomplices do. Mapeshaone is the only man who speaks of B.D. 2. B.D. 2, m'lord, was the car of accused No.2, probably - and I trust that I am entitled to indulge in a little bit of extra court speculation for the moment - probably the best known car in that district is the Chief's car. But Mr. Molemohi, - of course he has been thrown overboard - Mr. Sothi and Mr. Sapalami all of whom were at least in as good a position to see the car as Mapeshaone, they didn't recognize the Chief's car at all. M'lord, wasn't this a little bit extra put in by Mapeshaone to make sure that Chief Gabashane was involved in this case? Wasn't that a little extra thrown in to give a touch of verisimilitude to his story? Wasn't it an addition, and wasn't it an untruthful addition?

Now my learned friend has said, and he is quite right, that the evidence of Walters is not entirely satisfactory because, says he, the car only went to Ficksburg on the 12th March. It is a fact,^{and} that is not disputed, that Walters started work at this town, Kolonyane, on the 23rd February, at the firm there. It is a fact that he could not have had the car before. It is a fact that he had a job to do on the car. It is a fact that he had to do that job in his spare time. Now, is it not likely that Walters is telling the truth? And is it not likely that Chief Gabashane is telling the

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truth and that Chief Bereng is telling the truth when they say that this car was left at TY? And is it not likely that the reason for the delay was simply that the man was doing his job in his spare time and he wasn't hurrying to do it, especially as he does not appear to have got back. But the onus is not on me to satisfy Your Lordship that Walters is telling the truth. The onus is on my learned friend to satisfy Your Lordship that Walters is not telling the truth, and the only way that he can satisfy Your Lordship that Walters is not telling the truth is by Your Lordship having to accept the evidence of Mapeshoane which evidence is not supported in any way by any other of the accomplices. M'lord I suggest that if Your Lordship finds that Mapeshoane is not telling the truth with regard to B.D. 2, the car, then that is a serious criticism of Mapeshoane's evidence, because it shows that he is capable of inventing evidence for the purpose of throwing more blame on the Chief, more blame on the owner of the car.

Now, M'lord I have said I am not going to deal with the discrepancies because my learned friend will do that - the discrepancies between this witness and the others. Your Lordship will remember, before I pass this, how my learned friend said to Your Lordship, and correctly, and I agree with him, that it would be surprising indeed if all the witnesses gave evidence to show that each one held some part; this one held that part, and that one held the other part, and they all gave evidence about things happening in the same order, - my learned friend said that would be

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surprising. I agree. I agree with him entirely, but I suggest that it is equally surprising if Mapeshoane is able to give evidence as to the correct order of persons arriving, as to the correct order of things happening, in the manner in which he did. That is equally surprising. And I suggest that it shows that he is not giving evidence of what happened, but of what he has learned to himself.

Now I want to deal with Molemohi. My learned friend; that is assuming that Your Lordship wishes me to deal with that, in view of my learned friend's statement. HIS LORDSHIP: Of course it is not only that the Crown has rejected his evidence, but they are compelled to after hearing it, but they have sought to avail themselves of that witness.

MR. MAISELS: As Your Lordship pleases. And M'lord - may I put it this way - how do we know that Molemohi is not telling the truth in some things and Mapeshoane is lying on other things. How do we know for instance that when Molemohi says that he saw Mapeshoane pulling the deceased off the horse that Mapeshoane was not in fact in the first group? How do we know it? I want to deal with Molemohi's evidence.

First of all my learned friend himself pointed out to your Lordship that Molemohi told the Police that an umbrella stay had been used. The Police consequently ordered an exhumation of the body and of course there was not evidence to support that. Now not merely did Molemohi tell the Police that, that is one thing, he might have imagined it, he might have been mistaken, he might have thought it was an umbrella stay and it was a knife,

/Ntoane's knife,

Ntoane's knife, but that is only half of it, but he denied having told the Police so. Your Lordship will remember his evidence. It is not merely a false story but the subsequent denial of a false story. Then there is the other feature of Molemohi's evidence to which I wish to draw attention, and that is the feature on which Your Lordship questioned my learned friend in his address, that is the paragraphs at page²⁰ of the record.

There is some significance in these passages because it shows Your Lordship in my submission, what happens when Molemohi, Sepalami, and Mapeshoane, and the other man are put together in a camp. This is what he said at the Preparatory Examination.

HIS LORDSHIP: Well, you had better go back to page 18.

"I saw Mapeshoane and Sothi Chela help to pull deceased from his horse but I did not see on what side of the horse they were as it was dark. I saw these two men I was close to them and could have touched these two men I saw Mapeshoane and Sothi hold the deceased immediately he was dragged off his horse."

MR. MAISELS: M'lord why did he change that evidence in this Court? Why did he deny what he said on page 20? "Mapeshoane was already there when I arrived. Mapeshoane was already there throttling the deceased when we arrived. Mapeshoane knocked the deceased off his horse". Why did he deny it in this Court? I would like to make a suggestion to Your Lordship why he is denying it in this Court. The suggestion I make to Your Lordship as to why he is denying it in this Court is because Mapeshoane denied it. Is there any other reason m'lord? Is there any reason which my learned friend

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can advance? The reason is because Mapeshoane has said to him, "No, look here, that is not so."

HIS LORDSHIP: But he was present in Court when Mapeshoane gave his evidence so he heard it.

MR. MAISELS: Oh, no m'lord. I understand the position to be that at the Preparatory the witnesses were outside who weren't called, and I understand that each witness was brought down by himself from the Police Camp and taken back, and in this case, that procedure was adopted.

This all happened as a result of the conversations which they didn't have with one another while they were in custody.

The seriousness of this is not the contradiction in itself. That is bad enough, but one asks oneself why this particular contradiction? The efforts of Mapeshoane I suggest to Your Lordship, to obtain corroboration. And that will be proved, I will suggest that again in relation to another witness with whom I shall deal presently.

This man is really quite a remarkable man, Molemohi, Because Your Lordship will remember that Molemohi recognized No. 11 accused, Maloi Ntai, in pitch darkness at a distance of 15 feet from him indicated, - 5 yards away - but he was unable to recognize the person whom he was killing! He was next to the deceased, there was a torch on his face, he carried him down the hill - I suggest he must even out of idle curiosity, if for no other reason, have looked at the face of the person he was killing - but he didn't recognize the face of the person he was killing.

Is that, m'lord, a minor point, or is it a fundamental?

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Going to the credit of this witness. Ofcourse in the Court below he recognized him coming on his horse.

HIS LORDSHIP: The curious thing is that there were three horsemen, and nobody speaks of more than one.

MR. MAISELS: There is a possible explanation m'lord, in fairness to some of the witnesses - and I don't want to put my case too highly - and that is that the one horseman went some distance away. I agree with Your Lordship, that none of them talks about three horsemen, One of them, Sothi, recognized the horse under circumstances which I shall suggest to Your Lordship show that it is very doubtful whether this thing happened at all, I'll deal with that presently.

HIS LORDSHIP: You've got it that these horsemen were there about that time. After all they were coming back from the funeral.

MR. MAISELS: "About that time", Would Your Lordship just note that phrase, "about that time", because that is the first matter I am going to deal with when I deal with Sothi. I shall suggest to Your Lordship that if Sothi's evidence is true then Mapeshoane's evidence of the original meeting and everything must be completely untrue.

M'lord not only was Molemohi able to recognize Maloi Ntai, and not only was he able to recognize Fusi following the horse, but he was able also to recognize the bay mare, at night. But the person whom he was killing No. That is why I suggest that when he was in the Witness Box possibly Ananias wasn't the owner of the horse but Ananias was the person who was giving evidence. I think, m'lord, my learned friend has accepted that situation with regard to Molemohi.

/According

According to this witness, Molemohi, he says that, with regard to the meeting of the horsemen, they were on the footpath, that is the "murderers" - shall I call them that for convenience sake. They were on the footpath and the horsemen were on the Main Road. And he says not that one of the horsemen detached himself and went across to No.4, but he says - and this is a matter of some importance - that No.4. accused, Makione, went in the direction of the horseman. That is towards the Main Road. That, m'lord, is something which neither the Ntai brothers, nor the other person or persons talk about the meeting of the accomplice speak about. I suggest to Your Lordship that that is an important factor because that is one of the ways in which one tests, if one can, the truth of stories of accomplices with regard to the part played by particular persons.

Now I pass to the phrase of "about that time", Your Lordship will remember the evidence of Sothi given in this Court that he recognized Maloi as the horseman because it was not yet dark, in cross-examination by myself. That is a most significant piece of evidence, If Maloi passed when it was not yet dark, the situation is then that Mapeshoanes evidence is completely untrue, that the evidence of Maloi is completely untrue, that the evidence of the Ntai brothers is completely untrue, that the evidence of the "Johnny-on-the-spot" (that name implies the gentleman who stood in the rain), is untrue, and that the evidence of this having taken place late at night must be false. Now, m'lord this is a matter of vital

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importance to this case, and was not dealt with by the Crown. I suggest to Your Lordship that it is not unfair to call it a fundamental.

Your Lordship will appreciate these facts; It is approximately two miles from where accused No.2 lives to the scene of the crime. It is approximately four miles from where the funeral took place, Mahleke's. That is what I understood. The spot where Sothi passed these people, where he says the horseman passed him, was a spot a few hundred yards away from the scene of the crime, and my reason for saying that is this. If Your Lordship will be pleased to refer to plan No.2, Your Lordship will remember that Sothi said that the meeting place was at David's. David's place is just above spot H. on the plan. They must have met the horseman therefore between spot H. and spot J.

HIS LORDSHIP: I always thought that Sothi speaks of spot G. as being the place where the groups divided up.

MR. MAISELS: Sothi says in his evidence, m'lord, that the meeting was at David's place, opposite H. I think he said that & I may be wrong. My learned friend tells me I am correct. Now even assuming it is G. for the moment - it doesn't really matter - and even assuming for a moment, at worst, as against myself, that where the horseman passed them was at H. which was pointed out by Mapeshoane, or one of the Ntai brothers I am assuming m'lord against me, against myself.

HIS LORDSHIP: Yes, he said, "When we divided at David's place." Then he says, "The man ^{was} on horseback and was completely away from us, and I noticed him for the first time when he was 60 yards away."

MR. MAISELS:

MR. MAISELS: Then he says it was just dusk and he could see the man quite clearly. In cross-examination by myself, he said that m'lord. As a matter of fact he says this, "The horseman was beside the road; No. 4 was outside the road; he spoke to him for a short time; Mapeshoane I don't know if he saw it; he couldn't avoid seeing it."

The point I am now making is this, that it was this meeting, if it took place ... Oh, Yes. He said this in cross-examination, "It was just beginning to get dark" (talking about the meeting), "One was able to recognize persons; it was not yet so very dark; one would be able to recognize persons easily; that was why we were able to recognize these people". I think that is the correct note.

That meeting m'lord, took place somewhere between spot H and spot J. I am not putting the evidence unfairly. Now if it took place between spot H. and spot J that was a matter of some couple of hundred yards, from the point of the, I think at most 600 yards, from J. If it was quite light at that time, Your Lordship will appreciate these features that the party must have set out

HIS LORDSHIP: Sothi at the end of your cross-examination said ~~this~~ "The horseman passed our group; No.4 remained behind and stood with the rider, not a long time; we passed the rider and No.4 passed on to the first group." I am reading from Sothi's evidence. "It was just ^{as} ~~it~~ was beginning to get dusk." Then he says, "You could recognize a person at a distance, it was not yet so very dark, you would be able to recognize the persons passing by."

MR. MAISELS: That is the passage. That is a bit of
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evidence of great importance in this case, m'lord, because there are certain things that follow as a result of that piece of evidence. Firstly ofcourse, it is in violent contradiction to the evidence given by Mapeshoane and Sepalami and Molemohi, because they say that it was late in the night when the assault happened, and they say - one of them says - it was possible Mapeshoane did not see because it was too dark. Mapeshoane said, in his evidence-in-chief on this point, that he was called the second night, as he gave it, ~~some~~where, I think it was about 8 o'clock, he was called by No. 10 accused, a distance of two miles away. HIS LORDSHIP: He says it was ^{at} sunset when he was summoned by No.4.

MR. MAISELS: The difficulty about that ofcourse is ^{that} he puts the meeting place at David's and therefore it would be between point H. at David's and point J. where the assault is alleged to have been committed. Between H and J. as I say the distance can't be more than half a mile. The situation is this then, that Gabshane and Bereng and others must have left their village when it was still light. That follows. If it wasn't quite dark when they got to H. it must have been light when they left there, especially on foot. And it follows also, M'lord, that No.11 accused, Maloi, was telling the truth when he said he got home just after dark and he left this place when it was still light. He had to travel about 4 miles while the others had to travel two miles. I suggest to Your Lordship that if there was a meeting at point H. with Maloi then m'lord that is at the time spoken to by Sothi, a most serious

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criticism of the Crown case. It destroys the evidence of the so-called impartial witness about the dogs barking late at night when he stood in the rain; it destroys the evidence of Mapeshoane and Sepalami and of Molemohi. It renders the whole of their evidence improbable. It renders the story of the Ntai brothers improbable.

Now I can't over-emphasise the importance of this aspect, and I think my learned friend would agree with me when I say that this is a fundamental point in the case, - fundamental to know whether these people set out for a ritual murder in broad daylight, fundamental to the whole question of the selling of the deceased by No. 11, fundamental to the whole story of the deceased being left behind for an ulterior motive; all those things are affected by this question as to whether Sothi is correct or not. If Sothi's evidence on that point is correct, then I suggest to the Crown it is very seriously affected. If Your Lordship pleases it is not my job to suggest to Your Lordship that this witness is telling the truth on point A, and on point B and on point C. My learned friend has relied, as he is entitled to rely, on one accomplice corroborating another. I am merely pointing out to Your Lordship the fundamental points of difference. It may well be that Sothi is telling the truth as to the time when these horsemen passed.

HIS LORDSHIP: He said, "I usually feed my horses at sunset."

MR. MAISELS: Yes. This witness was tested on that and I say that if that piece of evidence is true, it has a most serious effect on the rest of the Crown case.

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Not merely as to time m'lord. Quite apart from the contradiction of Mapeshoane, it shows the following set of circumstances. It shows that these gangsters set out to commit a murder in broad daylight, virtually, which I suggest is improbable, and it shows something much more important if Sothi is telling the truth as to this meeting. It shows that No.11 is not the Judas Iscariot my learned friend said he was, it shows that No.11 is perfectly truthful when he says that they left in order to get home in time to feed his cattle, that he left early, and that he got home just as it was dark. That is what he said. M'lord it throws considerable doubt on the evidence of the Ntai brothers, and I'll show Your Lordship why presently, and it also throws more than doubt on the evidence of the witness who was standing in the rain, Moliko.

The Ntai brothers are the people who accompanied Maloi from the funeral, and the other witness is the gentleman who stood in his garden when it was raining, and who recognised No.11's voice late at night, somewhere about 10 o'clock talking to other people on the road about 60 yards away.

According to Sothi the meeting went from David's place, and according to Sothi the horseman, as far as I can make out, met these people on the main road, because Sothi says, "We were on the Main Road and we stayed on the Main Road."

HIS LORDSHIP: Sothi says that they travelled on the path then went on to the Main Road and then back to the path. Isn't that so?

MR. MAISELS: Your Lordship may be correct. It is just

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aminor point. I mentioned it with regard to the meeting because the real corroboration of the Crown in this case, as I shall try and show Your Lordship, is based almost entirely on the Ntai brothers - almost entirely, and the fundamentals deal with this question.

M'lord I only want to say one thing with regard to Sothi. Sothi was a very amenable gentleman, because Your Lordship will remember the evidence he gave. He is a Yes-Man under these circumstances, because Your Lordship will appreciate certain questions I put to Mr. Sothi, and may I make one thing clear? Apparently the impression has got round that my Defence has been an attack on the Police and Police methods. It has been nothing of the kind. As a matter of fact I am very grateful to Mr. Castle for the fair way in which he told us things which he wasn't obliged to tell us, but what I want to point out to Your Lordship is this: I asked this witness whether, when he had made his statement, the Police Officer asked him certain questions, and he said that he could see from the questions that the Police Officer knew everything, and he agreed with what the Police Officer said.

The Crown is in a difficulty about Sothi. Either Sothi is a credible witness or he is a person who found himself in a very unfortunate position. He found himself arrested for ritual murder, questions were put to him, it enabled him to get himself out of it, and what was easier for Mr. Sothi than to say "Yes"? That is one aspect of the matter. If that is so then his evidence is of no value. On the other hand if Sothi did take part in a ritual murder, if he is really a person who knows

/something

soemthing about it, and if he is trying to tell the Court what happened, then the situation is that if his evidence is true, it has a very serious effect on the other accomplices' evidence. What ever way the Crown looks at it, and whatever way the Court approaches the matter, Sothi's evidence presents a difficulty for the Crown.

That is not all with regard to Sothi. The "Yes-Man" pretends that he was not a "Yes-Man", and if he could show that he was not a "Yes-Man" he was a much better man. Your Lordship will remember a question that was put by my learned friend Mr. Thompson to Sothi in examination-in-chief. The question was this: "Did you see Fusi at any time of the day or night?" And Your Lordship will remember what happened after that. The answer was "No." What was the answer in the evidence at the Preparatory Examination? Not a single word about Fusi at all, in the whole of Sothi's evidence in the Preparatory Examination.

HIS LORDSHIP: I have got his answer, "I recognize Fusi. He does not live far away from the place of the killing. I did not see Fusi there at any time that night."

MR. MAISELS: My learned friend as a matter of fact put it very fairly.

HIS LORDSHIP: I know. Yes. Quite rightly he allowed these people to tell their story, but then he said he didn't see Fusi there, and the others say

MR. MAISELS: The person who took that up m'lord was, I think, one of the African Assessors. It came right at the end of the evidence, because then I obtained leave to

/cross-examine

cross-examine again, and if my memory serves me correctly it was in reply to Your Lordship or one of the African Assessors.

HIS LORDSHIP: These Assessors have asked some very pertinent questions.

MR. MAISELS: I was very grateful for that question, because it gives me an argument which I otherwise might not have had. For the very first time m'lord that this witness said he saw Fusi was in reply to the Assessor. Now doesn't that show that Mr. Sothi is also capable of suggestion? Doesn't it show that there was a little bit of corroboration of Mapeshoane, again from Sothi? Doesn't it show that he is open to suggestion even in regards to this gentleman.

The next point with regard to Sothi to which I draw attention is this: according to Sothi there was 100 yards distance between the groups. No.4 accused, Makione, was in the second group. Now a miracle happened, m'lord, because although Makione was in the second group 100 yards behind the first group, who was the person who did the throttling? That was one thing on which they were all unanimous - No. 4 accused. The reason why he knows about No.4 is because Your Lordship will remember No. 4 is the person to whom Maloi is supposed to have spoken.

The horseman is supposed to have spoken to Makione, No.4. Makione, according to this witness, Sothi, is in the second group. That is 100 yards away from the first group, but by something quite remarkable, No. 4 accused happened

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to be the person who was right intat the beginning of the kill, and was the person who was throttling the deceased. They all say so m'lord, No.4 is the man who held him by the throat. There are what my learned friend calls matters of detail, of no substance. I don't know any way of testing where the truth lies in a case/excepting by examining carefully what the facts are as deposed to by the witnesses and find the result from it.

Then we come to Sepalami. Sepalami starts off his evidence this way, and may I suggest to your Lordship that Sepalami's evidence, if it is true, destroys the question of the meeting of the horseman altogether as deposed to by Sothi and Molemohi. I should say that neither Mapeshoane nor Sepalami speak about the meeting with the horseman, No.11, but Molemohi and Sothi do. Now what does Sepalami say? He says that these people fetched him "dark and very late". Sepalami says, too, that these people were divided into groups at David's place. If they were divided into groups at David's place, it means that the meeting with the horseman was between David's place and J. Your Lordship appreciates that point. Now what is the spot pointed out for the meeting? The spot pointed out for the meeting with the horseman is the other side of David's place, H, just opposite David's place, that is H. is the spot pointed out by one of the Ntai brothers where it is alleged that No. 11 accused met the people on foot and spoke to them. This witness saw no such horseman, he is another one of the people who talks of there being 100 yards between the groups, and, m'lord, this witness is able to give a little bit of

/detail.

detail, in regard to one person only, a most unfortunate person. (M'lord I was going to suggest to Your Lordship at a later stage of the case that this is reslly a most convenient arrangement of the Crown case, because apart from Mapeshoane, Sothi, Sepalami and Molemohi all live outside of the Chief's skerm, and what is easier than to get the people in the skerm on the other side, They were all in the same group. And he is the person who actually assigns to Fusi a job, because he is the person who says that Fusi suddenly appeared on the scene and he saw him holding the deceased's right arm. He doesn't know where he came from he doesn't know how he arrived there

HIS LORDSHIP: The right hand.

MR. MAISELS: The right hand, is it m'lord? Well that is still better. This is one of the masses of detail that you can't expect the Crown witnesses to give evidence about - but he does, especially when it implicates Fusi.

Even the other people who said that Fusi was there were at a loss to explain to Your Lordship and the Court what Fusi was doing. But not so Sepalami. Sepalami got out of that by saying

HIS LORDSHIP: He says there were many people there and he didn't notice who was ^{The} holding ~~the~~ only person he speaks of as holding was Fusi, and the other two, No. 4 and No. 3.

MR. MAISELS: Those two everybody speaks about. There was a sudden appearance of Fusi on the scene, M'lord, most improbable, because Your Lordship has seen Fusi and I take it that, quite apart from his sub-normal mentality,

/nobody

nobody could accuse him of being in his first blush of youth, and certainly if there were any killing to be done and the Chiefs had taken the precaution of taking about 14 men with them, most of them appear to be very bable-bodied young men, one would have imagined that there would have been quite enough work for the others to do without Fusi having to hold the deceased by his right hand.

It seems most improbable. It has been suggested that he was a sort of sentinel, but this is one of the attractive theories of my learned friend, which unfortunately has no foundation in the evidence. I can suggest to Your Lordship that the whole thing was Fusi's idea, that he in fact had communicated with the Chief's secretly, and that he had arranged the meeting and it was near his place so that he could be handy - but where is the evidence?

Where is the evidence m'lord? If Fusi was the sentinel then he was guilty of a very grave dereliction of duty because he left his post. This was a funny killing m'lord; this was indeed a funny killing, because there don't appear to have been any guards, there don't appear to have been any sentinels, and the sentinel who is supposed to have been there, alleged by my learned friend the Attorney-General, turns out to be Fusi, who, according to Sepalami is holding the deceased by his right hand. Isn't that a most improbable story? Doesn't it look as though we have got to fit Fusi into this because after all Fusi is a doctor, and don't we all know that doctors always take part in ritual murders, just like Chiefs? And the ritual murder wouldn't be complete unless we had a doctor in it?

So we must find a job for Fusi, so we find a job for Fusi by saying that he held the right hand. M'lord isn't that too fantastic for words?

Fibally m'lord dealing with this witness: he is one of the people who says that Bereng was on foot. Three of them say it. The only man who says that Berang wasn't on foot was Sothi. He says that Bereng went by car. I think Your Lordship will find that correct. I am suggesting to Your Lordship that if Chief Bereng took part in this act, there is one thing that I find difficulty in visualising gout or no gout, I find difficulty in visualising Chief Bereng walking two miles in the rain when there was a car handy.

May I suggest m'lord, if my learned friend's other argument is correct, of the blind obedience which the subjects show their chiefs, especially, as my learned friend said, where ritual murder is concerned, if Chief Bereng and Chief Gabashane had ordered these people to go on foot, could it be suggested that they wouldn't have gone because Chief's Bereng and Gabashane were going in a car? M'lord it is not a question of gout, it is not a question of miles, it is a question of ordinary probability and a question of ordinary common sense. Could one visualise Chief Bereng going for a two mile walk on a rainy night when there is a motor car there in which Gabashane is going? In which, according to the evidence, at least one other accused went. M'lord they were all there. It was not as if the car was going off at some distance.

The Crown case is, according to some of the witnesses,

/that

that it was virtually, according to one of the witnesses, a procession along the road. The first group then the car then the second group. According to the other witnesses the group was on the road for some time and some time it was off the road, but the point is that they all agree the car was there or thereabouts. And what was Chief Bereng doing on foot? M'lord I suggest that that is a most serious improbability .

COURT ADJOURNED.

ON RESUMING:

HIS LORDSHIP: There is this point about Makione. We have been looking through his evidence. All three witnesses say he was in the first group.

MR. MAISELS: I was just checking that M'lord. With regard to Sothi he said two things: He said in cross-examination in reply to a question I put him, that Makione was in the first group, and then lower down he said in reply to myself, "No. 4 was in the second group. The horseman passed on the way. No.4 remained behind. He stood with the rider not for a long time. We passed him and then he passed us again." That is the passage. "No.4. was in the second group, not in the first group." He first of all said he was in the first group - that was in-chief - and he said that in cross-examination. Lower down in cross-examination he contradicted himself.

HIS LORDSHIP: I have got this: "The horseman passed on the way. No.4 remained behind. He stood with the rider not for a long time. He (No.4) passed on to first group."

He said so at first and there must have been some amendment.

MR. MAISELS: He meant that he was with their group at the

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time when the horseman passed. I don't rely on that point very much at all m'lord. May I accept that for the moment? If that evidence is true then one asks oneself the question of why it is that Mapeshoane didn't see the horseman, if that evidence is true? Because it is inconceivable that he didn't see him. And M'lord one asks oneself another question: it is clear on the evidence of all the witnesses that they were hurrying to this murder, going as fast as they could, and Makione must have sprinted past them to take up his position in the first group.

Your Lordship sees the difficulty if Sothi is true about this, then Mapeshoane should have seen him - but he didn't see him.

Now, M'lord I want to consider the so-called corroborative evidence, the so-called independent witnesses, and we examine the question as to whether this evidence can be accepted, whether it convinces the Court and whether it ought to convince the Court. Now there were two nights which are relevant to the present case. The first is the Wednesday night, and the second is the Thursday night.

With regard to the Wednesday night Mapeshoane stands alone excepting insofar as Ntai brothers, that is Ntsane and Makhetha confirm this evidence, Now Mapeshoane says that No.5 accused was sent for and returned with No.11 accused, Makoi. Neither of the Ntai brothers say anything at all about No.5 accused. If Mapeshoane is telling the truth then No.5 should have been there. If the Ntai brothers are telling the truth then No.5. wasn't there. Now that is, I submit, not a minor discrepancy but a point

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of substance, because how else can you test Mapeshoane? He could say what he liked. He could say No.1 accused went to fetch him, but when you seek for the corroboration it is not there.

Thursday night is the next. Thursday night, m'lord, there are the following witnesses who are suggested as corroborating the Crown case. The first, the Ntai brothers - whom I lump together for the moment - the second Mōliko Khothatso, the third Kocha Kocha, the fourth what I call the Fusi witnesses, just to lump them together for convenience m'lord, and the fifth, Trooper Hamilton. I propose to examine shortly the evidence of these people, and to ask Your Lordship to come to the conclusion that it would be extremely unsafe to rely on the evidence of any of these people - extremely unsafe.

If the evidence of the Ntai brothers is correct, then it is clear, and I concede this point freely, that the case against No.11 is strong. If their evidence is true! Because it shows that he took part in the first meeting, that No.11 did, and it shows that there was a conspiracy to leave Meleke behind, - if their evidence is true. It is very important evidence because as I said, it corroborates the Wednesday night and the Thursday night, i.e. the conspiracy plus the actual leaving behind of the unfortunate deceased, for an ulterior motive. But can the Court really rely on the Ntai brothers. What were the serious features of their evidence? I think they are three, as against the accused. The first was the meeting on the Wednesday night, the second was the leaving behind of the sick man for an ulterior purpose, and the third

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was the approach of No. 11 to this group of people, so the Ntai brothers' evidence has to be considered seriously and one has to be satisfied I suggest to Your Lordship, particularly in view of the serious consequences that flow from an acceptance of their evidence, that they are trustworthy witnesses on whom reliance can be placed.

Now how did my learned friend deal with their evidence? He said this: their demeanour was good, and he suggested to Your Lordship that their evidence should be accepted. With all respect to my learned friend, that was a very tenuous basis on which to found an argument. M'lord the Ntai brothers were cross-examined, or interviewed by the Police a few days after the death of the deceased. They told the Police none of the things to which I have just referred. Capt. Castle said they told an innocuous story. They told Capt. Castle in effect what No. 11 told this Court. They told him that they had left this man behind because No. 11 accused wanted to get back in time to tend to his cattle and Meleke was a man who was sick and couldn't gallop. My learned friend said, and he may be quite right, and I am going to concede this point to him for a moment, for the purpose of argument, it is quite possible that these two people I think he said it was a fact that these two people told this innocuous story because they were afraid of telling a story which would implicate the Chiefs. Your Lordship will remember that that was the explanation my learned friend advanced. Now M'lord none comments in regard to that, that there is nothing to show that these people knew that the Chiefs were involved, but my criticism of these witnesses is not

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so much that they told the Police an innocuous story, quite inconsistent with the story they gave in this witness box, my criticism of them is the fact that they denied in this Court having told the Police that. That is the criticism m'lord, a much more serious one. I could understand these persons saying, "Yes, we told the Police an innocuous story because we were afraid; we didn't want to implicate the Chiefs, " or "We didn't want to get ourselves into trouble." This was in cross-examination by myself, m'lord, and I was putting to them specifically, both of them.

HIS LORDSHIP: Then there is a general criticism of both of them, that they say that Maloi told them a man was to be killed when they left the house. They must have known quite well, you see. They must have known who it was and when it was going to take place.

MR. MAISELS: Then if their evidence is true m'lord, they knew who it was, they knew how it was going to take place, and they knew when it took place & they knew everything about it.

In cross-examination Your Lordship will find that I specifically put it, and I was a long time asking them about it.

HIS LORDSHIP: Yes.

MR. MAISELS: If Your Lordship will look towards the end of that cross-examination by myself Your Lordship will find this: "I was taken into custody about a day after Meleke's death; it was a Saturday. Three days afterwards I was questioned and I made my statement. I do not remember if my statement was taken down in writing. I signed it. It was taken down in my presence and I signed it."

/He says

He says, "The Policeman did not ask whether No.11 went to meet the group of people ..." He went on to say "I told Castle re:the meeting and he will not say differently."

M'lord the other witness, Makhetha Ntai, in cross-examination by myself says this: "I made a statement after I was arrested. It was made after questions were put to me by the Police. Ntsane was arrested on the following Saturday. The statement I made when written was not different from the previous statement. I told Castle on the very first occasion, may be I have forgotten, I told Castle about the meeting at the Chief's place." Then lower down I put it to him that he didn't mention to Mr. Castle anything about No.11 at the meeting on the first occasion, and he said, "Mr, Castle will say I did. Mr. Castle will not say that I told a different story now."

Mr. Davidson, my learned friend, says he agrees with what I have read out to Your Lordship. The ofux of the whole matter m'lord, is not the different evidence, but the denial of the previous story. But that is not all. I suggest to Your Lordship that that in itself would be a very serious ground for doubting their evidence. But M'lord both these people came in the witness box and gave Your Lordship evidence not with regard to these things happening thenight before and the day of the funeral, when dates didn't matter, they gave evidence about the 4th of March, and about the 3rd of March, and about the 4th of March - both of them - and it transpired, after cross-examination, that neither of them had any idea of any date at any time in any month! One of them

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didn't know how many days there were between Wednesday and Thursday, that was the second witness, Makhetha. He, Your Lordship will remember, didn't know how many days there were between Wednesday and Thursday, What kind of evidence is this, on which to hang persons? What kind of corroborative evidence is this? Two persons who tell untruths in the witness box, two persons who give evidence about dates glibly, and who really haven't got the faintest idea of the difference between July and January. This is evidence which my learned friend said was acceptable, and they can't tell the difference between Wednesday and Thursday, but he said that it should be accepted because the demeanour of the witnesses was good. I don't blame my learned friend for using that argument because there was nothing else that he could say in their favour, and I suggest to Your Lordship it is a curious ground on which to ask Your Lordship to accept their evidence.

But M'lord the matter doesn't end there. There are certain other difficulties in the way. Neither of them saw a motor car. They were on the main road, the motor car was on the main road, and if the meeting with the first group took place the motor car must have been there or thereabouts, but neither of them saw it. The suggestion was made by my learned friend that the car might have pulled off the road and hidden away. Well, anything is possible m'lord. I can merely say that the probabilities are that if there was a car on the road and if they were there at the time then they would have seen it. Both of them say ^{that the} group must have seen the three of them.

Nobody says that. But m'lord if one really analyses the

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story they first told i.e. the story they first told to Mr. Castle, and the story that No.11 tells, Your Lordship will find a remarkable similarity, and Your Lordship will find that similarity if Your Lordship looks at certain parts of their own evidence. They admit that they left the funeral before dark. Both of them admit that. Now *that was a matter of four miles away. They were travelling hard, because they left the deceased behind because he couldn't gallop.

M'lord I am not a horseman but one can run a mile if one is fairly good in five minutes, and I take it a horse can run in five minutes, so within 20 minutes they would have been where the scene of the crime was, and within a few minutes later they would have been where the groups were. Wasn't that before dark? And wasn't No.11 telling the truth m'lord when he said he was trying to get home before dark? Isn't that a simple explanation m'lord? Why shouldn't it be accepted? I suggest to Your Lordship that the evidence of these two Ntais in regard to the real points of the case are probably true insofar as they say that they left the funeral before dark, that Maloi wanted to get home quickly, it was raining, and he wanted to tend to his cattle, the deceased couldn't keep up with them and they went without him. M'lord the rest of the story in regard to the mysterious meeting the night before, No. 11 virtually telling them in advance that a murder is going to be committed, that is evidence which Your Lordship should not accept.

/Then m'lord

Then m'lord we pass on to the next so-called corroborative witness, and that is the witness Moliko Khothatso. Your Lordship will forgive me if I use an American expression in regard to this gentleman, he is what would be called in America "Johnny-on-the-spot", because Moliko was really quite a remarkable man. He happened to go out at the time when his dogs were barking and he saw a crowd of people some distance away from his house, I think it was 65 yards away, so he moved away from his hut or stable and he went down to the garden, where he stood in the rain. Having stood in the rain for some time, who should pass - and this was about 10 o'clock at night, according to his evidence - but Maloi. No one else but Maloi, Maloi happens conveniently to pass m'lord at a distance of some 60 yards from where he was standing, and Maloi was talking so loudly to his fellow-horseman that he could hear him. Now m'lord is that probable evidence? Maloi was talking to the people next to him, some sixty yards away, but he could hear him when Moliko was standing in the rain in his garden. But that wan't the end of what happened, because when he was standing in the rain in the garden he saw a stationery motor car which the Police evidence says he couldn't see. He saw a stationery motor car down on the road Mr. Castle says he couldn't have seen it from where he was standing. But my learned friend said "Well he was really drawing an inference. People often do that sort of thing they hear a car and they think they see it," but unfortunately for my learned friend the witness said more than that, he said he saw three or four people

go to the car. How could he have seen that? How could he?

If Your Lordship looks at the plan ...

HIS LORDSHIP: He says ^{he saw} "two or three" people.

"I heard the sound of a door being closed..."

MR. MAISELS: "I couldn't say if they went into the car".

HIS LORDSHIP: He didn't say he saw a motor car. He said, "Afterwards there came a motor car".

MR. MAISELS: He said quite clearly m'lord that he saw it; because I cross-examined him.

HIS LORDSHIP: "There came a motor car and it stood still at the cross-roads, and after the car stood I saw two or three persons going into it. I heard the sound of a door being closed. The car went on the main road in the direction of Fusi's. I saw only one light in front."

MR. MAISELS: It was specifically put to him by myself and by my learned friend that he couldn't have seen the car at that spot because I cross-examined him with regard to the trees and with regard to the aloe and he said, Oh! no he could see it alright. If I am not mistaken m'lord, I rather fancy that he actually pointed out the spot to Mr. Castle, but I am not too sure on that and I won't pursue it.

But it is a most extraordinary state of affairs, that he goes out because the dogs are barking - that I can understand. Then the group passes on, so he moves himself down to the garden, if Your Lordship will see the plan, stands at the spot of the garden watching this group disappear out of sight and apparently standing there for no reason at all. Then who should pass but Maloi whom he doesn't see but whose voice he can recognize from 60 yards distance, and then by a happy chance the motor car

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stops to pick up some people. M'lord who were being picked up there? How does that fit in with any story? What people got into the car there?

Questions were specifically put by my learned friend Mr. Grobelaar; "The car was invisible from where you were standing? -- No the car was standing there; I saw it as it stood there. I saw only part of the motor car." He specifically and clearly said that he saw part of the motor car. There is another criticism with regard to this witness because not only was he "Johnny-on-the-spot" on Thursday night, but he was the man who gave very, shall I say, serious evidence against No. 11 by a statement that No. 11 is alleged to have made to him on the Saturday morning. Now the witness said this in examination-in-chief in this Court for the first time which he did not say in the Preparatory Examination. He was talking about what No. 11 is alleged to have said to him on the Saturday morning and he said this: inter alia - he said he had mentioned to those people he had gone with that if the group met people they might kill them. That was said by this witness purporting to repeat what No. 11 is alleged to have said to him. That piece of evidence was not given in the Preparatory Examination at all. That, m'lord, is the most serious piece of evidence against No. 11. If Your Lordship will check the Preparatory Examination of this witness Your Lordship will find that nothing of the kind was said. Why was this put in? Wasn't it just made up? M'lord that is the next corroborative witness on whom the Crown relies.

Then we pass to Kocha Kocha. Kocha Kocha's evidence m'lord, if anything, supports No. 11. completely.

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There was one minor difference between the two of them. Kocha Kocha says he asked who had killed the deceased and No.11 is supposed to have said "I don't know", No.11 said, "He asked me how he had died and I said I don't know." Your Lordship pointed out that after a lapse of months it was impossible to draw any adverse inference on that point.

I rely on Kocha Kocha because it shows firstly how easy it is to jump to conclusions and it shows secondly that when No.11 was challenged on the Saturday morning with having deliberately left this man behind, he immediately had a fight with Kocha Kocha about it; he resented it; and quite rightly so too. I suggest to Your Lordship that that evidence is not against us at all. . If anything it is consistent entirely with our innocence.

Now what is the next kind of corroborative evidence? It is the evidence of the group of people who we shall call the "Fusi group" - the women who were in the hut, the woman who said her husband had surprised her, they talk about Fusi being there at night, - now m'lord my learned friend criticised certain parts of my alibi evidence when he said, "How could these people remember what had happened on the 4th March?" Well, these people could remember going to a funeral. These women were there with children or with husbands who were mental patients at Fusi's. Could one really expect them to say it was Thursday night, or any other night? Can any importance be attached to that as against Fusi? I suggest that that

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evidence is entirely negative.

There is the evidence, m'lord of Paulus who talks about Fusi saying that there was a man fainting in the road. Paulus is the man who said something about a drunken man falling off a horse, or something like that. I am not sure of it. But that is not evidence against anybody but Fusi. Oh, I am informed by my learned friend that it was Manpane. I don't know what kind of weight can be attached to that. I don't know when it was; this witness doesn't know when it was; nobody seems to know when it was; Fusi denies it, he didn't go out at night. My learned friend suggests, and he is entitled to make the suggestion, that Fusi was on the prowl for another victim because poor old Meleke had no blood. I can't help my learned friend suggesting it, but what is the foundation for it m'lord? What is the foundation for it? I suggest there isn't any at all. That is the Fusi corroboration m'lord.

Finally we get the little bits of evidence to suggest that Fusi had sent the people particularly early there on Saturday morning.

I am going to deal with evidence now which may or may not have any significance about Fusi having ordered Paulus to take the patients to be washed earlier than usual one Saturday morning, but I don't understand this kind of argument. On the one hand the body is thrown in an inaccessible place so that it shouldn't be found; on the other hand elaborate steps are taken by Fusi to see it is found. I find some difficulty in reconciling them.

M'lord one feature is curious. If the evidence of the

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accomplices is correct and the evidence of Paulus is undoubtedly correct that the patients are taken to wash every morning, why wasn't the body found on Friday morning? That is a feature which is completely unexplained. It is clear from Paulus that they go every morning; they go to that spot every morning; the body was there from some time on Thursday night. If the evidence of the accomplices is true that this was done on Thursday night on the way back from a funeral, why wasn't the body found on Friday?

Finally we come to the last witness on whom my learned friend relied so strongly - the/Hamilton, Trooper Hamilton. My learned friend said that Trooper Hamilton's evidence with regard to the motor car spoor is reliable and should be accepted. Of course the mere fact that Trooper Hamilton found spoor there doesn't matter on my hypothesis of the case, because if Sepalami was involved, Mapeshoane was involved, in murdering somebody and a car was used in connection with the matter then ofcourse there would be spoor there. But the fact of the presence of spoor is one thing, but one has to examine whether Trooper Hamilton hasn't rather let his zeal as a Policeman run away with him! Trooper Hamilton says this: "The tracks seemed to come from the place of accused No.2 and when the tracks came near the place of No.8 they turned and seemed to go back to where the car had come from". He agreed when I read that to him from the Preparatory Examination that he had said it. Just near the end of his evidence, m'lord.

I then asked him for what distance he could

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see tracks. He told me he could see tracks for a distance of seven yards. I defy anybody in the world, let alone Trooper Hamilton to see from 7 yard track marks that they seemed to come from the place of No.2, and when they came near the place of No.8. they turned and seemed to go back where the car had come from. M'lord they were 7 yards long those tracks, and the length of the car m'lord is I suppose somewhere about four yards, or five yards.

Fifteen feet at least. From seeing motor car tracks 7 yards, Trooper Hamilton, the zealous constable, was able to deduce that they came from the place of No.2, and when they came near the place of No.8, they turned and seemed to go back to where the car had come from, and when he was asked how many tracks he wouldn't have any of that sort of question. My learned friend apparently agrees with him, because he says, "You can't expect an ignorant African, especially a constable, to be able to tell you what the motor car tracks are", so that one must test what Trooper Hamilton says. One must accept blindly that from 7 yard tracks you can see that they came from the place of No.2 and when they came near the place of No.8 they turned and went back. But Trooper Hamilton's powers of deduction were even greater, because he is apparently a person who is able to say for how many days track marks have been there.

HIS LORDSHIP: He says he didn't attach any importance to it at that time, so he didn't make a proper examination.

MR. MAISELS: Exactly, m'lord! And it slipped out, in an answer that he gave in-chief, he said, "When I heard that

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a car had been there three days before, then the inferences were drawn. So I suggest m'lord that Trooper Hamilton's evidence really takes the case no further at all.

I just want finally, in dealing with the Crown case to deal with what I suggest to Your Lordship are certain improbabilities in the whole case. I am quite conscious of the fact that what may appear to a European mind to be improbable may not necessarily be improbable to people engaged in ritual murder. I quite accept the force of my learned friend's argument on that. Nevertheless Your Lordship, in the absence of any evidence as to what is customary in ritual murders, and I emphasise the word evidence, not bits of idle talk gathered here and there, - in the absence of any such evidence, ^{will}/I submit, judge the matter in the ordinary light.

HU\$ LORDSHIP: The case will be decided on the evidence before the Court.

MR. MAISELS: As Your Lordship pleases. M'lord the improbabilities are, I submit, as follows: why invite so many people to kill one man? Why invite ... I can understand m'lord a situation of these 11 men or 10 of them, all in the Chief's skerm, being taken into confidence and being invited to kill a man. What was the necessity for calling Molemohi, Sepalami, and Sothi. Weren't there enough to dispose of this weakling? What was the necessity of inviting detection by inviting strangers? I suggest to Your Lordship that ~~that~~ is a serious criticism of the case and the story told. Why invite so many people to the first conspiracy? Why have the bargaining for Meleke's body in the presence

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of all of them. I take it ~~that~~ treachery to Chiefs is not entirely unknown even in Basutoland. Why invite detection in this way? Why should Bereng walk in the rain? (I deal with this matter as a improbability). Why is there no blood? Why perform an operation on the Main Road? (Six yards off the road with the car just standing off the road and a gang of people and one, possibly two, torches). Any-body who passed could see, Why perform it on the Main Road close up to the houses on the side of the road? Your Lordship saw those huts at the inspection. Why were the parties divided into groups? Why were there no guards? Why, on the Crown case, take those elaborate steps to dispose of the body on Thursday night, and take elaborate steps of finding the body on the Saturday morning? Why endanger their own lives in disposing of the body? Because it is clear m'lord that the murderers were endangering their own lives by doing this. That cliff at night, in pitch darkness, no torches, walking along the edge of that donga! Basuto may be able to do that, but it looks on the face of it to be a most dangerous, hazardous, and unnecessary thing, especially as they were going to have the body discovered shortly afterwards. And finally, why should the Chiefs take part in this? Now, m'lord, my learned friend suggested, Chiefs do take part in ritual murders to recover some of their lost power. He suggested that to Chief Gabashane in the witness box, it was denied; it was suggested to Chief Gabshane that he was suffering, under a sense, a grievance because his revenue had been diminished. No evidence on it m'lord, not a word. He suggested reasons, as against one of the premier Chiefs in

/Basutoland

Basutoland committing a ritual murder, a man who is a Christian? A man who has served his country in war time? And this accusation is thrown out and the motive is one in the realms of fancy. I suggest to Your Lordship that it would require convincing evidence for Your Lordship to be satisfied that a ritual murder was committed by persons of this nature. I suggest to Your Lordship on the Crown evidence alone that Your Lordship cannot be so satisfied.

I want to deal, very briefly, with the evidence for the accused. Here my learned friend's argument seemed to me, with respect, to be somewhat inconsistent. He said "With regard to all the accused other than No. 10 who established an alibi, one would expect them to be able to produce evidence of other persons as to where they were on the 4th March." And he said with regard to the witnesses called for No. 10, "How could their evidence be true, how can they now be expected to remember what happened on the 4th March?" He has it both ways m'lord. But let us examine the validity of the argument in relation to the accused who have not called witnesses to establish an alibi. Was the 4th March, on the evidence of the accused, of any significance at all? On the case for the Defence, did they know what was happening on the 4th March? When they were arrested in July, m'lord, if they had been able to tell any body what they were doing on the 4th March - unless they could tie it up with some incident like a funeral - nobody would have believed them. If Chief Gabashane, or Chief Bereng, had said that on the 4th March at this particular time we were listening to the

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radio, having looked up the programme, they could have said, "We listened to some sort of orchestral thing" - who would have believed them? They would have said "How are you able to remember so carefully what happened on the 4th March?"

And I suggest m'lord that the fact that they ~~give~~ this evidence, that they don't know what they were doing on the 4th March other than that they were at Gabashane's village, is evidence which should weigh with Your Lordship in their favour, and the fact that they do not produce witnesses to swear to alibi is something which should count in their favour and not against them in the circumstances.

Moreover, m'lord, who would be the persons who would establish the alibi? It would be the very persons who are standing charged with accused Nos. 1 and 2. They were the people who would ordinarily be with them. If they say they were with them that night, my learned friend says they were with them at the murder, but if they say they were with them in the hut. m'lord, then that evidence is valueless. How could the Defence be expected to produce other evidence than that of their co-accused.

Then when we deal with No.10 accused and we are able to produce alibi evidence for a particular reason, then that evidence is scorned. Now let us examine the evidence with regard to No.10. That he, and I suggest to Your Lordship that it cannot be seriously disputed, that he was at the funeral. He was at the funeral and he came back with Tsiu. He was seen at the funeral. Your Lordship asked Tsiu at the end certain questions that had not been put to him in chief or in cross-examination, and

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he corroborated exactly what No.10 had said as to what his own movements were. That evidence should be discarded? Might it not reasonably be true? Now, m'lord if the evidence with regard to No.10 being at the funeral might reasonably be true, then I submit the following consequences flow: that he could not have gone back to the village - (he went on foot and he came back on foot), the village of Chief Gabashane, joined the conspirators and gone with them to murder the deceased. The people who left the funeral before him and who went home hurriedly were Maloi and the two Ntai brothers. No.10 could not have got to the village in time to get back to perform the murder, especially if there was any meeting between the group and Maloi on the way to the murder.

Moreover m'lord, the evidence is, by the accomplices, that No.10 was^{met}/at the village, Chief Gabashane's village, and that he was with them the whole time. What is more m'lord, the evidence is that No.10 was the person who held the horse. If Your Lordship is in doubt as a result of the evidence as to whether No.10 held the horse because he may not have been there at all, thenⁱⁿ/my submission

HIS LORDSHIP: Who said he held the horse?

MR: MAISELS: My learned friend Mr. Davidson agrees that one of them said he didn't know whether No.10 took the bridle off, and the other one said that No.10 held the horse. My learned junior will look up the reference, m'lord, and I'll give it to you in a moment. Sothi said that he saw No.10 holding the horse.

Molemohi also says that Ramabanta caught hold of the horse by the reins. That is a most serious aspect of this case because if Your Lordship on the evidence is not satisfied that No.10 may not be telling the truth; in other words if Your Lordship feels that No.10 may have been at the funeral and may not have taken part in this assault the consequence flows m'lord that serious doubt is cast on the whole of the case because the four accomplices speak of No.10 accompanying them all the way to the village. The evidence with regard to No.10 which was well given and which was not shaken in cross-examination affects not merely No.10 but goes to the root of the whole of the Crown case in this matter.

With regard to this there may be an explanation for it. No.10 had been staying in Mamathe's for three nights. It was the easiest thing in the world to collect this crowd. They all lived nearby or were there at the time. No.10's story of an alibi might reasonably be true. Or one can approach it a different way, has the Crown established that No.10's story of an alibi is not true, supported as it is by two witnesses? No.10, Your Lordship will appreciate, was a frank witness, because No.10 said: "I was there on the Wednesday night, and I wasn't there on the Thursday."

Then there is finally Fusi. Your Lordship put it to my learned friend, there was one person who said that Fusi was holding the right arm. What was Fusi doing there? How did he come there? What did he have to do with it? This poor sub-normal individual. I suggest to Your Lordship that viewing the matter as a whole, especially

/Sothi's

Sothi's effort to put Fusi in, in this Court, makes one very suspicious, if I may submit it that way, of the truthfulness of the Crown evidence insofar as Fusi is concerned. Really one doesn't know how much of the evidence of the Crown witnesses is what they really saw and knew, or what has been suggested or what they think they saw or what people have told them that they saw. M'lord I don't know whether I can take this case any further. I would merely like to put the question to Your Lordship in this way: Is Your Lordship convinced, after hearing all the evidence, and the arguments, that the accused are guilty? Can one really say that the Crown case carried conviction? Can one really say notwithstanding the criticisms of the witnesses and the improbabilities to which I have referred, that the case has been established beyond a reasonable doubt? Or isn't this the type of case where the remarks of a famous Scottish Judge are applicable, He said that the dividing line between suspicion and proof may be as thin as a hair, but it is ^{as} deep, as the grave. Isn't this a case where the most that can be said for the Crown case is that it gives rise to suspicion and no more? I submit to Your Lordship applying the ordinary rules of criminal law that the accused are entitled to be acquitted in this case.

HIS LORDSHIP: How do you account for these people telling this brutal story if nothing of the kind happened?

MR. MAISELS: It is possibleI put my argument at the outset in the alternative, either it didn't happen or it did. If it did happen it does not follow that these accomplices are not implicated, they are persons who had something to do with it. Are they not doing what accomplices

/often

often do, are they not doing what the texts books and what the cases of the Appellate Division warn one against in connection with their evidence, implicating innocent persons. The first point is, did this man meet his death by violence, but if I fail on that and he did meet his death by violence in the method described by the accomplices...

HIS LORDSHIP: Can we rely on the evidence that the accused did it?

MR. MAISELS: That, m'lord, is the argument in a nutshell, and I submit it to Your Lordship, and say that the Court would not be justified, on the whole of the evidence in this case, in finding the accused guilty.

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MR. GROBELAAR:

May it please Your Lordship and gentlemen assessors.

I shall be brief this morning, my learned friend has covered most of the field, and I don't propose to keep Your Lordship here long.

May I be permitted, m'lord, to mention just a few brief remarks in regard to the approach of this case and more especially the approach in a murder case. There are just a few observations to which I wish to refer.

M'lord, the first passage I wish to refer to is one in Gardner and Lansdowne Volume 1, at page 368, and this is what the learned author says, M'lord, that "If the Defence, either by criticism of the evidence for the Crown or by the tendering of testimony, creates in the mind of the Court, or Jury, a reasonable doubt as to the conclusion which the Prosecution claims, if the Jury thinks that the explanation offered may reasonably be true, though they are not sure that it is, the accused is entitled to acquittal." This is an exposition of the law following upon Woolmington's case, Woolmington and the Director of Public Prosecutions, an English case, and that is later referred to in an Appellate Division case which I shall refer to.

HIS LORDSHIP: The golden thread of the law is that the Crown must prove it's case beyond reasonable doubt. That onus never shifts.

MR. GROBELAAR: That is so, m'lord. Only I will refer to this case because it is rather difficult to define "a reasonable doubt", but in these murder cases the Courts have made it rather easier than was the case before because the expression, "a reasonable doubt", to one man may mean one thing and to another, another, but if it is explicitly

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put like this, that if the explanation may reasonably be true, then there is a clearer definition as to what is meant by the word "doubt" and I shall refer to a recent case in the Appellate Division which puts the matter perhaps a little more clearly. There are just two more cases I propose to refer to, the one is the case of Rex vs. Difford (A.D. - 1937 - p.373). It may be that the facts of the case are rather strange where this fellow who was in charge of the money, lost the money and said he had gone to a dance and left it in his pocket, but what I refer to is not the facts of the case so much as the principle which I will show was again adopted in Rex vs. Ndhlovu, 1945. As to the facts of the case, with respect, m'lord, they are somewhat strange. But the principle, m'lord, is unchallenged and this is the principle which was enunciated by the learned Acting Chief Justice, now Chief Justice Mr. Justice Watermeyer. It is equally clear that no onus rests on the accused.

HIS LORDSHIP: You haven't given me the reference.

MR. GROBELAAR: A.D. - 1937 - p.373. The Court says, if he gives an explanation even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied not only that explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

HIS LORDSHIP: That was relevant to that kind of case. They hadn't to give any explanation had they?

MR. GROBELAAR: No, m'lord. What I mean about explanation is, the explanation tendered by their Counsel by criticism of the Crown case. An explanation not given necessarily by the accused in evidence, but an explanation tendered on the

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improbabilities of the Crown case, by criticising the Crown case, by showing that death in this case need not necessarily have been committed by violence, that there might have been an accident and that is what the word "explanation" covers, not only explanations in evidence but criticism of the Crown case and a showing of the inherent improbabilities or the unreliability of the witnesses. I come now to a more pertinent and more recent case which deals with murder and where the onus was very clearly defined in a judgment by Mr. Justice Davis and concurred in by the Chief Justice and Mr. Justice Greenberg, the case of Rex vs. Ndhlovu (A.D. - 1945 - p.369). The headnote reads: "On a charge of murder, the Crown must prove not only the killing but that the killing was unlawful and intentional. It can discharge that onus ^{either} by direct evidence or by proof of facts from which necessary inference . may be drawn. If, on the review of all the evidence, whether led by the Crown or by the accused, the Jury are in doubt whether the killing was unlawful or intentional the accused is entitled to the benefit of the doubt. That doubt must be one which reasonable men would entertain on all the evidence. The Jury should not speculate on the possible existence of matters upon which there is no evidence or the existence of which cannot reasonably be inferred from the evidence." If I may pause here for a moment, this remark is particularly applicable to suggestions thrown out by my learned friend, that there may have been blood on the blankets or the clothes. And this remark covers entirely any suggestion that this Court should even consider the possibility of blood being on the blankets or any other incriminating evidence.

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This remark is particularly apposite when one considers the suggestion of that kind, and in my submission, with respect, the Court is precluded by this very remark from entertaining any suggestion even that there may have been blood. "The Court shall not speculate on the possible existence of matters of which there is no evidence or the existence of which cannot reasonably be inferred from the evidence." On the contrary from the evidence there can be no inference be it reasonable or otherwise that there was blood. I continue with this remark.

HIS LORDSHIP: What page are you quoting?

MR. GROBELAAR: M'lord, I was quoting from the headnote, but this remark is again found in the body of the case at page 386, four lines from the bottom, m'lord. I'll read this again from the body of the judgment to show the headnote is accurate and these are the words:-"The Jury should not speculate on the possible existence of matters upon which there is no evidence or the existence of which cannot reasonably be inferred from the evidence." May I just refer to a few more passages at page 372 at the bottom, three lines from the bottom. The learned Judge says:-"The determination of the question whether on the facts as I have set them out above the conviction of murder was justified directly involves the determination of the question whether we are to accept as accurately setting out our law the unanimous decision of the House of Lords in the case of Woolmington and the Director of Public Prosecutions (A.D. - 1935) Appeal Court on which Mr. Miller relied. The headnote reads as follows:-"In a trial for murder the Crown must prove death as the result of a voluntary act of the prisoner and malice of the prisoner. When evidence of death

/and malice

and malice have been given the prisoner is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused the death was unintentional or provoked. If the Jury are either satisfied with his explanation, or upon a review of all the evidence, are left in a reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted." Then page 375; the principle is referred to and page 376, paragraph 1, there, in a more recent case in the Appeal Court in England, the same principle is quoted and the learned Judge points out it was there also approved of. Then page 380, paragraph 2;-"What conclusions are we to draw from the authorities which I have cited above? The majority seem to agree that notwithstanding any supposed presumption of intention, it is for the Crown to prove the whole of it's case, and when it sets out to prove that the killing was intentional, that is to say that the crime was murder and not homicide, it must do so. The case of self-defence is more doubtful but many seem to be of contrary opinion. However, I shall show later that even where an alibi is raised, then it is not for us to satisfy the Court that the alibi has been established beyond a doubt. If on weighing up such evidence the Court is in doubt as to whether it may not reasonably be true, then the accused is entitled to an acquittal and it is not for them to convince the Court of the truth of an alibi." Then at the bottom this golden thread is referred to, namely, that throughout the web of the English Criminal Law, one golden thread is always to be seen, that is, that it is the duty of the Prosecution to prove the prisoner's guilt. Page 380 subject to

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what I have already said as to defence of insanity and subject also to any statutory exception. Then dealing with self-defence, and I submit this remark is also applicable to a defence such as an alibi. On page 381 the learned Judge says:-"According to those cases, therefore, the burden of proof, when the plea of self-defence is set up, is still on the Crown. I only use this by analogy." So, finally, there is page 386. The learned Judge sums up:-"I may sum up the law as follows:- In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the Crown to prove all averments necessary to establish his guilt. Consequently, on a charge of murder it must prove not only the killing but that the killing was unlawful and intentional. It can discharge that onus either by direct evidence or by the proof of facts from which a necessary inference may be drawn. One such fact from which, together with all other facts, such an inference may be drawn is the lack of acceptable explanation by the accused. Notwithstanding the absence of such an explanation, if on the review of all the evidence, whether led by the Crown, or by the accused, the Jury are in doubt whether the killing was unlawful or intentional, the accused is entitled to the benefit of the doubt. The doubt must be one reasonable men would entertain on all the evidence." And then the remark is repeated that, "The Jury should not speculate on the possible existence of matters upon which there is no evidence." M'lord, that concludes my reference to the law and my submission is, therefore, that it is the duty of the Crown and the onus is on the Crown in this case, to establish firstly that the deceased was murdered, that he met his death by violence

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applied by others, and, secondly, that it was the accused who applied that violence.

Now, it is when we come to analyse the evidence in regard to the alleged commission of the murder that we meet the first difficulty, and I submit an insuperable difficulty in the Crown's case. Meleke met his death by violence inflicted by the accused - this is what the Crown says - and this is the case they sought to make. But, m'lord, the factors militating against such a conclusion are so numerous and so convincing that in my submission, no reasonable man can find in favour of the Prosecution on this point. It is submitted that even if the issue of unlawful killing had to be decided as in a civil case, where the onus is heavier, and on the balance of probability, the Court would, on the evidence adduced, inevitably come to the conclusion that on the general probabilities it has not been established that the deceased met his death by violence at the hands of others. Now let me refer to only a few discrepancies, which, I submit, are - as my learned friend calls them - fundamental.

HIS LORDSHIP: I would like to deal with, at some stage, the argument of Mr. Thompson as to these points. He says, with regard to the possibilities, that there were four possibilities. He says the story is fundamentally and absolutely true in fact. Then the other probability has been concocted by the Crown witnesses themselves. Well, he invites you to say to the Court which of those possibilities you suggest. And then about the finding of all these articles. He goes on to say that no witnesses contradicted each other on these fundamentals - on the gathering together before the murder; travelling in two groups and the actual manner of the murder; the seizure of the deceased - holding him down and cutting

/his lips -

hus lips - and that the body was thrown down. He suggests the Crown witnesses pass the test with "flying colours" as he puts it. He says the finding of the saddle and various things and the places at which they were is a strong factor in the Crown case.

MR. GROBELAAR: Yes, I'll deal with those m'lord, in time if Your Lordship will permit me just to elaborate my positive argument first. Now, M'lord, I propose to refer to a few important discrepancies in the Crown case. I make no apology for doing so because the only manner in which we can judge as to whether the one side of the case is true or not, is to find out whether on important features, there is disagreement, and if there are discrepancies which are such that one could not expect them to take place if there is an honest endeavour to relate a fact which is specified to as having happened in the presence of the witness, then, m'lord, if it is clear that if there was an attempt to recollect and such an attempt shows that there are divergencies which cannot be explained as an honest attempt to do so, the Court would be entitled to say that that is a strong reason for doubting the veracity of such evidence and for treating such a witness with suspicion and, perhaps, rejecting such evidence altogether.

Now, M'lord, the first divergence I wish to refer to is one which possibly has not even been realised by my learned friend, and I submit that it will come as a surprise to him. Perhaps he will contradict me when I say so. And it is this vital point, m'lord, that in this Court and in the Court below, all the Crown witnesses who indicated which part of the lips were missing, it is interesting to remember

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M'lord that all those Crown witnesses stated under oath and pointed out and demonstrated that it was the left portion of the upper and lower lips of the deceased which were cut in the first place and which were found missing. M'lord isn't it strange that the Doctor pointed out at the Preparatory Examination and stated in his Report, and also in his evidence here under oath, when demonstrating on his own lips, that it was the right portion which was cut and which was missing. M'lord, is that an accident? Now let me adopt my learned friend's challenge for the moment, namely, the challenge that even if witnesses are telling the truth, one would find discrepancies. And let me for a moment accept his theory that truthful witnesses will not always agree. Let me accept it for the moment. Now what would we expect? One would expect that some of these witnesses might have said the left, some would have said the right portion of the mouth was injured, but what do they do? One and all, they pointed out and they swear in two Courts of law, that they saw that it was the left portion, whereas, in fact, it could not have been the left portion. It was the right portion of the mouth which was partially destroyed.

This is what the Doctor says: "The upper and lower lips were missing from below the right nostril in a semi-circle round the right edge of the lip to the middle of the lower lip."

HIS LORDSHIP: All he said in his report was, "the upper and lower lip missing from below the right nostril in a semi-circle". I admit it is an important factor.

MR. GROBELAAR: It is vital, m'lord, in every sense of the word. He stated it at the very beginning of his evidence, M'lord, when he deals with the cause of death. Perhaps Your

/Lordship may

Lordship may remember the actual demonstration in Court.

HIS LORDSHIP: No, I didn't make a note of any demonstration.

MR. GROBELAAR: That evidence can be verified from the stenographer.

HIS LORDSHIP: We'll have to check that up.

MR. GROBELAAR: M'lord, this is my learned friend's manuscript note, he says: "The upper and lower lips were missing from below the right nostril in a semi-circle round the right edge of the lip"

Now, m'lord, let me pause here for a moment in an effort to weigh up the effect of this fundamental and vital discrepancy. The fact that, without a single exception, no less than five Crown witnesses swore and demonstrated that the flesh on the left side of the mouth of the deceased had been removed, can mean one thing and one thing only. That is that these witnesses are not honestly endeavouring to recall what they saw, otherwise there might, perhaps, have been a divergence of opinion, or recollection, but it means this, that they have either schooled themselves, or they have been schooled by persons unknown who have one object, namely the conviction of the accused at all cost, whether the evidence can be got to square with the truth or with the ascertainable facts, or not. And in my submission, this point cannot be stressed too strongly.

HIS LORDSHIP: I would have been much happier about their demonstration if they had said, "Well, it was dark and there was confusion and I can't say exactly." As it was each one was prepared to give an exact demonstration and then two of them gave the same, and there were three different demonstrations.

MR. GROBELAAR: That is so, m'lord, but I would not set so

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much store on the demonstrations as to the various methods although they are also important, but also m'lord if these witnesses have been honest, in my submission, they might have said, "Well, ^{but seeing that this was such a gruesome performance} we're not certain/ it is a performance which must have been indelibly impressed upon the minds of the alleged perpetrators of the crime, and, therefore, they feel that if they saw it that they cannot say they don't remember how, because one witness says two lights were focused on the head of the deceased when this terrible operation was performed, other witnesses say that there was one torch and therefore they realise that it would be almost impossible to forget the details of such a terrible act and it is for that reason that they come into Court and they swear that that is how it happened.

Now, m'lord, this evidence cannot but give one a sense of shock which must inevitably shake one's faith in the Crown case to it's very foundation.

M'lord, my next point which I wish to make is this, In view of the very nature of the act which the witnesses speak to, they must have a very clear impression of the performance of this brutal act. And one thing must clearly stand out in their minds if what they say is true. They must know and they must have seen whether this was what I may call an ordinary murder or whether it was a ritual murder which entails the brutal removal of flesh from a person who is still living, but who has been rendered helpless and defenceless. There is this vital and fundamental difference between the ordinary murder and perhaps the removal of flesh afterwards and the brutal ritual murder which, according to judicial cognisance, Your Lordship

/would know

would know takes place by the removal of the flesh from a living person, and therefore, in my submission, seeing that the Crown witnesses did not accidentally come upon a scene of the killing of a person which they did not expect, but seeing that they had conspired as to probably why this act should be done, how it should be done and how it should be carried out, it is for that reason that they cannot be mistaken in their recollection if this was indeed what the Crown suggests, a ritual murder, they would then all know and they would all have seen, that the flesh was removed while the person was still alive, but what is the evidence? They are agreed at least on this point, they say that he was dead when his body was carried to the donga.

HIS LORDSHIP: I understand there was one witness who said while his lips were being cut his eyes were open. Who was that?

MR. GROBELAAR: M'lord, that was Molemohi.

HIS LORDSHIP: Well, the Crown cannot discard Molemohi with equanimity. We don't depend on his evidence, but there it is, we're entitled to refer to things he has said which other people haven't said.

MR. GROBELAAR: Yes, that is so, m'lord. Now, m'lord, in the first place we have Mapeshoane who, although he said that the intention was first to kill and then to take what was required, says in his evidence that the death occurred after the lips had been removed. He says that the deceased expired immediately after the lips were cut as before that he was still alive. Then we have Sepalami who states that the deceased's eyes were open and that he was struggling. He also says after the lips had been removed, then accused No. 2 said: "Now, the first thing we've got to do is to kill this
/man else

man else he will report", and, strangely enough, he is the only witness who refers to that. Well, it may be that the others did not hear it, but in my submission that is a remark, which, if it had been said, would have been heard by everybody, but it at least establishes this, that Sepalami was certain that the deceased was still alive; Mapeshoane was certain he was still alive when the lips were being cut; Sothi says that the deceased died after he was throttled and the lips were cut after he ^{had} died; Molemohi says after he died Ntoane was ordered to cut the lips.

The submission, m'lord, which I was to make was this, that in view of the careful planning of this alleged murder and in view of the fact that the witnesses knew what to expect, and also because there was this clear light of one light, perhaps two, concentrated on the head of the deceased while this operation was being performed, I submit, m'lord, if this had actually taken place there could not have been this disagreement on this very important point as to whether the deceased was dead or alive when the flesh was removed from his lips. To the ordinary European as well as to the Basuto, m'lord, there is a vital difference between the ordinary murder and the ritual murder. This murder was one thing or the other. The bulk of the evidence seems to suggest it was a ritual murder and therefore the witnesses could not have made a mistake on this point if they had witnessed this scene. One set of witnesses could not have said that the man was alive, and the other that the man was dead. If flesh is removed from a person who is struggling in extremis then it is such a revolting act that one cannot possibly forget it, especially if the act is done under compulsion and against one's will. For that reason, this evidence strongly suggests that the evidence of the accom-

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plices cannot be accepted and is very suspicious and contrary to the general probabilities.

Now, although all the witnesses agree that the deceased was dead when he was taken to the donga, the medical evidence discloses that after this very brutal assault, no evidence of any assault by human agency whatsoever could be detected. In dealing with that evidence it is well to remember what was said by Mapeshoane. All the other witnesses agree, in effect, to his version of the nature of the assault committed on Meleke. Mapeshoane says, "No.4. used as much force as he could. All of us used as much pressure as we could to kill Meleke as soon as possible." Now I stress those words, m'lord, "as soon as possible", and in my submission it is indeed probable that if there was an attempt to kill that there should have been an attempt to dispose of the deceased as quickly as possible because this was done on the road as the witnesses suggest. In view of that evidence, which is corroborated by all the other witnesses, namely, that extreme force was used, it is extremely unlikely and, I submit, impossible, that no marks of violence, of strangulation or otherwise, were detected on the body of the deceased. The medical evidence has no doubt.

If ~~gr~~ great force had been used in strangling the deceased there would have been probably finger-nail marks on the neck of the deceased which, the Doctors say however, depends upon the length of the nails. But, further, they say there would certainly have been bruises round the neck and I would just remind Your Lordship of the medical evidence and the the medical text book which has already been referred to which makes it abundantly clear that bruises, internal at any rate, would be inevitable. And Dr.Ogg says, "if a hard grip on the throat
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had been used I would have expected internal injuries." And he agrees with the passage quoted from Rhode's book on medical jurisprudence.

Now, here again, m'lord, I say that after this alleged violent strangulation, after the dragging of the deceased from his horse at a place which is littered with stones, and the carrying of the body of the deceased down that hill which is covered with rocks and stones, and bearing in mind that it was thrown down 13 feet as deposed to by the Crown witnesses, if all that evidence is borne in mind it would seem highly improbable, nay, impossible for the body of the deceased not to have had any scratches or bruises, and that evidence is, therefore, inconsistent with natural facts as we know them. Again a very strong reason for rejecting the Crown evidence.

Then coming to the next point, m'lord, Dr. Ogg says that he would have expected bruises if the body had been thrown down a donga 13 feet deep. Here also we must bear in mind what was said by Hamilton, namely, that it appeared to him that when this body was thrown into the donga it was probably dry and that the water collected at that spot afterwards. After the body had been thrown there. Which brings out my point, m'lord, that there hadn't been much rain, only soft rain up to the time the body was thrown into the donga. The ground therefore was not very soft in that portion of the donga, and, therefore, in view of the Doctor's evidence that if the body had been thrown down he would have expected bruises, the Doctor also says that if the person is unconscious then bruises would be accentuated.

HIS LORDSHIP: There is this point of Hamilton's evidence,

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that the blankets were found away from the body.

MR. GROBELAAR: Yes. The upper part then of the body from the waist up to the neck was absolutely uncovered and, therefore, there was nothing to break the fall of the deceased. Therefore, m'lord, that also does not square with the evidence of the accomplices. The body was thrown down, according to Molemohi's evidence, in one of two places, the one of which was absolutely littered and covered with stones, and in the other place there were also a number of stones. According to Mapeshoane, it was thrown down a place where there are a number of stones, some of them smooth, some of them rough, and in my submission, if the body had been thrown there, even contact with the ground only would have caused bruises, according to the Doctor's evidence, but if there were stones then it is even more probable that bruises or abrasions would have been found.

HIS LORDSHIP: But the Doctor says he doesn't think it was thrown down at all. He says the condition of the body was, I think, inconsistent with it having been thrown into the donga from a distance of 10 to 15 feet.

MR. GROBELAAR: That was put in, m'lord, and I shall later on refer to the evidence in detail. So, according to the Doctor, his medical science does not allow him to find that that body was thrown into the donga. He admits, however, that the body might have fallen into it - that the finding of the body in that condition is consistent with a fall while the person was walking, I take it, or with a fall from a horse, and I shall deal with that point later.

Then, m'lord, I come to the point which has been made already. I'll just refer to it, namely, that the Doctor said unless the lip was held away from the gums he would

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expect cuts on the gums. Now according to the two versions of how the lips were cut, namely, the one version by Sothi is that both of the lips were being held together, and according to the other version is that one hand only was used and the knife being inserted at right angles and then being brought round. That was Mapeshoane's evidence. Sothi pointed the same way. Now, m'lord, I don't care for the moment which of those two versions one accepts, at any rate the Doctor says that unless the lips was held away from the gums he would have expected an incision on the gums and it would have been clearly visible at the time when he inspected the body, within two and a half days after the alleged murder had been committed.

Now, m'lord, it is easy to see that if the lip is held away and the cutting takes place and not much is removed, then it is possible, as the Doctor says, that you may not have an incision on the gums, but, m'lord, if in the evening when it is raining, when it is dark, when time is of the essence, when the persons are in a hurry to get away and to avoid detection, if one hand is used and a sort of semi-circle is made at right angles to the gums and on a point which must inevitably come in contact with the gums and this is forcibly done, it is inevitable that the gums would have been injured in that operation. It is humanly impossible for the gums not to have been injured. The time of the examination was so shortly after this, yet the Doctor says, "I would have expected to find signs if that had been done." Again, m'lord, it shows that the Crown witnesses speak to things which are humanly impossible, not only improbable, but impossible.

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Now I say it is of the greatest importance that no cuts on the gums were discovered. The next point is that Dr. Ogg says that in spite of the closest examination he found no evidence that the lips were cut at all. And he says that the injuries were probably caused by crabs. Now this again, m'lord, is a very important fact, that the Doctor, although he examined this body with a view to ascertaining whether the lips had been cut in a supposed ritual murder, we take it, in spite of the closest examination to that end, he says that he found nothing to indicate that there had been any cutting at all. So even the cutting is not established by the medical evidence. On the contrary the medical evidence is negative on this point, and the Doctor says, "all the injuries are probably caused by crabs." Now, m'lord, if at this stage of the history in Basutoland, and I think one can take that into consideration

HIS LORDSHIP: The Doctor says, "I cannot state that the lips have been cut."

MR. GROBELAAR: Yes, that is so. My learned friend didn't quote the remark fully yesterday when he said that the Doctor did not find anything inconsistent, the Doctor said, "I find nothing inconsistent, except that I find no evidence of cutting." So Your Lordship sees that the evidence does not support the Crown. On the contrary the evidence is against the Crown version.

HIS LORDSHIP: He says, "I definitely formed the opinion at the post mortem that the injuries were caused by crabs. The injuries I saw appeared to be by crabs. I can't rule out that some portion had been removed, I found no evidence there of any sort."

MR. GROBELAAR: Yes, he can't rule it out but he said he found no evidence thereof. And my submission is then, m'lord,
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that if the evidence of the accomplices is to be accepted, that the assaults as described by them were committed on the deceased and that they did dispose of the body in the manner indicated, then, in my submission, they executed this assault with a skill and cunning which no Harley Street specialist could emulate, however hard he tried. Let us imagine that some surgeon is asked to remove the lips under those conditions, or that some criminal expert is asked to strangle a person and let us take it that the body has to be removed under those circumstances and to be dumped into the donga under those conditions, it is inconceivable that some mark or other would not have been left. We have the strangulation with the greatest violence but without bruises. We have the cuts on the lips without any discharge of blood - the point of blood I shall not deal with again, it has been adequately dealt with by my learned friend.

HIS LORDSHIP: Did they all say there was no blood?

MR. GROBELAAR: M'lord, they all say no blood was pressed out of the wound and that there were no drops of blood. And there was one witness who said a little blood "oozed" out.

In my submission, in view of the evidence, m'lord, it is evidence of such a nature that usually corroborates the Crown case and which, in this case, is entirely contrary to it. It would be extremely dangerous, m'lord, for any person to accept the evidence of the accomplices in view of the facts deposed to by them. May I just briefly refer to the evidence of Dr. Ogg. In the first place, I've already referred to the cutting of the lips and he points out the tip of the left nostril abraded irregularly, probably due to crabs. He finds abrasions on the left leg due to crabs.

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On the midsternum, abrasions due to crabs. The right leg also abrasions due to crabs. The eyelids had been superficially removed.....the skin had been removed...this was due to crabs. Now, in view of all this, m'lord, doesn't it show that all the injuries were probably caused by crabs and he has had an extensive experience of damage done by crabs. In regard to the cause of death, he says the river sand definitely suggests that death was due to drowning and he says to Mr. Thompson's : " If the Crown says a knife had been used to cut, was there anything inconsistent in your finding?" And the Doctor replies; " No, except that I cannot state that the lips had been cut." And I've already made the remark that the Doctor said if the object had been not to strangle but to prevent him from crying out, then would you expect signs, the answer was in the negative.

The Doctor says he was told foul play was suspected; that he looked for evidence of assault or unnatural way in which the death of the deceased was caused, and he says: "I put it merely as a possibility that the lips may have been cut and the crabs eaten the lips afterwards. There is no direct evidence that a knife was used. If the deceased had fallen and cut his lips, the crabs would have gone for that part first. There were no signs of an assault by human agency on the body. The condition of the body was inconsistent with an assault having been committed. The cause of death: I have no doubt that death was due to drowning."

Yesterday my learned made a faint attempt to discredit the doctor on this point, namely, as to the cause of death, but the doctor says, " I have no doubt that death was due to drowning." He said the lungs were bigger than usual due to water. Then further, " I found no positive evidence

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that the deceased had been assaulted." "If force had been used with the intention to kill, would you have expected to find signs of throttling? -- Yes by fingernails and bruises of the tissues." The witness agrees with Rhode's Internat at page 155 and he says, " I would have expected bruises and abrasions." " Don't you consider^{if} the force had been applied there would inevitably have been bruises and abrasions?" And the answer is, " Yes". M'lord, could we expect to find stronger evidence than that? He says the dissection must reveal well marked bruises, and he did dissect the neck. " If the lips were not held with fingers I would expect the gums to be cut." " If the body had been thrown from a height of 10 to 15 feet before drowning, would you expect bruises to be found on the body?" " I certainly would expect to find bruises. The condition of the body is inconsistent with it having been thrown that distance." Now, m'lord, that is absolute evidence whether there were stones or not, the Doctor finds it improbable to accept the Crown evidence. And, " the condition of the body is inconsistent with a sharp instrument having been forced into the throat at any time. The injuries are all consistent with the deceased having fallen from a horse." I shall deal with that point later, m'lord. Then the Doctor says, " I would expect bruises in the connective tissues, underneath the skin side of the neck if a fair amount of force had been used." Now, in this case it wasn't a fair amount, there was the utmost amount of force used. This is quite apart from fingernails or finger marks and he says, " In epilepsy you may have a fit and not another for years and years afterwards." I shall deal with that point later in trying to suggest how the deceased met his death. And the Doctor also says that usually in ritual /murders more

murders more flesh is removed from the body, although I must be fair and refer to the fact that incertain cases, he says that only blood was removed, but in this case there was not even blood m'lord, so seeing there was no blood, the inference is that other parts of the human anatomy would have been removed.

Now, to finish off this evidence m'lord, in my submission it is quite improbable that the deceased could have lost his way - I shall deal with that submission later in regard to the way in which the death could have occurred - but it is utterly impossible for the death to have occurred under the circumstances described by the Crown and especially too, if we have regard to the absence of blood - which point was covered by my learned friend yesterday and which I shall not deal with again. But, m'lord, in regard to the eating away of the lips by crabs, as the Doctor suggests, is it improbable that, seeing that the corner of the mouth is regarded as a tidbit by crabs, these crabs could not have started in the corner of the mouth and could then have eaten some of the one side and some of the other and that in a natural way the lips could have been eaten away like that? But I have yet another submission and it is this; m'lord is it not possible that in the way the deceased fell - it is said that he fell on his right arm-one part of his mouth was either protected by his hand or his arm, or that the one part was covered up with mud or so firmly pressed against the ground that it was only the other portion which was accessible to the crabs. M'lord, that is a theory which is indeed very probable and which we must consider in explaining the eating of only portion of the lips. The Doctor says that, according to the evidence seen by him, the damage

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was done by crabs, and, if we bear in mind that the body could have fallen in such a way that the right portion of the mouth was not accessible to crabs, then we have the whole explanation, but we need not go so far, m'lord. We have the evidence of the doctor that the injuries were due to crabs, that there were no signs of cuts and that is, therefore, sufficient for the purpose of this case.

M'lord, I propose now to deal with certain inconsistencies in regard to the first evening, namely, the evening of the conspiracy - the Wednesday night. Of this conspiracy m'lord, there is the direct evidence of only one witness, namely, Mapeshoane, but it is sought to bolster up his evidence by the evidence of Ntsane and Makhetha who testified that they were taken to one of Chief Gabashane's houses where Maloi left them for a long time and when Maloi returned he told them about a meeting mentioning the names of certain conspirators who were alleged to have been present. Now both Ntsane and Makhetha state that it was clear from what Maloi told them that he knew nothing about the plan to kill a person before he called them and that he obtained the instructions at the meeting attended by him while they were waiting for him, near one of Gabashane's houses. On the contrary, m'lord, Mapeshoane's evidence entirely destroys this version of the alleged conspiracy, or perhaps I should say that this account of the conspiracy destroys Mapeshoane's version, because he said that Sankatana was sent for ^{Maloi} while he was already in the Khohlong, and he said that Sankatana went and brought Maloi after a short while. Now, M'lord, these two versions are entirely contradictory and seeing that the conspiracy is a very important portion of this case, if the only witnesses who speak to this conspiracy ...

this conspiracy destroy each other and if their evidence is mutually inconsistent and contradictory, then the Crown fails to prove the very portion of its case which is very important, and what is more, it rather shakes one's faith in all three of these witnesses, Mapeshoane as well as the others, and one doesn't know which of those witnesses to believe. The effect of this evidence is, that Mapeshoane's story of the conspiracy on the Wednesday night told with such vigour and apparent conviction falls to the ground as this and the Crown's story are mutually inconsistent and destructive of each other.

Now we come to the next point, namely, the evidence in regard to the killing. I've dealt with that already and shown that the witnesses knew what to expect as they say and for that reason, if one gets two versions of the killing one a ritual murder and the other an ordinary murder and removal of flesh afterwards, that also shakes the credence of the Crown witnesses.

The next point is the time when the conspirators are alleged to have started on their mission that evening to go and kill Meleke. Now, m'lord, in my submission, if a number of people get together by design whether it is to go to a political meeting or to a social function or anything such as, let us say, a surprise party if they have got to go to the house of someone, then one remembers it, one remembers where the party got together, even such an insignificant event as the coming together with the object of going to a political meeting or to have a social evening together, it is remembered for months and months afterwards by the people who took part in it. But, if we have, as is alleged by the Crown in this case, the coming together of people who are

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dragged to a place to do a thing which is abhorrent to them and a thing which they are compelled to do because they are in the power of their Chiefs, then, m'lord, it is impossible to conceive that they would not remember the time when this coming together took place. Now, what have we? Nothing but divergencies and discrepancies. Sothi says that he was feeding his horse when he was called and he says that he fed his horse at the usual time. He generally feeds his horse at sunset and he did so on that day. He says that he was called at dusk, just after sunset. He even says that when the killing started, it was still light. He says it was just after dark. Now how can one square that evidence with the evidence of Molemohi who says it was nearer midnight. Sepalami says it was very late at night and he'd come back from an evening which he had spent with Manerio. Mapeshoane, on the other hand, says that it was Thursday, 8 o'clock. If one looks at the Preparatory, it is clear that there he positively states it was eight o'clock and he says he hadn't gone to bed. Then, m'lord, there is another discrepancy. When we come to how the witnesses were brought together, we find that Mapeshoane said that he was instructed to fetch Sepalami and No.9. Regard may be had to the Preparatory Examination, he says, " I called these two men and they came. When I returned with these two men the other accused were all standing behind the hut of No.4." So this is the picture which he paints. But, m'lord, what does Sepalami say? Sepalami says that he came back from his lady friend late at night and that he walked into this party and he saw the group and when he came near the group he saw Mapeshoane leave the group. Mapeshoane left the group and Mapeshoane walked in a direction - not of the

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house of Sepalami - but in an opposite direction, and then Mapeshoane spoke to him and he joined the group. Now, m'lord, how did this square with the evidence of Mapeshoane in the Preparatory where he said, " I was told to get No. 9 and Sepalami. I went and fetched them and when we came along the others were already in a group standing behind the house of Makione." An entirely inconsistent version.

Then the next inconsistency is the meeting place and the starting point of this party. It is true that most of the other witnesses make Makione's house the gathering place and here too, I say, that this is a point on which their memories could not have failed. The parties must have known where they started from, where did they begin. Now, what evidence have we? Again inexplicable discrepancies. Sothi says Makione called him when feeding his horse and " we went to David's place - we went in the direction of Fusi's and at first there were just myself and No.4 as we went out of the village." So when they left the village there were only two of them. Makione's house is in the village. He said, " just the two of us walked along and we met some persons at David's place. No.10, No.6, No.5, No.7 and No. 9," and he mentioned the others. So it is quite clear, if Sothi is to be believed, that he and Makione were the only ones who walked as far as David's place which is hundreds of yards away from the village. Now, could Sothi have possibly forgotten a thing like that? But, m'lord, this is not the only time that he says so. He made the same statement at the Preparatory and my submission is therefore that if these other witnesses give entirely a different account of this historic beginning of that fatal march, then one doubts the veracity of these witnesses and their intention.

TEA ADJOURNMENT.

ON RESUMING:

ON RESUMING:

MR. GROBELAAR: I have a few more points to make. I dealt with the discrepancies up to the place where the parties met, when this party got together. May I refer Your Lordship also to the Preparatory where Molemohi said that he went with No.4 to a meeting held outside the village and the same is said by Sothi, but on the other hand, all the other witnesses say that the meeting place was behind Makione's house. Now how can one possibly be mistaken. There couldn't have been an honest endeavour to recollect what happened. This only shows that the whole matter is trumped up and if it had been real, the discrepancy is inexplicable. Then in regard to the march to Fusi's, it is strange that in the Court below, all the witnesses merely refer to this march to Fusi's as having taken place on the road, it was only Sepalami, in the Court below, who indicated that some of them went along a path, but all the others - if one reads their evidence - say that they merely walked along the road.

Whereas now, we have Sothi saying that they kept on the road all the time, the car in front, the two parties behind the car, and in that way they walked along to the scene of the crime. The improbability of Chief Bereng walking has already been referred to. And, m'lord, that is as improbable as if we would have a prince or a princess going to a convivial party and walking for two miles while one of the other members has a car at his disposal. It is equally improbable, m'lord, especially as Chief Bereng was a guest at the house of Chief Gabashane. And in addition to that we know that his foot is bad - we noticed the other day that he couldn't walk at the inspection in loco and Your Lordship will not regard that as mere pretence. He genuinely could

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not walk.

Then the next improbability is, m'lord, how could these people know that the murder would take place at Fusi's or near Fusi's. There are numerous villages - there is David's village, Seoka's Village, Pheka's village and clusters of hoises all along this road. How could the party when they start two miles away, say this is going to happen at Fusi's place. The man wasn't tied down. He was coming from the opposite direction, and strangely enough, this alleged murder took place directly opposite Fusi's. Doesn't that also show the improbability of the Crown evidence?

As to the killing, now on that point, m'lord, as to how this throttling happened, there could have been no difference of opinion or recollection if there was an event which did take place, but what have we? Molemohi shows how it was done - he stands astride the man leaning forward pressing with all his might. Now, m'lord, that would have been indelibly impressed upon the minds of everybody, yet we get Mapeshoane who in the Court below gave a demonstration of how he stood on the left hand side of the deceased, and here he stands on the right hand side. Now, m'lord, one cannot assume that an officer so experienced would make a mistake of that kind and his summary of the evidence agrees with the recollection of everyone who is here in Court. Therefore I say if he did it, he could not possibly have for-gotten now whether he leant this way or the other and precisely how he stood when he committed this brutal crime. And the time of the death - I've already shown the discrepancies.

We come to the next point, namely, the carrying of the body. Now here again, if the event had taken place, I submit it is indeed improbable that some members of the

/party should

party should carry the body shoulder high. It must be a gruesome thing carrying a body and a body that has been mutilated at that and one would be afraid probably of blood being spilt - the whole thing is abhorrent, carrying a body that you have just murdered. You would remember it. But, m'lord, we have some witnesses saying it was carried shoulder high, others that it was suspended.

Then coming to the disposal of the body, that is perhaps the strongest improbability. M'lord it is indeed lucky that an inspection in loco was held. It was not held at the instance of the Crown, the suggestion came from us and it was very nearly abandoned. But, m'lord, I submit that if the Court had not seen the terrain of this alleged murder, very valuable information which may have a vital bearing in this case would not have been available to the Court, and it is very fortunate and in the interests of Justice that Your Lordship and the Assessors should have seen this place, the nature of which is such that one can only imagine that the two arch conspirators, Nos. 1 and 2, had designed not only to have a ritual murder, but they wanted all those who took part in it to go down that perilous journey and to destroy themselves while they were disposing of the body. Ofcourse in doing so they would only have called upon them the further investigation of the police and the whole matter would have been broadcast, but, m'lord, if one bears in mind the nature of this terrain, the ledge or bank along which Mapeshoane says they walked in utter darkness after the fall of rain, and this ledge of 40 feet between two branches of the donga is at certain places two to three feet wide, it is indeed a miracle that the whole lot of them didn't tumble down with the body of the deceased.

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We might have had a number of people losing their lives that night, but for an inexplicable miracle. And it is nothingless than a miracle that, without the assistance of any light at all, those persons should have been able to deposit the body in the place where they said they did leave it. I don't know whether it is place No. 1, No.2, or No.3 - I don't care which. And, m'lord, it is inconceivable that that could have happened. It is impossible that such a performance could have taken place and what is more, if the party knew the place why would they have gone in the middle of that bank insteaad of just dropping the body in from the side? M'lord, is there any explanation of that? This is within two miles of the residences of most of these people. Now, why should they have gone in and risked their own lives and gone on to that precipice, perhaps they didn't know it was that place, they would have tumbled down and there would have been many mishaps on that perilous journey. One only needs to have seen the place to realise how impossible it is for the events to have taken place in the way that the Crown witnesses say it did take place. That would^{even}/have been stranger, M'lord, than the absence of marks, under the circumstances of violence described by the Crown.

My conclusion is, m'lord, that on the Crown evidence, in view of the inherent improbabilities and the unreliability of the witnesses, especially Molemohi, it is very fortunate that by the merest chance we were able to demonstrate that this witness is unreliable. We don't know how many others might have made such inconsistent statements, it is merely because of the instructions given to the Doctor and that these instructions were recorded by

/the Doctor

the Doctor that we were able to discover that, but for that accident, we would never have been able to demonstrate that Molemohi was an absolutely unreliable witness and if we had access perhaps to further statements, who knows what else might still be discovered. M'lord, I leave the point there, I only say this, that it is fortunate, very fortunate, and in the interests of justice, that we could demonstrate, not only show, that Molemohi was an unreliable witness, and if we know that one of the Crown witnesses is capable of fabricating an assault of that brutal nature, why cannot he fabricate more? And if he can fabricate that why cannot the others? M'lord that is the answer to my learned friend's suggestion, 'why should this happen! If one of these witnesses admittedly told such a convincing lie that a lot of trouble was gone to after the body had been buried for months, then certainly m'lord it is easy to see that if one can do it, why could not the others have done so.

Coming to the Defence, we have the witness Titimus who stood there four square with a bland open face, as Your Lordship will recollect, excellent demeanour if I may say so, and not being shaken a bit in cross-examination. There was Chief Bereng, calm, quiet convincing, meeting every point showing that this sinister suggestion about buying the clothes was a mere camouflage was nothing but a mean slander suggestion and unnecessary belittling of his character. He showed that he had a lawful purpose to go there, he was visiting a friend who had already visited him and he had certain business to perform. For that reason, m'lord, I submit, without going further into his evidence, that he gave explanations in a reasonable and satisfactory way and that his evidence cannot be doubted. The same applies to

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Mojautu and we have this, therefore, that Your Lordship had three witnesses whose demeanour was excellent, who were not shaken at all, whose stories were not inherently improbable and, from the nature of their occupation at the time, they could not have further evidence available to prove an alibi. Under those circumstances, m'lord, I apply the remarks of the learned Judge in Ndhlovu's case that if their explanation that they were not there can reasonably be true - if there is a reasonable possibility of it being true - then the Court must discharge them. And they are entitled therefore to their discharge.

M'lord, I cannot refrain from referring to the request by my learned friend that the cross-examination of Chief Bereng should stand down. Is it not another indication of things that might have happened as with Molemohi? For very good reason, my learned friend thought he had information at his disposal which he wanted to investigate. Well this case has been going on since March and there is no reason to suggest that he could not have investigated every channel of his information, yet at the last moment something was probably thrown out and it was thought "there is something else we can tie round his neck" and my learned friend cross-examined him and in vain m'lord I scanned his questions, I examined them, I weighed them up in order to ascertain which was the question in regard to which the information was ascertained the night before. There was not a tittle of such evidence that there was anything new came to light. Again, evil/whispers that were probably going around, and suspicions such as this case is founded on.

On these grounds then, m'lord, I submit that the Crown has not made out a case, that even on the balance of

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probabilities the case for the Defence is very much stronger and that the accused are entitled to their acquittal.

Perhaps I may say just a word in regard to my learned friend's contention, 'why should this have happened'. We've already submitted that it is possible that these accomplices may have been in it and that they are now just giving the actors other names. There is one suggestion. Further, m'lord, the possibility is not excluded that the deceased might have lost his way that night, that he might have fallen from his horse - the Doctor says the evidence is consistent with a fall from his horse - that he might have been stunned in the fall, he might have had an epileptic fit and he might have fallen in the donga, and it is for that reason there are no bruises found on him. Then the question is put, "but the fact these articles were found near the body suggests that there were foul means employed."

M'lord, on the contrary, assuming^{now} that these conspirators wanted to plant the hat and the boot at a place where it would be convenient for their theory of accident, then why should they in their endeavour to cover up this crime have taken the hat and the boot from the bottom of the hill with the intention of leaving them near the body of the deceased and then drop them en route. It is ridiculous. It is futile to make such a suggestion and the suggestion destroys the case put up by my learned friend. On the contrary, M'lord, my suggestion is much more reasonable. It is only suggestion of course, that when the body was carried down, the boot might have slipped off and the hat might have slipped off and it might have been carried there by somebody else, by some of the young natives about, or dogs might have

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interfered, or in any other way. The body might have been carried there in other circumstances, not those suggested by the Crown, and in that way the articles could have been found at the place where they were found. In regard to the saddle, the girth was not even broken. It may be, if the assault had taken place in the way described by the Crown that something might have happened to it, but the fact that nothing happened to the girth may go to show that the deceased was weary and he might have got off his horse, he might have taken the saddle off, we don't know in what condition the girth was found when it was discovered the first time, and for that reason, m'lord, the finding of these articles is not at all inconsistent with the theory, or the suggestion by the Defence, that the death did not take place as the result of violence. As to when facts can be inferred from other facts, namely, the kind of argument that my learned friend is using now that the finding of these articles is inconsistent with a natural death, I would refer to the case of Rex vs. Blom (A.D. - 1939 - p.188) and in that case, m'lord, it is said that if the proved facts are consistent with innocence then the Crown cannot convict, and the proved facts in this regard afford such flimsy evidence that one cannot, on those admitted facts alone, infer there must have been a murder or that the accused must have taken part in it. The admitted facts are perfectly consistent with an innocent explanation, and if they are, then it is either for my learned friend to suggest that the finding of these articles indicates but one thing, namely, that there was the killing of the deceased by violence and that the accused, in this case, were the parties who were responsible for that death. On all these grounds, then m'lord, and also adopting the

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argument of my learned friend, my submission to you is, that not only is there a very strong and well-founded reasonable doubt as to the killing of the deceased by violent means, but there is the strongest doubt that the accused were responsible for that crime, and on the balance of probabilities even the Court must find that the facts deposed to by the Crown are so improbable that the Defence is so sound and so strong that it cannot be rejected and on those grounds, I ask you m'lord, to acquit the accused - I only speak for three of them - of the crime with which they have been charged.

May I thank you for the indulgence and may I thank you for your patience in sitting early and late in order to accomodate us, M'lord.

COURT ADJOURNED.

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