

IN THE HIGH COURT OF LESOTHO

In the matter of:

REX

v

THOKO LEBITSA

J U D G M E N T

Delivered by the Honourable Acting Judge, Mr. Justice M.L. Lehohla,  
on the 5th day of September, 1986.

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The above accused is charged with murder:

In that upon or about 29th day of January, 1985, and at or near Ha Rannakoe, in the District of Mafeteng, the said accused did unlawfully and intentionally kill Ramohau Phinithi.

Accused pleaded not guilty to the charge. On behalf of the accused, Counsel for defence made the following admissions:

- 1) the evidence of P.W.6 at P.E. Detective Sergeant Thoahlane,
- 2) the evidence of P.W.7 at P.E. Khathatso Phinithi and on some contingent basis,
- 3) the evidence of P.W.1 at P.E. Dr. Gyasi-Agyi NYAMEKYE who, however, came just after the opening of defence case and whose evidence was heard after the granting of an application for the re-opening of the Crown case for the purposes of hearing his oral evidence otherwise he is to be referred to as P.W.4 in these proceedings.

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The evidence of P.W.6 at P.E. was to the effect that he is a member of the Lesotho Mounted Police attached to the C.I.D. stationed at Matelile. On 30th January, 1985, he received a report following which he proceeded to Ha Rannakoe. On arrival there, he found the body of the deceased. The body was lying outside the deceased's garden but close to it. The body was still clothed. P.W.6 at P.E. undressed the body, examined it and saw a hole in the vest. This hole seemed to have been caused by a sharp object. The witness noticed an open wound on the left side of the chest. There were no other external injuries besides that one. The body was later taken to the mortuary and it suffered no further injuries in the process.

P.W.7 at P.E. testified that he is the uncle of the deceased. Having received a report relating to the deceased he went to deceased's home. The deceased was already dead. He didn't see any injuries on the deceased. He <sup>identified</sup> the body before P.W.4 who performed a post mortem examination. He later buried the body at home afterwards.

The first witness P.W.1 Joseph Bofihla Mejaro gave oral evidence before this Court and testified that he is a Warrant Officer stationed at Matelile Police Post in the Mafeteng District. He knows the accused. On 29th January, 1985, he received a report following which he sent police on patrol on 30.1.85. After the patrol left, accused came to him at the office between 8 and 9 a.m. Accused said he had come to report himself in connection with a fight he had with somebody the previous day. Accused gave P.W.1 an explanation and handed him a knife. P.W.1 cautioned the accused and warned him

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that should he make a statement such statement would be recorded and used in evidence against him. Accused expressed his willingness to go on with the conversation at the end of which P.W.1 laid a charge against the accused.

Under cross-examination P.W.1 testified that he sent out a police patrol after he had received a report that a person had died. He happened to know about this, through deceased's relative who had come to the police station on 29-1-85. The relative was one Tebello or Tello Phinithi.

In answer to a question put by one of the gentlemen assessors, P.W.1 stated that at the time he came to make the report accused appeared normal except for the time when P.W.1 told him that the report received regarding the knife was that the man on whom it was used had died.

The next witness for the Crown was P.W.2 Tello Phinithi who testified that he is illiterate but however knows the calendar months in Sesotho language. He is related to the deceased.

On 29-1-85 P.W.2 was at home building a kraal. He heard accused's voice. Accused was shouting after a herdboys who was herding sheep and goats. He was shouting that the herdboys should leave those animals where they were and that he (accused) would see to the man who was saying they should be removed. P.W.2 indicated that he was between 100 and 120 paces away from the accused. He further testified that accused was obstructed from view. P.W.2 was occupying a higher ground.

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Immediately after ~~the~~ heard the foregoing, ~~he~~ heard 'Matello's voice saying accused should not fight the deceased because that's deceased's place. There and then P.W.2 went to where he could see. He saw the deceased standing. Accused was about three paces away from the deceased. When he saw the accused and deceased in this position P.W.2 was about seventy paces away from them. Accused was approaching deceased. Accused had his hands at the back as he did so. When accused reached the deceased, accused removed his hands from his back and stabbed the deceased. Before the stabbing P.W.2 had heard no altercation between the two. Had there been one, he says he would have heard it as he was approaching them fast. P.W.2 heard accused saying "I will kill you" after stabbing the deceased with a knife. Accused said again "I am telling you I'll kill you." Accused was leaving the deceased there as he uttered those words. P.W.2 said he could not identify the knife because the handle was covered by accused's hand. He only saw the blade which, as he indicated, could be about 6 inches long. As accused turned back and left the deceased, P.W.2 came rushing to where deceased sat down after being stabbed. Deceased had moved some five or so paces from the point of his encounter with accused and sat there. Then deceased lay on his side.

The herdboys drove away the sheep which had been grazing where accused had said they be left to graze. The sheep belong to Chele Lebitsa, the accused's father. The sheep had been, according to P.W.2, grazing in deceased's yard.

P.W.2 held the deceased up but deceased appeared to be dying.

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Deceased had a knife wound below the left breast. He died in P.W.2's hands. The latter raised an alarm and people came in response thereto.

P.W.2 went to report to the chief who in turn handed him a letter to take to the Matelile Police Station where P.W.2 reached at dusk. The stabbing had taken place towards sunset. P.W.2 was accompanied to Matelile Police Post by the chief's messenger, a youngster called Ts'eliso.

Police arrived the following morning, waited for their vehicle after examining the body in the presence of P.W.2. When the vehicle arrived, the body was loaded in it and conveyed to the mortuary at Mafeteng where it was examined by P.W.4 and later released to relatives for burial.

P.W.2 testified that accused and deceased were not on good terms.

Under cross-examination learned Counsel for defence taxed this witness for saying he knows accused because he and accused are fellow villagers instead of saying he knows him because they are relatives. It was suggested that blood relationship should come before the relationship based on the fact that accused and this witness lived in the same village. P.W.2 conceded but denied that he ignored this obvious and natural rule because of his bias against accused.

To the questions: "Where were you building the kraal .....? At my home.

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Where was accused .....? I did not see him while I was building, I only heard his voice.

Can you hear conversation between accused and deceased from the distance of deceased's home ...." I could.

How good is your hearing .....? I don't know.

I put it to you you don't have good hearing .....? It is good", he replied.

P.W.2 testified that from his own home he could see 'Matello's home. However, he could not see 'Matello because when he heard her voice, she was not at her home. He only saw her when he came to view and she was in a path leading to her home. When she fell into view she was not far from him. He further stated that the horse which deceased had been riding belonged to 'Matello. Deceased only looked after it. Deceased had dismounted the horse at 'Matello's home on arrival from the fields. He denied that the horse was at any time grazing in the yard behind accused's house.

He further stated that during the hoeing done at accused's father's field he could see the horse in the fields away from home. The distance between P.W.2 and the fields was estimated at about 400 paces (from witness box to King's Way). In P.W.3's estimation, the same distance was estimated at around a kilometre. P.W.3 however, said because P.W.2 is the one who usually does the pacing of lands during ploughing season, she deferred to P.W.2's estimation as opposed to hers.

Taxed further as to how he could see the wound on the deceased despite the fact that not only was the wound covered by the vest worn by deceased but also the fact (as deposed by this witness at the

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P.E.) that deceased had placed his hand over the wound,  
P.W.2 said he could see blood oozing around the hand.

To the question: "There is a difference between  
blood and wound .... ? None; Blood comes from  
a wound.

Was deceased bare - breasted ..... ? He had  
a vest and overall.

You saw the wound through the vest and overall ...?  
The overall was unbuttoned.

The vest .....? It was punctured. I had  
seen accused stab.", he replied.

P.W.2 further testified that his home and 'Matebello's  
are equidistant from the scene of the incident. On  
coming into view, however, he estimated that he must  
have been closer to accused and the deceased than  
'Matello. This is why he could see the knife blade  
clearly as opposed to 'Matello's testimony on this  
point that she only saw accused's fisted hand striking  
at deceased. P.W.2 insisted that he went rushing  
to the scene because he had seen the knife used by  
accused in stabbing the deceased. In reply to the  
question put to him that at that distance he couldn't  
have seen the knife because it is not as long as he  
estimated it, he replied that if it is not that long  
then accused may have changed it. He denied the suggestion

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whether accused showed him the knife after stabbing the deceased with it. In answer to that he said "No, he pocketed it in his back pocket and left."

P.W.2 vehemently denied that deceased used to tether 'Matello's horse in accused's yard. He was adamant that deceased used to tether the horse in the public grave yard. The grave yard, it appears, is behind accused's parents' house. He further stated that each time the horse had been tethered there by deceased, accused would come and untether it claiming that the area there is in his yard. He further denied that prior to the stabbing, there had been any fight between accused and deceased. He also pointed out that Chele refused to come to deceased's assistance. Chele had been closer to deceased than was Letutla who even by-passed him standing there and came to assist the deceased.

P.W.2 insisted that accused said to deceased after the latter had been stabbed "I'll kill you." Asked what deceased said if anything after the stabbing, he replied: "Come and see what you have done" to this accused said: "I'll kill you I am telling you," and left. He further said there was bad blood between deceased and accused manifested by accused untethering the horse tethered by deceased at least twice in the area in question, namely the grave yard.

P.W.3 'Matello Phinithi testified that she had gone to the lands on 29-1-85 to thrash wheat. Deceased came to collect wheat that had just been thrashed. On returning from

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the lands, deceased came to P.W.3's yard. Accused's father and deceased's father are related.

Deceased gave her a report and ran. He was running towards his yard. P.W.3 came following but at some point waited and watched. She saw sheep in deceased's yard. Deceased drove them and the herdboys away from that yard. While at about from the witness box to the new Government complex, P.W.3 saw accused come at deceased in full run and deliver a fisted blow at deceased's chest region. Before then P.W.3 had shouted to accused saying "Where are you running to and for what are you running to Ramohau?" She testified that accused sometimes fights the deceased. She thus feared that he was running to fight the deceased one more time. She went into her house to drop the basins she had been carrying from the fields. On coming out she saw the deceased sit down. There and then she saw P.W.2 supporting the deceased. She also went up there. When she arrived there were many people running towards the scene. Others were already gathering there.

When last she saw accused run to deceased she only saw him strike at deceased. Thereafter accused ran away. When she came to the scene she saw a wound below deceased's breast. It looked as if caused by something sharp. P.W.2 left for the chief's place to report. He later came back in the evening and joined people who were keeping vigil around the deceased. Police came the following morning.

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She testified that during the day deceased had tethered the horse in her own field which was not under crop. She said her field is separated from Chele's by a donga. Deceased had gone to hoe in Chele's field while waiting for wheat to be filled in bags in P.W.3's field and in turn loaded on the horse and donkeys and carried to P.W.3's house.

She corroborated P.W.2's evidence that deceased and accused used to fight. She detested the swearing done to deceased by accused because accused is by far the deceased's junior and owed him respect. She further said accused used to untether the horse from the grave yard next to accused's home. Under cross-examination she testified that deceased had been invited for the hoeing at Chele's field. Deceased was using P.W.3's hoe. She further said the only horse that was in the area was hers having been tethered in her field by deceased who was hoeing next door at Chele's field. The kaffir corn hoed was still young i.e. two ears or 1½ feet tall. She said her horse is big and can be seen from the village to the fields i.e. a kilometre away or in P.W.2's words 400 paces away. She conceded that by the expression "deceased used to fight with accused" she did not mean physical combat, rather she meant the verbal abuse hurled by accused at deceased and that it was detestable because accused was deceased's junior. She also conceded that Chele's sheep were feeding on grass and not crops as there weren't any in deceased's yard.

She denied that there was ever a scuffle between deceased and accused before the incident. She denied that

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deceased did at all / <sup>lash</sup> accused with a whip. She said nothing obstructed her view and that had there been any whipping she would have seen it. She denied that she was prejudiced against the accused. Under re-examination, she said when she saw accused go to deceased, she was outside her house.

She said before the incident deceased had said to her "look, Chele's sheep are grazing in my yard, but accused detests my horse grazing next to his home. She said deceased's yard is not fenced. She said accused was born in 1957 while deceased in 1936.

The next witness for the Crown was P.W.4 Dr. NYAMEKYE. Although his evidence at P.E. had already been admitted, it was in the interests of justice that his oral evidence be heard.

He testified that he conducted a post mortem examination on the body of deceased on 31-1-85. The body had been identified to him by P.W.2 and another. It had been dead more than 24 hours. Inspecting the knife Exhibit "1" he said it was possible the wound he saw on the deceased could have been caused by a similar knife. His report was handed in marked Exhibit "A". He testified that death resulted from laceration of the pericardium and the left ventricle. There was a stab wound in the sixth intercostal space in the mammary line. Under cross-examination he elaborated that what he said meant that there was a cut or a tear on the left side of the heart. The sac of the heart was torn. The result of the tear was the bleeding into the heart. The flow of blood into the sac

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exerted pressure on the heart muscles. Asked if Exhibit "1" despite its size could cause the injury referred to, he replied: "Yes" and elaborated that Chest muscle is less than 3 centimetres from the heart. He said it was difficult to determine the degree of force used because the knife went through soft tissue but he was of the view that because the knife was not sharp the degree of force used was more than slight.

The Crown closed its case at this stage and the accused gave the balance of his evidence.

Accused swore that on 29th he left for his sister's home. On the way he met with deceased who inquired why accused untethered his horse. Accused replied that he had not untethered deceased's horse whereupon deceased said: "Don't argue with me. This is my horse not your mother's," and imprecated a curse on accused by referring to accused's mother's front passage.

Deceased then struck accused with the handle of his whip. He hit him the second time and then accused inquired why the deceased hit him thus. Thereafter the two grappled. Accused got hold of the whip. A struggle for its possession ensued. The whip fell down. Deceased hit accused with fists. Accused did not see anybody during the struggle. Accused did not see P.W.2 nor did he see P.W.3. Accused said both these witnesses' homes are out of view from where he was engaged in the struggle with deceased. He denied having been warned against approaching deceased by P.W.3.

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During this struggle deceased placed his hand in the pocket and produced a brown knife. Accused produced his too i.e. Exhibit "1". When "he (deceased) tried to kill me I ducked. Then when he tried again he failed to stab me. Then I stabbed him as it appeared he had come closer to me. I managed to stab him. We then parted. He went away, so did I."

Accused testified that deceased was wearing an overall. He never thought the knife had penetrated the overall. Accused says he never intended killing the deceased, not even seriously injuring him.

At the time accused went to his sister's home he did not see any sheep in deceased's yard. He would not expect seeing them there because he knew they were far away in the veld.

Accused's reason for objecting to deceased's tethering the horse in the area was that the horse would overgraze the area and the result of this is that when cattle bolted from the kraal at night they would stray into the fields and destroy crops because nothing on which they could graze would attract them <sup>beforehand</sup>. Earlier accused had said he objected to this because the peg used for tethering the horse would make the soil loose and thus attract fresh lawn to grow there and consequently the cattle which would bother him. He said the kraal and the grave yard are 50 paces apart and that there is no visible border dividing his father's premises from this grave yard.

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On the day in question, the horse was not tethered there.

After parting with deceased, accused met with a boy called Lebamang who told the accused that he learnt there had been a fight between deceased and him. Accused admitted the event. On hearing from Lebamang that deceased had been injured, accused went home collected a blanket and set out for the Police Station. He reached the Police Station the following day and reported himself. Late in the evening, police informed him that people had come to report that deceased had died. Police searched him and found a knife on him and informed accused that this was the knife with which he had killed the deceased. They laid a charge against him, took away the knife and locked accused up in the cell.

Under cross examination accused stated that Chele is his father and the sheep which were in the veld belonged to his father Chele and on that day were herded by Makhala in a small valley far away from home. He stated that P.W.2 and 3 were not telling the truth when they said the sheep were grazing in the village that day herded by Makhala.

Asked why they should lie thus, he answered: "To support each other." He denied that he ever shouted after Makhala while the latter was tending sheep in deceased's yard. To the question put to him that "you said Makhala leave those sheep there; whoever says you should remove them I will see to (him) -----? They are not telling the truth", he replied,

and suggested that P.W.2 and P.W.3 are just imaginative. He said he was 50 paces away from the deceased when he went to meet him. He denied that P.W.3 asked him not to go to the deceased. He said

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there had been an altercation between him and deceased before the fight. He denied that P.W.2 saw him holding a knife. He said deceased walked some 15 paces away from the scene of the incident before falling out of view. To the suggestion that evidence showed deceased could not have walked more than two paces away from the scene accused said that was not true. One of the crown witnesses had in any event said deceased had moved about seven paces away from the scene.

Asked what he was going to report to the police, accused said: "Because Lebamang had told me deceased had been injured." Accused didn't think he had seriously injured deceased though he had used a knife. Asked why he didn't think he had seriously injured deceased while using a lethal weapon on him accused replied: "I was running away."

Accused denied that deceased said to him after being stabbed "come and see what you have done." He said he had never quarrelled with P.W.2 and suggested that he was being implicated by him because of "The horse of P.W.3 and P.W.2." Further pressed for an answer to the question put: "P.W.3 never said the horse is P.W.2's ----  
---? "It is P.W.3's," he replied. "Then why should P.W.2 implicate you -----?" He knew deceased's feelings." Accused denied that he handed the knife over to the police.

To the question: "At the place where deceased tethered the horse, is it communal property or any particular person's ---? It is the chief's place", he replied.

Accused said the place where the horse was tethered was not

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the grave yard. In the same breath, he said the place did not belong to him. He was thus placed in a cleft stick to explain why he bothered deceased about where deceased tethered the horse.

Asked why he did not run away from deceased while the latter whipped him, he replied that deceased denied him that chance.

Confronted with the statement that when deceased's body was searched only tobacco and a pipe were found and no knife, accused said there was. Asked what happened to it, he said the first person who came to the scene took it.

It is significant that nowhere was it suggested, let alone put to Crown witnesses, that deceased had a knife with which he tried to stab accused. This is a factor that arises late under cross-examination. Accused truly said he did not tell his Counsel about it. It is to be wondered how he could fail to give to his Counsel such ammunition of great importance to his defence if it is true at all.

Another matter which was raised was with regard to P.W.2's hearing ability. Questions were rightly put to him to show that his hearing is not good. Learned Counsel referred in support of this point to P.W.2's failure to respond when being asked to come to the witness box next to the interpreter. It is true P.W.2 looked rather sheepish after being ushered into the court room by Court Orderly who did not properly show him where he was to take his stand. Naturally, he looked back to locate where the Orderly had disappeared to because the latter had been following him. Amidst all that P.W.2 was seeing in the well of the Court, he saw the accused

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sitting in the dock with all the length and breadth of the bench to spare, so he headed for the door to the dock intending to go and sit next to accused who was blanketed the same way as this witness. It was at this stage that the interpreter raised his voice to attract this witness to the place where he was required to take his stand. I would conclude that P.W.2's initial sheepishness was due to the fact that he was over-awed by the Court atmosphere and thus failed to take his stand as easily as one who is used to the place.

I am quite satisfied with his hearing ability. Nowhere during the proceedings did it require anybody including the interpreter to raise his voice above normal speaking tone in order to enable P.W.2 to hear. He denied that his hearing is defective.

Facts adduced in evidence in fact point counter to any suspicion that he does not hear properly. It was when he was busy building the kraal and obscured by the lie of the land from view that he was attracted by the raised voice of accused addressing himself to Makhala who was grazing sheep and goats in deceased's yard. It was in the same circumstances that he heard his mother's voice reprimanding accused for rushing at deceased who was asking Makhala to remove his sheep from deceased's yard. It was in response to these voices that he left his kraal-building business and headed in the direction from which the voices were coming.

He saw ... the accused stab the deceased with a knife. He heard accused after doing so say I'll kill you and repeat his threat to deceased. He heard deceased ask the accused to come and see what he had done. As for the stabbing incident P.W.2 is corroborated by P.W.3 who because of the distance (she was further away from

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the scene than P.W.2) only saw a fisted blow around the chest area of the deceased.

Accused is one-eyed. He concedes that with his one eye he is not able to see as well as when he used to have both his eyes functioning. Obviously his field of vision is to some extent reduced therefore, assuming that he is truthful when he says he did not see P.W.2 and P.W.3 This could be ascribed to the fact that not in all cases where a two-eyed person can perceive things accused would not. But there was no suggestion that during the encounter with deceased accused fixed his vision no where else except on his quarry. In any case if he did so, that is all the more reason why he could not see P.W.2 when he came rushing to the scene followed by the rest of the people who came afterwards. It is clear that accused cannot be telling the truth when he says he did not see P.W.3 less still when he says P.W.2 and P.W.3 were not in the area at all.

Both these witnesses gave their story convincingly and without any attempt to either exaggerate or falsely to put accused in any bad light. They knew of bad blood that existed between accused and deceased. Nowhere in evidence did it seem they preferred one to the other. In fact P.W.3 stated categorically that she did not like accused's habit of swearing at the deceased because deceased was older than accused therefore was expected to respect him. To the questions: "Accused in your view has always been wrong ---? I don't say he is wrong. I blame him for killing deceased who had done no wrong. I put it to you that you are prejudiced against the accused because of being disrespectful to deceased----? I don't mind the lack of respect. I am concerned about deceased's death", she replied.

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Accused would have me believe that when the incident took place in the village at day time nobody was around, who could have seen anything except himself with one eye and deceased who can no longer testify.

The incident which precipitated this episode derives from deceased driving away accused's father's sheep and herdboys from deceased's yard. This is in turn connected with deceased's horse actually P.W.3's horse in the care of deceased being tethered in the grave yard behind accused's parents' home.

I reject accused's story that on this fateful day deceased had insulted accused by his mother's private parts. Had this been so P.W.2 would have heard because immediately after he had heard accused's shouting at the herdboys Makhala and P.W.'s verbal attempts at discouraging accused from making for deceased, P.W.2 impelled by eagerness to see what was going to happen was at the spot within two shakes of a duck's tail.

Even assuming for the moment that accused's tale is worth consideration, and that the provocative words were uttered relating to his mother's private parts, one is left in a quandary to visualise where exactly in the chain of events the narration given by him fits. First it is improbable that such words could have been uttered without P.W.2 hearing them and seeing the events that took place either then or shortly afterwards. P.W.3 definitely should have seen the events even if she were not to hear the exchange of words uttered or the insults even.

It is difficult to see where the provocative words fit in the

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light of the fact that before the encounter with deceased, accused while still a good distance away from the deceased was asked by P.W.3 to desist from rushing at the deceased. P.W.2 though not seeing anything at the time was quick to debouch into open ground and see accused heading for the deceased with his hands behind him. Meantime he was gaining on deceased and accused as there was no suggestion that accused and deceased were moving away from the point of their encounter. P.W.2 saw accused deliver a stabbing blow at deceased. This is the signal point at the question of the encounter. It is preceded by no acts such as whipping of the accused by deceased, falling of the whip during the struggle that ensued, delivery of fist blows at accused by deceased, and drawing of the spurious brown knife by deceased coupled with two attempts by deceased to stab accused before the latter delivered the fatal knife blow at the deceased.

Indeed accused's story that P.W.3 did not see everything as she claimed she did, does have some substance in that, after seeing accused deliver a fisted blow at deceased she went for a brief moment into her house to put away the basins she had been carrying and later when she saw deceased sitting down and P.W.2 supporting him. While nothing of significance seems to have happened at the place of encounter while P.W.3 was in the house, P.W.2 was near enough to deceased and accused to have heard and seen what was taking place between those two. In other words any suggestion that the acts alleged to have been committed by deceased on accused, could not have been seen by P.W.3 while she was in the house is countervailed by the fact that P.W.2 would have seen such and heard same because by then the approach of accused to deceased was nearly complete and P.W.2 was closing in on the scene all the time.

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P.W.2 and P.W.3 corroborate each other on material aspects of this case. As eye witnesses to the event their evidence is above par and beyond reproach. They were not shaken under cross-examination. Accused himself corroborates the Crown story as to the whereabouts of the horse on the day in question notwithstanding questions put by his Counsel to Crown witnesses that the horse was tethered at or near accused's home.

Accused's story is a pitiful fabrication or at best an after-thought pointing to the fact that he is telling a palpable falsehood.

Hoffman in South African Law of Evidence 3rd Edition at Page 461 says:

"In certain circumstances however the making of a false statement may throw an unfavourable light upon a fact previously neutral, which can become an item of corroborative evidence."

The Crown very properly concedes that the fact that the accused is proved to have told a false statement either in evidence or out of Court cannot per se constitute corroboration. Hoffman P.461 (supra). But in the light of the accused's inconsistent defence it is clear there is something which he wishes to hide.

It is trite law that "----- All such false incredible contradictory statements if disproved or disbelieved are not simply neutralized but become of substantive inculpatory effect."  
(R. vs MAKALO MOLETSANE & ORS 1974 - 75 LLR 316 at 334)

Indeed as was properly submitted by Counsel for the Crown

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the accused does not have or bear the burden of convincing the Court of the truth of any explanation he gives. It is enough if there is a reasonable possibility that it may be substantially true.

But "The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice" See Miller vs

Minister of Pensions 1947(2) All E.R.372 at 373 by Lord Denning.

Regarding accused's credibility it was submitted by the Crown in argument that his evidence consists of inconsistencies and deviations. Indeed this aspect of the matter clearly surfaced when under cross-examination this Court heard for the first time that deceased attempted to stab accused with a knife. At this stage accused strove to make belief that he remembered everything that and as it occurred but was soon hoist on his own petard when he was earlier confronted with questions requiring him to account for his actions. He attributed his failure to give satisfactory <sup>account</sup> /... to confusion. During the "alleged fight" he seems to have had an opportunity to look around and see if anybody was at or near the scene. Apart from the fact that evidence has shown that there was no such fight, there is further evidence to show that accused's was an unprovoked attack on the deceased. Accused's story has been shown to be demonstrably false on this aspect of his evidence as compared with that of the Crown. All that remains clear is that he is absolutely unable to account for his own explanations. For instance he said he was searched by the police for a knife yet he himself handed over the knife to the police. No question by his Counsel was put to P.W.1 to gainsay P.W.1's evidence in chief that accused had handed over the knife to him. Hence P.W.1's version in this regard becomes conclusive.

The Crown evidence remained intact and unshaken by any cross-

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examination. Accused's story cannot approach anything near what is reasonably true.

It remains therefore for the Court to determine whether the killing itself was intentional or not.

Williams J.A. in S vs. Mini 1963(3)S.A. 188 at Page 192, it has been submitted to me in argument, neatly summed up the position in these words:

"A person in law intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not."

To determine the intent, it is also essential to have regard to the nature of the weapon used, the nature of the injury inflicted, the degree of force applied in inflicting the injury and the part of the body to which the blow was directed.

In the instant case the medical evidence revealed that the wound lay in the sixth intercostal space in the mammary line. The locality was explained as part of the body around the left hand side of the chest. Shown exhibit "1" whose blade is about 4 inches long, the doctor said such a knife could have been used to inflict the injury he had examined. His evidence further showed that the wound was at least 6 inches deep. The width was between 1½ to 2½ inches. As to the degree of force used to inflict the injury, the doctor said it was difficult to determine regard being had to the softness of the tissue through which the weapon cut. Nonetheless, he stated that the degree of force applied was more than slight. He was not asked how long after such an injury on the sac of the heart as he

described had been inflicted death would ensue if the patient had not been attended to.

The region of the body on which the injury was inflicted leaves no doubt, in the words of Holmes J.A. in S vs Mini at P.140 (supra) that

" ..... If a person forsee the possibility of death resulting from his deed and nevertheless does it, reckless whether death ensues or not, he has in law the intention to cause death."

".....It is not necessary that he should have a desire to cause death,"

the Learned Judge concludes.

It was further argued by Mr. Thetsane for the Crown basing himself on the authority of R vs. Jolly 1923 AD 176 at 187 that as Kotze J.A. said:

"The intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death the inference is that he intended to kill the deceased." See

See R v. Ngobo 1921 A.D. 92 also R vs. Butelezi 1925 A.D. 169.

In keeping with this submission is the presiding Judge's succinct remark at 194 that

"the knife went through the chest wall and there can be no doubt that any person pushing a knife through the ribs, through the chest wall, must have had the intention of causing serious injury to the person receiving the wound"

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and certainly one which might cause death afterwards.

There is no doubt that the position and nature of the wound inflicted reflect in this instance the relation between the psyche of the person inflicting it and such a consequence of his act as his victim's death. The wound was inflicted at deceased's vulnerable part of the body; directly at his heart. Nothing puts mens rea in any clearer perspective than this. If I may add, Mr. Thetsane very properly pointed out that credibility of witnesses is attacked not at the time of addresses but at cross-examination. In response to the attempt by the defence to argue that Crown witnesses had put their heads together to discuss the case against the accused. Accused's story of self-defence is baseless. At no time was his life put in danger by deceased's act.

In the result I reject accused's version of the events and accept as correct the Crown's.

I also find that accused in inflicting the wound that resulted in deceased's death had the requisite intent of mens rea. Consequently accused, is found guilty of murder as charged.

My assessors agree.

M.L. LEHOHLA  
ACTING JUDGE.

1.9.86.

For the Crown: Mr. Thetsane  
For the Respondent: Mr. Addy

### EXTENUATING CIRCUMSTANCES

I have now to consider whether there are any circumstances in extenuation of accused's crime, namely, his moral blameworthiness.

As Lansdowne J.P. said in R vs Biyana (1938) E.D.L. 310 -

"an extenuating circumstance, is a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not, legally, the degree of the prisoner's guilt."

In R vs Fundakubu 1948(3)SA 810 AD at 818 Schreiner, J.A. refers to the subjective side of the considerations to be taken into account, namely -

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

In CRI/T/40/71 R vs Mashalle & Ors. (unreported) Jacobs C.J. said

"Nothing that influenced accused's minds or emotions and therefore their conduct can be ruled out even if unreasonable for them to be so influenced. Nor must the brutality and callousness of the act be given too much weight and be allowed automatically to exclude extenuating circumstances."

In R vs Mkize 1953(2) SA 324 AD at 336 Steyn J.A. said

"I should be prepared to say that the subjective test of the accused's state of mind is not only a factor to be taken into account, but is indeed a more important one to consider in this regard than the objective test of the factual basis for that state of mind."

I have taken into account that there was no premeditation. I accept that accused is illiterate. It is important in considering the existence of extenuating circumstances to have regard to the

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social milieu of which accused is a product and a member. He is unsophisticated and is a layman of peasant variety. The wound that he inflicted is only one, but if I may add from the demonstration he made I was amazed by the deft manner and the dexterity with which he flicked and wielded the knife.

Accused had nurtured evident hatred against the deceased. There was no love lost between the two. Accused used to untether deceased's horse from where deceased had tethered it. There is no physical boundary between this place and the purlieus of accused's father's household. Seeing deceased drive away the sheep, goats and their herd from deceased's place which admittedly is not fenced, coupled with the fact that as the yard was under no crop but just grass accused's hatred was fanned to an uncontrollable degree against the deceased. His latent resentment could no longer be confined to the usual hurling of abuse at deceased. He had already ignored P.W.3's verbal restraint against going to the deceased. Apparently there was nobody to intervene physically before the fatal blow, which however indicated his intention to kill, for he had cunningly hidden the knife behind his back as he approached the deceased in order to perform his blackguardly act on him.

A swaggering young man imbued with such distortion of the mind due to hatred and animosity discloses the factual basis for the crime he committed; and that diminishes morally the degree of his guilt. I find therefore that there were extenuating circumstances but for which accused should suffer the extreme penalty.

#### SENTENCE

I have listened carefully to the submissions made on your behalf regarding sentence. I have taken into account the fact that you have been in custody

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since January 1985, that is almost two years now.

But innocent life has been removed. P.W.3 is now without a trusted and willing helper. The society has lost one of its members for no good reason. It is fitting therefore that society be, in terms of the law, allowed to get its own back as well as protected.

The minimum sentence I propose imposing is that of eight years' imprisonment.

My assessors agree.

M.L. VEHOHLA  
ACTING JUDGE

5.9.86.