

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

LETSOSA HANYANE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 25th day of February, 1983.

The accused is charged with the murder of one Thulo Matseletsele (hereinafter referred to as the deceased).

On the evening of the 28th August 1981 the deceased and 'Mamaipato (P.W.2) were in the house of 'Maphiela where liquor was being sold. There were other people also present drinking and among them was one Phohleli. Between the deceased and 'Mamaipato only the deceased drank. He had purchased six cans of beer. However, the deceased had been to this house prior to his coming there with 'Mamaipato. The two were lovers

As the two lovers were leaving and were at the door, 'Mamaipato met Phohleli who asked her the whereabouts of one Lieketseng. When their short conversation was over apparently the deceased took offence at that and enquired as to who she was talking to and upon being informed, he assaulted her by hitting her with his open hand. 'Mamaipato then went back into the house and made a report to 'Maphiela. The deceased came into the house and while 'Maphiela spoke to him, 'Mamaipato left for her house. The deceased

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immediately followed her.

Shortly they arrived at 'Mamaipato's house, apparently there was a change of heart for he requested her to accompany him to 'Maletsatsi's home. When they arrived there she was already asleep, i.e. 'Maletsatsi. However, upon finding out who they were, and with the prior promise of payment of debt due to her by the deceased, she opened. The deceased was drunk and noisy. He inquired as to the whereabouts of 'Maletsatsi's mother. Just after they made their entry into the house the accused entered and 'Maletsatsi was under the impression that he was in their company. Because of the noise the deceased made, he was ordered to go out of the house lest he awakened the children. It was in this house that the accused was heard to ask the deceased whether he was still boastful or proud whereupon the deceased replied in the affirmative.

'Mamaipato and the deceased left and the deceased came behind them. They got into the street and still the accused followed them. He, the accused, then overtook them. The deceased at this stage was staggering somewhat. When the accused was a distance of ten to fifteen paces he began to fire in their direction. 'Mamaipato appraised the deceased of this but the latter just said there were not being fired at and continued to walk. 'Mamaipato, perhaps with fright, sat down. With the third shot the deceased fell. She saw clearly what happened because of the light emanating from 'Mamotoa's (D.W.3)'s house. There was an electric globe which was lit, attached to the outside of the house. She made reports, first to 'Maphiela and later to 'Maletsatsi. In the morning she made a report to her sister 'Mamookho.

Under cross-examination she denied that there had been a fight between herself and the deceased. She denied that

/the accused

the accused intervened inside the house when there was a fight between herself and the deceased precisely because no such a fight took place. She denied that the accused pushed the deceased. She denied that the accused had chased the deceased outside the house of 'Maletsatsi. She saw the deceased stagger three times and fall down. She was still sitting down. The firing was in quick succession. She could not remember if more shots were fired as she was frightened. She also stated that she did not know that 'Mamotoa's husband was a policeman as she had just arrived in that area. However, she knew that there were dogs at 'Mamotoa's home. She also knew that there was a headman not far from 'Maletsatsi's place but she was afraid to go there as it was at night and was afraid that the man who had fired at the deceased might also fire at her. She also stated that she could not go and inform the deceased's people as they had previously been reprimanded about their love affair.

When she saw the body of the deceased the following day, she saw the key on the left hand and on the right hand he held a knife. It was brown and it was a clasped knife. It was exhibit 1. He had taken it out at 'Mapheila's when they had had a quarrel. He had put it back in his pocket still opened. How it came to be in his hand she did not know. She thought he might have taken it out during the firing. He had had his hands in his pockets. She could not remember when he took them out.

It was then put to her, that the accused had pushed the deceased outside and the latter attacked the former with a knife. She denied. It was further said that accused had tried to run into 'Maphiela's (P.W.6) premises but he missed the gate and got himself entangled in a barbed wire and

deceased came while he was so entangled and he tried to stab him with that knife. He then shot at him. She said that she never saw accused try to run into 'Maphiela's premises. She never saw accused entangled in the wire. She never saw deceased trying to stab the accused with the knife while the latter was being entangled in the wire. Accused and the deceased were close to each other about five to six paces. It was then specifically put to her :

Q: "Before he fired these shots he had fired the warning shots as he was running away. - I saw the firing but no chasing."

She denied that at 'Maletsatsi's place accused ever said that she should get outside. She also denied that she ever told Crown counsel that there had been any pushing inside 'Maletsatsi's house. She identified exhibit 1. She said she knew it and it belonged to the deceased and that was the knife she had seen in the deceased's hand while he lay in the street.

In re-examination she stated that she had not been asked questions about a knife at the preparatory examination. She did not see any exhibits previously. She had seen the pistol at the charge office. She further stated that she did not see properly how the deceased's hand held out the knife because she was some distance away and there were also many people. She also stated that she did not see which hand actually held the knife. At the time she saw it, the police were present. She had gone to the scene when the police were already there. She had passed the body of the deceased earlier that morning at about 4.00 a.m. and that was the first time when she was going to 'Maletsatsi's home. Then it was too dark to see whether there was any knife. Both hands were outstretched. Where the deceased lay, to the fence the

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the distance was between eight to ten paces. She had made a statement to the police and this was on the 29th August 1981.

'Maletsatsi (P.W.4) confirms to a large degree what 'Mamaipato said took place in her house immediately upon the arrival of the deceased and 'Mamaipato. The accused arrived almost with them. She thought they were going together. She confirms that the accused uttered the words which 'Mamaipato said he did. She denies that any fight took place between the deceased and 'Mamaipato. She denies that the deceased intervened in a fight between the deceased and his lover. She had asked the deceased and 'Mamaipato to leave because the deceased was noisy and would wake up her children. The accused never said anything to her. She never saw anybody being pushed in her house.

After the trio had left she immediately went to sleep and never heard anything. In the morning 'Mamaipato woke her up and made a report to her about the deceased.

Under cross-examination she stated that she was not related to Maipato and that they were just friends. She had seen many people in the street; she saw the deceased; she came closer; he was dead but did not see exhibit 1. From her house to where the body of the deceased lay was a distance of about 130 yards estimated. The body was covered with a blanket. His hands were also covered. She did not know to whom the blanket belonged. She also stated further that while at the scene of the crime she did not talk about the key. She stated that she was taking no sides in the case but assisting the court to arrive at a just decision.

/She

She stated that after letting the deceased and 'Mamaipato in the house she did not ask them what they had wanted because the deceased had said earlier that day he would come to pay and she does not usually ask him when he arrives if he has come to pay. She said that she had said the deceased should go away because he spoke loudly and was drunk and would wake up her children. 'Mamaipato also spoke in a loud voice when speaking to the deceased who was drunk. 'Mamaipato was not drunk and she does not drink and she, 'Maletsatsi, does not drink either. She said it was at the time when she was telling them to go out, to leave her place, that the accused arrived and asked the deceased whether he was still boastful. The accused never spoke to him nor did she speak to him. In fact, she says, she thought they were going together because they arrive simultaneously. She says that words spoken by the accused were uttered on his arrival. She stated that at the preparatory examination she did not mention anything about these words because she was frightened then. She said there was neither a quarrel nor a "qabang" between accused and 'Mamaipato. There was no fight between the deceased and 'Mamaipato inside her house and accused never intervened because there was no fight at all between the deceased and 'Mamaipato.

It was then put to this witness:

"Accused will deny that he said to the deceased that he was proud. - He cannot deny that because that is what he said."

D/Sgt Lerotholi (P.W.5) deposed that on the morning of the 29th August 1981 he received a report as a result of which he, together with D/Sgts. Thoahlane and Selebalo proceeded to Upper Thamae. There, a dead body of a male person, was identified to them as being that of the deceased.

/He examined

He examined the body. It lay on its back. It was covered with a blanket. The blanket was taken off. He inspected the vicinity of the body. He saw a knife. The knife was about two feet away from the body. The knife was opened. The nearest part of the body to the knife was the right hand, and it was about a foot away from it. He said there were fences nearby and the deceased lay in the middle of the street which was a sort of a passage. He saw two wounds one above the left breast below the collar bone and the other above the navel. The body was then transported to the mortuary. While he was at the scene of crime he received some information as a result of which he proceeded to the home of the accused. He found the accused in the bath-room.

(It must be mentioned at this stage that the witness also indicated that there was a key with the body of the deceased which was fastened on a finger). He ordered the accused to face away so that he could be searched. In his pocket he found a firearm which was fully loaded with six bullets and the seventh which was already engaged. He searched inside the house and found more bullets which he then took. The accused produced a licence for both the firearm and the ammunition. The accused, together with the bullets, was handed over to Sgt. Thoahlane who was responsible for the investigation of murders. The firearm and the bullets had been handed into Court at the preparatory examination as evidence but the knife was never mentioned. He mentioned that he never thought that the knife belonged to the deceased because when the deceased's brother was asked about it the latter said he was seeing it for the first time so "it could be that it did not belong to the deceased."

The witness was referred under cross-examination to the photographs taken by Sgt. Selebalo. He was asked if the knife, as shown on the photograph, was similar to exhibit 1 before Court and the examination went thus :

"Is it similar to knife that has been exhibited to Court? - No.

Where is the difference? - The wooden handle.

What is the difference? - This one looks white here on the photo.

D.C. It has to be white because it is a black and white photograph. Sgt. don't be stupid. It can't be otherwise. It can't show the colour of the knife."

It will be shown later that the witness was not as stupid as alleged at all. The D/Sgt. in fact, when being asked by the Court said :

"What is white on the photo? - The handle looks white."

He was then asked if the two knives were identical in shape and the D/Sgt. answered, "No."

In re-examination the D/Sgt. agreed that he was in the group of policemen who first arrived at the scene of crime and this was between 7.00 a.m. and 8.00 a.m. On being asked by the Court he denied that exhibit 1 was the knife he had found at the scene of the crime.

'Maphiela Mapetla (P.W.6) gave evidence and deposed briefly that the deceased and 'Mamaipato came into her house. That 'Mamaipato did not drink, that they had left and it was about 11.00 p.m. She closed her shebeen and slept. Some long time after she heard the sound of a gun three times and thereafter 'Mamaipato made a report to her concerning the deceased. She then said 'Mamaipato made a report to her concerning the deceased. She then said 'Mamaipato should go and report to the deceased's place. Under cross-examination she said that the body of the deceased lay near the corner of her premises.

D/Sgt. Thoahlane (P.W.7) gave evidence and stated that on the 29th August 1981 he, together with D/Sgts. Lerotholi

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and Selebalo proceeded to Upper Thamae after receiving a report at the Charge Office. They found the body covered with the blanket and it was uncovered and identified to them as that of Thulo Matseletsele. On inspection it was found to have two wounds. He inspected the body and near the right side of body found a relatively new knife and it was opened. In the hand was found a key and in the trousers pocket, when it was searched, an Okapi knife which was closed was found. The body was taken to the mortuary together with the two knives which were thereupon seized and labelled and then put into the police exhibit room.

That briefly was the Crown's case.

The defence evidence briefly is as follows: Neo Leteba (D.W.1) deposed that on the morning of the 29th August 1981 he left home for Lower Thamae. As he went down the path leading to Lower Thamae he saw many people standing. He saw a white cloth. He went nearer and in the centre of that cloth there was a person lying on his back. The cloth was put around so that people could not get closer to where the corpse lay. Whilst he was standing there amongst the people there was a call that all men should come towards the corpse. He came together with the other men. The corpse was dressed. He thought the corpse was covered with a blanket. The arms were outstretched. The corpse was undressed, he saw a knife and a key. The knife was in the right hand and the key inside the left hand. The knife was similar to exhibit 2. He saw exhibit 1 come out of the pocket of the corpse. It was taken by one of the men he thought were the police. It was closed when it was taken out. However, exhibit 2 was opened. He only left the scene when the body was put in the vehicle. He did not see what happened to the knives. He

saw when photographs were taken. He does not remember where exhibit 2 was placed when the corpse was undressed. When the body was photographed exhibit 2 was still in the hand. The body was photographed both before and after it was undressed.

Under cross-examination he mentioned that he had known the accused since he was a child. He did not know that the accused had been involved in the killing of the person. He did not see the white cloth in exhibit 'B'. He agreed that the photographs were taken from different angles. He said the white cloth had been a metre high. He agreed that the cloth ought to appear on the photograph. He was sure the cloth was not removed when the photographs were taken.

The accused gave evidence on his own behalf. He says that on the 28th August 1981 he visited different places at Upper Thamae. He was drinking liquor. He got to the house of 'Maletsatsi. He had come from Peete Peete's licenced bar. He had been drinking there until midnight. When he left it was closing time. He therefore took it that it was midnight. At the house of 'Maletsatsi liquor is being sold. He had been there on several occasions. However, on his arrival that evening the door was closed. He knocked and 'Maletsatsi asked who he was and he told her. Before the door opened a certain man who he did not know arrived. This man tried to say something to him but he took no particular notice. He says he was drunk but not much. He entered the house and while he was looking for a place to sit the man who had also entered rushed at a certain woman who was in the house and slapped her and hit her with fists. He did not know this woman but knew 'Maletsatsi. He did not know who that strange

man was but he now knows it was the deceased. He said that he saw the deceased assault 'Mamaipato. 'Maletsatsi and her sisters and brothers were present. There were no other guests. 'Maletsatsi pushed them and said they should get outside. There was noise. He then got hold of the deceased and said he should not fight. He pushed him some distance away. The deceased resisted and stood firm. He then pushed him towards the door and they both went outside. Deceased was not holding him but they were struggling. As he pushed him he found himself outside. When they were outside he let go of the deceased, who then rushed at him. The accused retreated and ran away. He was attacked by the deceased "with his hands." He ran towards the gate.

As he thus ran he took out his firearm from his pocket and fired into the air. When he looked back he saw the deceased going in the other direction round the house in which 'Maletsatsi and the family lived: "He was behind the house going past the house he had now left." He, the accused, then returned to 'Maletsatsi's house. He did not enter because when he appeared at one corner of the house and the deceased at the other the latter asked him whether he was there again whereupon the accused answered:

"I said you should stop fighting, what are you fighting in here?"

Then the deceased said:

"Are you boasting of shooting?"

He, the deceased, then put his hand in his overcoat and took it out with some object in it, however, he could not see as it was dark. He could not see it as the deceased rushed at him. He saw his arm raised. The accused then turned off and fled. When the deceased was now about six or seven paces from

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him, he then ran towards the gate. The deceased continued to chase him. He went out of the gate, he also went out. He was still firing in the air with exhibit 3. He had eight bullets in it that night. He had realised when he left the scene of the crime that evening that he had spent all the bullets as he was firing. The deceased continued to chase him. He then realised that the passage he had to run through was narrow and he then took a different direction going to pass 'Maphiela's home. In his own words: "I tried to get to her home. I was not yet at the gate and I tried to enter. I then fell or hit the fence. I got entangled. When I lifted my head I saw him very close and raising his hand. It was dark. I saw nothing in his hand. I took it he was having a dangerous object, a sharp object. I fired towards him twice, in rapid succession." He said he shot twice because he was in trouble. He fired in quick succession. He could not notice if there was anything between them. He thought the deceased was coming to kill him. He was trying to save himself. He did not intent to kill him. After he had fired at him, the deceased tumbled back and he, the accused, freed himself and ran away. He did not see the deceased fall. He ran away because he had the chance of doing so.

In the morning as he was polishing his shoes ready to go to 'Maphiela's house to find out who the person was who chased him the previous night, the police arrived. It was about 8.00 a.m. or slightly thereafter. He learned that the person who had chased him had died. He had noticed or discovered that after he had shot the deceased he found he had used all the bullets. When he fired at the deceased he did not know that only two bullets were left. He discovered this afterwards when he reached home. He re-loaded

exhibit 3 with seven bullets when he got home immediately.

Under cross-examination he conceded that when the bar closed he had had a drink but he was not drunk. He was not that much drunk, as he put it.

He said he had known 'Maletsatsi from childhood. 'Maletsatsi was not telling the truth when she said that he didn't usually go to her home. She wasn't telling the truth when she said that he asked the deceased whether he was boasting. 'Mamaipato says that he had uttered those words, but she does not speak the truth either. In his own words "I was not so drunk as not to know whether I uttered such words or not." He had heard that the trouble was that 'Maletsatsi wanted 'Mamaipato and deceased to leave because they made noise and she wanted to sleep. But it is not so, he had heard 'Mamaipato say so too but it is not so. The reason he can advance why she 'Maletsatsi said there was no fight is because that was her intention. He says he helped 'Maletsatsi by pushing the deceased out. He says when he started helping, she was already saying they should go. He said when he fired (referring the first occasion) he had not gone as far as the gate. It was surprising that 'Maletsatsi did not hear the firing. The firing did not take place far away. He returned to the house of 'Maletsatsi because the person who was chasing him had run away, and saw him disappear behind the house. He thought he did so because of the sound of the firearm. When they came face to face, as it were, with the deceased and there had been a conversation, there had been this chasing outside. 'Mamaipato and 'Maletsatsi must have heard. He said that 'Mantsela Mara heard all the commotion. However he conceded:

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"I could not come back to the person who had fired at me."

Nonetheless, the deceased came to him at "full force" as he puts it. He fired in the air. This was the second time he did so. The deceased continued to chase him. He conceded that it was very stupid of the deceased to have come back to him.

When he shot at the deceased he was defending himself. He did not see what he had in his hand. He did not see 'Mamaipato. He did not know whether she was there or not. "It could be that she was running with the deceased," he said: However, he says he could have seen her if she was close to the deceased. He further says she is lying when she says that he passed next to them and fired at them. He says he did not see 'Mamaipato at the shooting, that is at the time the shooting took place. She might have reported about the shooting because they had "just fought with the deceased" as he put it. He had run away after the shooting. He was not entangled in the barbed wire as he was running away from the scene. He did not go to the scene of the crime that night. He did not go in the morning. He was going to pass there on his way to 'Maphiela's home. He had re-loaded exhibit 3 at home because he did not know whether the deceased might come. He also stated that the policemen did not take him to the scene of the crime. He knew the knife the police told him about at the charge office. They had said that they found two knives at the scene, one of which must be his. They did not show him these knives. The policemen who had given evidence in this case were present when this was said. He said he was seeing exhibit 2 for the first time. He told the Court that the first defence witness had visited him whilst he was in custody. He had informed him that the dead body was found with bullet wounds. It had a key and

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also a knife in hand and another knife in the pocket that was all he remembered. He had also been told that the body had three wounds. He did not remember when 'Mantsela Mara told him that she had heard the commotion that night. He went to her to ask whether she was not at her home. 'Mantsela's house and 'Maletsatsi share a wall. He did not go and ask 'Maletsatsi whether she had heard the commotion. He did not ask 'Mamaipato. He went to 'Maphiela's. He asked her if she knew about the events however, it turned out that he was not talking to her but to her husband. They said they knew but they did not want to be involved in the matter.

The third defence witness Mrs. Motoa gave evidence and said briefly that there was a fence between her site and that of 'Maphiela; their sites are opposite each other. There is a road separating them, which has now slightly changed as two vehicles cannot now overtake each other. She has electricity installed in her house and there is a lamp which casts light into the street. She remembered the night of the 28th August, 1981. She was asleep. It was about 1.00 a.m. She was awake however, when she heard shots being fired in succession. She put it at more than five times. She then quickly got off her bed thinking that she was being attacked. She ran outside. As she handled the door of the sitting room, she heard foot steps of someone running upwards. She went out and checked the lights. The light outside was off. But when she went to bed it was on. She went back into the house, got a globe and put it on. She did not see anything. She said if there had been anybody in the street between her house and 'Maphiela's she would have seen that person. She knew 'Mamaipato. If she had been there or been in trouble she would have expected 'Mamaipato to have come to her. She owned a vehicle and would have assisted any

person. In the morning she heard an alarm by 'Mamookho. She got up and went out. There were some other people. On the left of the body there was a key. The right palm was opened. On the overcoat it seemed as if a knife had fallen or been thrown there. She could not say whether it was exhibit 1 or exhibit 2 but the make was the same. The knife was opened. She was shown exhibit 'B' 2 and 4 and she says: "The knife was as in 'B' 2, only the handle was showing." When the police uncovered the body she saw the whole knife. Her house is closest to the street. After she had replaced the globe she remained outside for some time. As she puts it, "because I went to the bedroom of the children." She took about ten minutes outside with the light on. She did not know why 'Mamaipato did not come to her house. Perhaps she was afraid of the dogs. If she was outside she would have shouted at her.

Under cross-examination she said that 'Maletsatsi lived not far from her, in other words, their sites are not far apart. If there had been any noise outside the former's home she would have heard it. The footsteps she had heard were heavy footsteps of one person. She could not have seen a person fallen where a body was subsequently found as there had been a heap of soil in her yard. She pointed on exhibit B1 what she said was a heap of soil. There are people standing there and they are perfectly clearly seen. The soil hardly reaches their legs. She had known the accused before this incident. She does not sell liquor at her place. 'Maphiela does. Her dogs are very vicious. There was nothing guarding the body like a white cloth. There was nothing preventing people from approaching the body of the deceased.

On being asked by the gentleman Assessor she said it was true that there is a custom at Thamae's that when one hears a commotion in the streets, even if they don't go out they look through the windows, but if 'Mamaipato had raised

an alarm she could have heard and helped.

Dr. N. Mapetla, a medical doctor stationed at the Queen ll Hospital, examined the accused on the 1st September 1981. She found that he had multiple scratch marks on the left leg on the chin, the left palm and on the back of the head. According to her the injuries were not dangerous to life. The injuries could have been caused by a sharp object, however, a knife could not have caused such injuries.

Under cross-examination she agreed that the injuries could be consistent with the accused having been entangled in a barbed-wire. She also told the Court that a pin could have caused similar injuries. She could not recall whether when she examined these injuries they were fresh, however, they were superficial.

Dr. Leoatle Motsamai, whose evidence at the preparatory examination, was admitted as evidence at this trial, was called and asked a few questions by the Court. The question really asked was whether from his recollection of the examination he could say the shot had been fired at close range or at what distance the missiles could have been fired and the answer was that he could not recall. He was unable to say so unless it appeared in his report.

He gave as the cause of death, internal haemorrhage. The deceased had gun wounds showing entry on left shoulder entering the case through the left second intercostal space injuring the left upper lung lobe, the pericardium, the ascending aorta and lodging in the right middle lung lobe; second bullet entered epigastric region injuring the stomach and the small intestines and lodging above the right iliac crest. According to his report he found a ruptured pericardium

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and there was blood in the pericardium sac. There was rapture of ascending aorta and the left haemothorax. In the left lung there was a hole through the apex. The stomach was perforated; so were the small intestines. That concluded the evidence before Court.

The defence had wished to call 'Mantsela Mara but as a result of the medical report handed into court by the defence it became virtually impossible and it could not be said when or whether her condition would improve and the case could not be postponed sine die. The Court would also have wished to hear this witness. However the circumstances were that was impossible. The Court waited for a week and a doctor called by the Court indicated that the witness's condition was getting worse. If she had given evidence at the preparatory examination I am of the view that the provisions of section 227 of the Criminal Procedure and Evidence Act (supra) would apply. These provisions are not applied in favour of the Crown only.

'Mamaipato was subjected to a lengthy, searching, tedious and repeatative cross-examination. (Her evidence covers some forty-four typed pages). But despite all that the witness gave her evidence very well indeed. There were the discrepancies, if one may put it that way, between her evidence and that of 'Maletsatsi. In fact, only one, namely, as to when the words alleged to have been uttered by the accused: whether they were uttered on his arrival or when 'Mamaipato and the deceased were leaving 'Maletsatsi's house. But on closer examination it does not seem to the Court that there is such a difference after all that. 'Maletsatsi describes that when the words were said it was when she was already telling 'Mamaipato and the deceased to go out. In other words, it was at the time when there was a talk of going out and the

accused was already in the house. 'Mamaipato says they were uttered by the accused as he entered. 'Maletsatsi says they almost entered the three of them together. So to the Court it does not seem as if there is much difference. It is of very little significance. The important thing is, she is corroborated by 'Maletsatsi that the words were uttered. Other than these little discrepancies she is corroborated by 'Maletsatsi in all the details of what happened inside 'Maletsatsi's house. It is also significant that to 'Mamaipato it was never put that the accused would deny that he ever uttered such words. About the events that took place outside the house 'Maletsatsi also corroborates 'Mamaipato that nothing happened outside her house. In other words, she did not hear of any commotion outside her house. nor did she hear any loud conversation in front of her house. I treat the evidence of 'Mamaipato with great caution because she may have a motive of falsely implicating the accused. Her lover had been killed. In certain aspects, of her evidence, also, she is a single witness and I have warned myself of the dangers inherent in accepting the evidence of such a witness. (Rex v. Molomo CRI/T/38/75 dated 2nd April, 1976). I shall also treat 'Maletsatsi's evidence in the same way because she is friendly to 'Mamaipato despite the fact that she made her position clear as regards the accused and her duty towards the Court.

After the deceased was shot and he staggered and fell, the accused ran away. She is corroborated not only by the accused himself although he denies that he saw the deceased fall, even 'Mamotoa heard the footsteps of one person running, and 'Mamotoa had been awake even before the first shots were fired. She never heard the footsteps of many people. From exhibit B the deceased wore what appears to be the heavy

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military style boots. To this extent she is corroborated in her evidence that they would have caused heavy steps if one ran in them. The deceased was shot as he was not running nor was he chasing anybody. It was contended on behalf of the accused that he had fired five warning shots at the deceased. This fact, so it was argued, found support in the evidence of 'Mamotoa and one witness who gave evidence during the preparatory examination but not at this trial. It was argued that the witness's depositions even though not admitted by consent, were nevertheless evidence at this trial because a portion of the preparatory examination record had been 'let in' this being when the evidence of Dr. Motsamai at the preparatory examination was by consent admitted and thus became evidence at this trial. The procedure this Court knows and is followed daily in criminal trials is that where the Crown does not call a witness it intended calling and the defence wishes to do so, the defence simply obtains that witness's statement from the Crown and proceeds with the witness as its own. The strange procedure propounded by the defence is not known to this Court neither could learned counsel refer this Court to any authority for his proposition. (See R. v. Sepanya CRI/T/17/77; section 273 of the Criminal Procedure and evidence Act 9 of 1981 which governs admissions in a Criminal trial). Even assuming in favour of the accused that he fired warning shots, 'Mamotoa says the shots fired could have been more than five this tends to support 'Mamaipato's version. She said that shots were fired in their direction. It was during that period that deceased was fatally injured. If he fired five times in the process she said she did not remember as she was frightened. The witness who heard shots being fired, only heard them almost all at once - fired in succession. This then again lends support to 'Mamaipato's version that there had been no firing of shots outside

/'Maletsatsi's

'Maletsatsi's house.

The witness was made to repeat again and again what transpired inside 'Maletsatsi's house and here is an example:

"D.C. : So, what happened when the accused came in, - He greeted and asked the deceased whether he was still boastful.

I want to know what he said to the owner of the house? - Nothing.

H.L. : He did not speak to 'Maletsatsi ? - No!

Neither did 'Maletsatsi speak to him? - Yes.

D.C. : 'Maletsatsi did not say, look I am asleep already, please go away, I am not attending to you, she did not say that? - He came in at the time 'Maletsatsi was already saying we should go out because we are making noise."

'Maletsatsi subsequently was to confirm this. The witness was taxed about the fact that she did not raise an alarm when the deceased was shot at. She said she raised it by going to 'Maphiela's house and telling her about what had happened. It was as though this witness had done something very unusual. She had not gone to the Chief's place. She in fact did not cry out aloud and shout for help and yet she was to be borne out in this evidence by 'Mamotoa when she said it was a custom at Upper Thamae that when there is a fight people do not go out but peep through their windows. So it turned out that although at first sight 'Mamaipato seemed to have given evidence contrary to the custom as it is known in Lesotho, she was telling the truth as far as the custom is practised at Upper Thamae.

About the evidence that the following morning when people were gathered at the scene she saw a knife in the right hand of the deceased and the knife had a brown handle and that the knife belonged to the deceased and that it was exhibit 1. I think here she was mistaken. There was a knife on the ground about a foot away from the hand of the deceased.

/She had

She had seen a knife in the hand of the deceased on the previous evening or early that morning when they were at 'Maphiela's place. She saw the deceased put the brown knife inside his back trousers pocket. What must have happened is that by association she looked at that knife and immediately thought it belonged to the deceased. The fact that she has told what appears to be an untruth does not necessarily lead to the conclusion that her evidence is totally unreliable. (Rex v Nketu, CRI/T/45/81, dated 11th August, 1982). Except for this piece of evidence she has been corroborated in all the evidence where there were other people present. She is also corroborated by 'Mamotoa (a defence witness) that there was only one outburst of shots. Her evidence is therefore reliable, trustworthy and is accepted as being truthful. From her demeanour 'Maletsatsi was a witness of truth. Indeed she lived up to her promise to the Court.

The other witness who says he saw a knife in the hand of the deceased is the first defence witness. He must be mistaken because the two policemen who have given evidence together with 'Mamotoa did not see any knife in the hand of the deceased. In fact the photographs bear this out although the first defence witness wanted to suggest that more photographs had been taken. There was, however, this knife which was on the ground, a foot away from the right hand of the deceased. Perhaps, to a person who did not look properly, as it were, it might have seemed as though the deceased had this knife in his hand and to 'Mamaipato who had seen the deceased in possession of the knife previously this became a reality. From exhibit 2 especially the handle looks whitish in colour. In other words, the colour is white and when the knife itself was produced the handle is of a light colour so that the D/Sgt. Lerotholi was not stupid as the defence

/counsel

counsel had suggested. He said the knife which was before Court was not the knife which was on the ground at the scene of the crime.. The brown knife was found when the person of the deceased was searched and it had been closed. I accept the evidence of the two policemen that there was a knife near the right hand of the deceased but not in his hand. I accepted their evidence that one knife with the brown handle was found when the person of the deceased was searched. I accept the evidence of the policemen that the two knives were kept in exhibit room. Why the evidence about the knives was not led at the preparatory examination cannot be laid at their door for they do not or are not responsible for the leading of evidence at the preparatory examination. That is solely the function of the Public Prosecutor.

Neo Leteba, the first defence witness, describes himself as a senior Audit Examiner. That morning he saw a white cloth surrounding the body of the deceased and at the centre of that cloth he saw a person lying on his back. It was put around so that the people could not get closer to the corpse. He said that he saw the knife but as indicated earlier many other witnesses who were present at the same time as him did not see the knife which he says he saw in the hand of the deceased. The white cloth was no where to be seen on exhibit B. The photographs comprising exhibit B were taken from different angles and yet the white cloth, which he said was a meter high, could not be seen. There were no questions concerning the evidence of this witness put to the police witnesses. 'Mamotoa also saw no such a cloth. This witness had informed the accused that deceased had sustained three wounds. The doctor only found two wounds. This witness has created the impression that he was not at the scene of the crime. He relied too much on hearsay evidence until it became a reality in his mind. He was shifty in the witness box and did not live up to his educational /standards

standards which were lauded so much in argument. This witness terribly misled the accused into believing that the body of the deceased was photographed still clutching a knife. That is one reason why exhibit B was introduced into the evidence by the defence. As they revealed, he had lied to him yet again.

The accused was restless in the witness box. He told one lie after the other. If it is true that the question of the knives was discussed at the charge office, in the presence of the two police witnesses, why was there not a single question to this effect directed to them? If it is true that the police refused to take him to the scene to retrieve the empty shells why is it that not a single question was directed to the two police witnesses who gave evidence at this trial? If it is true that prior warning shots had been fired at 'Maletsatsi's house why is it that witnesses only testified to one occasion when there was a burst of gun shots? Why is it that 'Mamotoa never heard of the earlier outburst of firearm shots? Why is it, as his counsel so kindly informed the court that not only would 'Mantsela Mara say that she heard the commotion inside 'Maletsatsi's house but that after the fight 'Maletsatsi came to speak to her; that she heard footsteps; that not a single question was put to 'Maletsatsi concerning this so-called important evidence? All these factors are clear indices that the evidence of the accused was fabricated as the trial progressed. It was unbelievable that the accused wished to consult his lawyer before he could divulge the name of 'Mantsela Mara. The importance of not putting his defence to the Crown witnesses while in a position to comment thereon will be shown shortly.

It was argued that the body of the deceased was not formerly identified. It was not necessary since there was

/no dispute

no dispute that the accused had killed the deceased but did so in self-defence. The only issue before Court is whether that is so or not. If it was meant that the body shown on the photographs was not that of the deceased then one fails to understand the reason why the defence introduced them into evidence. They were introduced solely to show the relative position of a knife in relation to the body of the deceased. It was common cause that the body shown in the photographs was that of the deceased. 'Mamotoa (D.W.3) said in her evidence that she knew the deceased (although at first she did not quite recognise him) and that the body was later photographed by the police. In my opinion there had been plenty of evidence of identification of the deceased and it is not clear at all why this matter was ever raised at all.

The accused has raised the defence commonly referred to as self-defence or private defence. The basic principle in regard to self-defence was succinctly stated by Watermeyer, C.J. in the case of R. v. Attwood, 1946 A.D. 331 at 340 as follows :

"The accused would not have been entitled to an acquittal on the ground that he was acting in self-defence unless it appeared as a reasonable possibility on the evidence that the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury ...". (See also Rex v Penedo, dated 26th May 1978; S. v. Mokonto, 1971(2) S.A. 319 (A.D.) at pp. 323-4). (My underlining).

The onus of negating self-defence in criminal cases is on the Crown. (R. v. Ndhlovu, 1945 A.D. 369 at 381; Rex v. Penedo (supra)).

The evidence of the Crown, through its principal witnesses, has clearly established that there was no fight between the deceased and 'Mamaipato. There was consequently no intervention by the accused between the deceased and 'Mamaipato since there was no fight nor even an altercation.

/The witnesses

The witnesses are agreed that the noise inside 'Maletsatsi's house was caused because of the deceased's drunken state. The Court accepts that the deceased and 'Mamaipato were asked to leave as the former was making noise.

It is significant that the defence version that another person named 'Mantsela Mara would give evidence to the effect that she had heard the conversation between the accused and the deceased when they stood at opposite corners and that she also heard the commotion inside the house and particularly that 'Maletsatsi went to speak to her immediately thereafter was never put to these witnesses. The importance of putting accused's version to Crown witnesses who are in a position to comment upon it was put by Maisels, P. in the case of 'Mota Phaloane v Rex, 1981 LLR. 246 at 252:

"Making due allowances for certain latitude that may be afforded in criminal cases for a failure to put the defence case to Crown witnesses, as to which see the remarks of Davis A.J.A. in Rex v M. 1946 A.D. p. 1023 at 1028, it seems to me that as MacDonal J.P. held in S. v. P. 1974(1) S.A. 581 it is important for the defence to put its case to the prosecution witnesses as the trial court is entitled to see and hear the reaction of the witness to every important allegation. And as Claasen J. put it in Small v. Small 1954(3) S.A. 434:

It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."

Not to have put the opposite view of what the witness would say suggests to the Court that the accused was not sure of his defence and it was fabricated as the case progressed. Apart from what has already been said, the following examples will suffice :

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In the presence of the accused his instructions were conveyed as follows to 'Mamaipato :

"D.C. : deceased was chasing him with that knife (reference to exhibit 1).

A : No.

D.C. : the deceased came whilst he was still entangled in the wire, raised his arm and tried to stab him with that knife and that is when he shot him, did you see that?

H.L. : Did you see the accused trying to run into 'Maphiela's premises? - No.

Did you see the accused entangled in a barbed-wire? - No.

Did you see the deceased try to stab the accused whilst the accused was entangled in the barbed-wire? - No.

D.C. : He will say that as he was fleeing from the deceased he had fired a number of shots at him that he had fired a number of warning shots at the deceased without success - I saw when he fired."

However, a day or two later when the accused gave evidence in his defence he never mentioned a single occasion that night when he saw the deceased in possession of a knife. He was expected to repeat his version which he had heard a few days previously vigorously put to 'Mamaipato. He was not recalling evidence he had given in another Court over a year previously as Crown witnesses did. His memory was letting him down terribly. The reason was simple. He had lied to his counsel. Accused is an intelligent person and not expected to have told the Court a tissue of lies. His evidence has been clearly shown even by his own witnesses to be false beyond reasonable doubt.

It is of significance too that the name of this witness was mentioned for the first time as a result of the Court's questions which, in turn, aroused such an unwarranted attack on the Court, by the defence counsel, for which no regret has been expressed up to now.

/There

There was yet another attack on the Court's conduct of the trial. It was contended that the court had impeded a crucial aspect of 'Maletsatsi's cross-examination. This occurred when the witness was being referred to what she had said in her evidence during the preparatory examination. The Court was merely drawing attention to what this Court has said in the case of Rex v. Tsietsi Moleleki CRI/T/29/81 dated 10th March 1982, in which Rooney, J. said at p. 2

"..... All the witnesses apart from Drs. Choi and Park, gave evidence in Sesotho. The magistrate recorded the evidence in English. He did not have a Court interpreter and he performed that duty himself in view of his knowledge of both languages. This is a practice which should never be followed, even where the magistrate concerned possesses some skill in interpretation.

In the first place, magistrates are not sworn translators. The magistrate at the preparatory examination in this case, set himself an almost impossible task. He had to listen to the evidence, interpret it and record it in another language. In the result the depositions abound in Sesotho idioms which have been translated literally into English producing an effect on the style and language used which could be regarded as a comical in a less grim context.

It should be remembered that (subject to the proviso therein contained) Section 7(1) of the Subordinate Courts Proclamations (as amended) lays down that the record of proceedings in civil as well as in criminal cases shall be in the English language. If the services of an interpreter are dispensed with and if it were shown that the evidence has not been properly translated by the presiding magistrate this could result in the setting aside of the proceedings at a preparatory examination. In the present instance no objections were made by the defence to the depositions recorded and they were admitted in evidence."

The deposition of the witness in question had not been admitted by the defence. However, the cross-examination of the witness was allowed to continue although it developed into the semantic use of certain English and Sesotho words. If there was any detraction of the cross-examiner that was certainly not the sole object of the Court. The Court did what it did in the interests of justice. It has a duty to

/protect

protect its witnesses whenever it thinks it's necessary.

Such outbursts against the bench were aptly described by Schreiner, J.A. in R. v. Silber, 1952(2) S.A. 475 at 484A-B :

"Why then, one asks oneself, did he make the application? The explanation of his conduct is certainly not obvious. Perhaps his vanity had been hurt because his objections, despite his strenuous arguments, had been so regularly overruled, and he might have been aiming at restoring his self-esteem and possibly his position in the eyes of the public by a daring attack on the magistrate. Another possibility is that he felt that the case was going against his client and hoped to intimidate the magistrate, or, perhaps, to drive him into committing some irregularity of which use might be made on appeal. The appellant's counsel submitted that so long as he was aiming at the advancement of his client's cause he could not be guilty of wilfully insulting the magistrate. I do not agree. It may seem to a practitioner, in a seriously misguided moment, that his client's cause may be advanced if he wilfully insults the Court, but this ultimate sense of duty to his client will not excuse him if his immediate intention was to insult the Court. I do not think that the reasonable possibilities admit of any more favourable estimate of the appellant's behaviour than that he had not consciously worked out a plan to insult the magistrate but that, irritated by the lack of success of his objections, he (adapting the language of Lord Esher in Royal Aquarium and Summer and Winter Gardens Society, Limited v. Parkinson, 1892(1) Q.B. 431 at p. 444) allowed his mind to fall into such a state of unreasoning hostility towards the magistrate that he was reckless whether the charge of bias had the slightest foundation or not. And if that was the position then, too, in my opinion he was wilfully insulting the magistrate."

I entirely agree. If the accused did receive any undue attention from the bench's questions then so did the Crown witnesses. Crown counsel never for a moment questioned the Court's right to do so nor did he resort to any antics. The defence almost said the Court was biased. If that were the case, the proper procedure should have been adopted. It must be made quite clear that a judicial officer is entitled to ask witnesses questions. They may at times be difficult. A judicial officer in our legal system is not an "umpire" who sees to it that the rules of the game are observed.

/(Rex).

(Rex v Hepworth, 1928 A.D. 265 at 277). However, a judicial officer must be wary lest he descends into the arena and it is a terrible thing to see justice blinded. (Phafoli v Rex, 1976 LLR 88 at 100-102). There are times when a judicial officer will appear to be unfair to one of the parties to the dispute. In such circumstances it is the duty of counsel representing such a party to bring such conduct to the notice of the judicial officer. They are also human beings and suffer from human frailties. In doing so counsel is not expected to disrupt the decorum due to the Court. He will bring the conduct of such judicial officer to his attention with the combination of courtesy, respect and firmness. (See Morris: Technique in litigation, 2nd Ed. p. 304). The general public must see, by conduct, that counsel owes his allegiance to the bench and however strong his feelings towards the cause of his client, the confidence to his bench must be maintained. His personal feelings must not be allowed to get the better part of him because once that happens he may be sure of being dealt with swiftly for contempt. It nearly happened in the present case. Arrogance and offensiveness are the attributes not recommended to a lawyer towards his bench.

The two witnesses for the Crown were adamant that there was no commotion outside 'Maletsatsi's house. If there had, they would have heard. However, 'Mamaipato was in the company of the deceased. She saw nothing of the sort. When she left the house of 'Maletsatsi she was with the deceased who never left her company except shortly before he was fatally shot. The Court accepts their evidence as being the truth of what they say happened that night. The conclusion this Court arrives at on the evidence is that there is no reasonable possibility on the evidence that the accused was ever attacked.

/by the

by the deceased. He might have sustained the injuries described by the doctor elsewhere. 'Mamaipato did not even implicate the accused falsely saying that he already sustained those injuries on his arrival at 'Maletsatsi's house. 'Maletsatsi would have also said that accused had already sustained those injuries on his arrival at her home. She had seen him. She knew him. But because they were endeavouring to tell the truth they did not do such a thing. They had not paid much attention to him. On the evidence there was therefore no unlawful attack on the accused by the deceased that fateful evening.

There was much to be said for the argument put forward by Crown Counsel, namely that exhibit 2 had been planted by somebody who did not know that the deceased already had in his possession exhibit 1. This argument finds support in the evidence of the defence witness, 'Mamotoa.

The next inquiry is whether the accused had the requisite mens rea when he so fatally shot the deceased. 'Mamaipato did not know the accused. She, therefore, did not know whether he was drunk or not. 'Maletsatsi who knows the accused well was never asked the condition of the accused as regards his sobriety. The only evidence on the issue of sobriety is that given by the accused. He started drinking early on the evening in question until about midnight. There is no evidence as to the quantity of liquor he consumed. However, the accused made it quite clear in this Court that he was not so drunk as not to remember what words he uttered. He therefore knew that he had a lethal weapon in his hand. When he discharged the pistol in the direction of the deceased, in his proximity, he was reckless whether death

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ensued or not. This result he must have foreseen. He therefore had the requisite mens rea when he fired and killed the deceased.

The accused is found guilty as charged.

My assessor agrees with all my findings.

EXTENUATING CIRCUMSTANCES.

The onus is on the accused of establishing the existence of extenuating circumstances. This onus is discharged on a balance of probabilities and the test applied is subjective.

The Court is not confined to the evidence that may be led at this stage, because if looking at the whole of the evidence before it, there is a fact or facts favourable to the accused, the Court is entitled to take such fact or facts into consideration in deciding whether extenuating circumstances exist. (Rex v. Mokoena, CRI/T/19/80 dated 3rd September, 1981).

The Court in considering this moral judgment is enjoined to take into consideration the standard of behaviour of an ordinary person of the class of the community to which the accused belongs.

There are only two factors which favour the accused in the present case and these are :

- (i) it has been found that his dolus was eventualis; and
- (ii) that he was under the influence of intoxicating liquor, when he committed this crime.

As regards (ii) above it was held in Rex v Ramonyatsi and another, CRI/T/47/81 dated 10th December 1982 that the law

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does not demand a defined degree of intoxication before it can serve as an extenuating circumstance.

The combination of these factors constitute extenuating circumstances in the present case.

My assessor agrees with these findings.

SENTENCE.

The accused has used a lethal weapon in killing the deceased. The killing, on the evidence before Court appears senseless. However, in murder trials it is seldom that the Court is ever told the motive for killing. From the words which the accused uttered in 'Maletsatsi's house, it would seem that the accused knew the deceased and that they had had some experiences together from which the accused gathered that the deceased was a proud or boastful person. Whatever this experience, the Court has been denied its nature by the evidence before it.

There has been an increase in the use of firearms which have resulted in many deaths. A few examples will suffice :

- (i) Rex v Mokoena, CRI/T/19/80 dated 3rd September, 1981.
- (ii) Rex v Phaloane, 1980(2) LLR. 260.
- (iii) Rex v Tlelima, CRI/T/11/82 dated 16th September, 1982.
- (iv) Rex v Ramonyatsi and Another, CRI/T/47/82 dated 10th December, 1982.

It is obvious that the use of a firearm as a means of killing fellow human beings is on the increase. The Courts would thus be failing in their duty if they did not demonstrate their abhorance of this menace. The Courts have in the past warned against this reprehensible conduct. It is, in the words of Maisels P., in Phaloane's case reported in 1981(2) (supra) at page 267 "the Court's duty to

/demonstrate

demonstrate in unmistakable fashion that such conduct will not be tolerated in this country and the way in which it is able to do so is to pass an exemplary sentence in this case." This is precisely what this Court intends to do in the present case.

After careful consideration of the facts the least possible sentence the Court can impose on the accused is one of ten (10) years' imprisonment.

ORDERS :

Exhibit 3 (the pistol) is hereby declared forfeited to the Crown.

J U D G E.

25th February, 1983.

For the Crown : Adv. S. Peete

For the Defence : Mr. K. Sello

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

LETSOSA HANYANE

REASONS FOR GRANTING AN APPLICATION MADE BY THE
CROWN FOR CALLING ADDITIONAL EVIDENCE.

When I granted an application made by the Crown to call two witnesses who did not give evidence at the preparatory examination I said I would give my reasons later. These now follow :

The Crown has made an application to lead the evidence of witnesses, at this trial, who were not called to testify at the preparatory examination. This Court has stated in the case of Rex v Rampine & Another, 1978(2) LLR. 377 at 383 that "provided sufficient notice, to which the intended evidence is annexed, is served on the defence counsel and he is given sufficient time to consult with his client and prepare his defence in view of the altered circumstances and ~~there is no objection,~~ it is usually granted at the Court's discretion." There must, moreover, be cogent reasons why such evidence was not led at the preparatory examination. It was made quite plain in Rampine's case (supra) that the Court would not allow such an application if the written statement of the witness now sought to be led was available at the time the preparatory examination was held and for no apparent reason, was not made use of. Let me hasten to add that in that case the evidence sought to be led was quite
/bulky

bulky - more than the evidence actually led at the preparatory examination. However, if there are cogent reasons why the evidence sought to be led was not so led during the preparatory examination then as Cotran, C.J. puts it in the case of Rex v Faku (2) 1979(1) LLR. 215 at 221-2 there is "nothing in law that prevents the Crown from calling a witness even if he did not give evidence at the trial (i.e. preparatory examination)." The only safeguard in this respect is that an accused person is entitled to have, as I see it, is an account of what the witness is expected to say, so that he (accused) will not be taken by surprise and prepare himself accordingly.

I have seen the evidence sought to be led. It is very short indeed. The accused has been given sufficient time to prepare his case. The reasons for the non-introduction of the evidence at the preparatory examination are, in the context of this case, sufficient cogent. The Crown, in my view, has satisfied the requirements laid down by the cases mentioned earlier in this judgment.

In my discretion and bearing in mind also that a Criminal trial is not a game where a judicial officer has to see that the rules of the game are observed but also (and that is what a Criminal Trial is really all about) to see that justice is done or to put it in another way, to arrive at a just decision, I grant the application.

J U D G E.

25th February, 1983.