CRI/T/22/88

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MOTAMO SEHLABAKA

Held at Butha-Buthe

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 18th day of October, 1989.

The admitted preparatory examination depositions of P.W.10 the headman of Ha Sakoane, chief Ishmael Sakoane shows that in the morning hours of a day in October 1985 a grim discovery of a dead body of an unknown male adult was made in an open veld in an area called Thaba-Bosiu.

The headman raised an alarm and proceeded to report the matter to P.W.1 No. 2812 Detective Trooper Mpopo of the T.Y. Police C.I.D. Section.

P.W.1 examined the body in the presence of P.W.10 and conveyed it to the T.Y. mortuary in a police van.

Following the investigations made by P.W.1 and his fellow members of the police force i.e. P.W.12 Detective Warrant Officer Mokhele and P.W.3 Detective Trooper Lelala a charge of the murder of the deceased Thami Madona was ultimately preferred againsed the accused.

It is important to show that no eye-witnesses were revealed by the investigation nor direct evidence led in this Court. Hence the evidence on which the case facing the accused depends, is purely circumstancial. The

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body was lying some three paces away from a vehicular road which was not in constant use. It is a dirt road.

Apparently the period between the time prior to the discovery of the deceased's body and the eventual arrest of the accused occurred during a rainy season.

It is in this connection that the questions put to P.W.1 and answers tendered are of relevance, viz:-

> "You said at P.E. there had been rain - ?
> Yes.
>
> Evidence will show that the accused was travelling in a car; and if he could have been at that spot on that day after the rain you admit there would be an indication that a car passed there - ?
>
> If a vehicle had passed after it rained that would show. But if before; then the rain would have washed away the traces of wheel marks."

The evidence of P.W.8 Sekonyela Ramaqabe and that of his mother P.W.11 'Malineo Ramaqabe along with that of the accused himself lend support to the fact of heavy down pour at Tsikoane in the Leribe district. By my calculations this place is quite far away from Ha Sakoane in the Berea or T.Y. district where the body was found.

P.W.7 'Mamolefi Madona the deceased's wife testified that on 27th October 1985 at around 9 a.m. or 10 a.m. the accused called at her place in the company of another man whom she did not know. She said they were travelling in a red car. The deceased was at home.

The accused and the stranger had come to fetch the deceased. The purpose of the mission was to sell deceased's truck to a buyer allegedly secured on behalf of the deceased by the accused. The transaction was to take place at T.Y.

P.W.7 and her husband stayed in a rented house at Upper Thamae. P.W.7 did not know this truck because

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since having been bought by her husband a month before his death, it was parked at Motimposo because the couple's yard at Upper Thamae was too small, therefore there was not enough space wherein to park that truck in that area.

Although P.W.7 acknowledged that at the Preparatory Examination she had told the magistrate that the deceased's company had left in a white Toyota van in fact that was a mistake for she recalled that they had left in a red car.

However P.W.6's evidence which is common cause indicates that the deceased and the accused were seen seated in a white Toyota van belonging to the accused outside the T.Y. hotel on a weekend between 5 p.m. and 6 p.m. They were drinking beer. P.W.6 is not certain whether this was a Saturday or a Sunday nor does he remember the year. All he remembers regarding the occasion is that it was towards the October Finals.

If by Finals P.W.6 meant the national soccer finals which are usually held at the beginning of October each year it would be worthwhile bearing in mind that the charge shows that the death occurred on or around 27th of October which is towards the end and not the beginning of that month.

However of significance is the fact that after P.W.6 parted company with the two he left the hotel at 7 p.m. of the same evening never to see either of them again that day.

Three days afterwards he learnt from casual conversationists at the Lake Side Hotel in Maseru that the deceased had died.

P.W.7 testified that the deceased was P.W.9's son i.e. Senekane Raliile's son, but not his blood son. She told the court that the accused used to visit the deceased at their joint home at Upper Thamae. His visits were so frequent that at times he called there twice a week.

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On the 27th October when the deceased left with his party for T.Y. he was wearing a short-sleeved blue scotch shirt, a navy blue pair of trousers and a pair of black shoes.

P.W.7 was always at her home that day but the deceased did not show up. Nor did he the following day.

P.W.7 went about searching for the deceased. In pursuance of this she went to P.W.9's home at Motimposo on 29th October 1985.

Having failed to find the deceased there she asked for the use of the phone and rang the accused's place of work at Lesotho Freight Services in order to inquire from him about the deceased's whereabouts. But the accused was not there. Her reasons for trying to contact the accused was that when last she saw the deceased the accused was in his company.

Her attempts at locating the deceased by means of contacting his friends produced no results.

One of the deceased's friends whom P.W.7 questioned on 2nd November 1985 about the deceased's whereabouts was one Fani from whom she once more drew a blank.

Finally P.W.7 heard of the deceased's death on 3rd November 1985 from P.W.2 Makhama Ralilile. Meantime the accused had not been seen anywhere near P.W.7's home. She immediately set out for T.Y. Charge Office in the company of P.W.2, and one 'Malikeleli Mokokoana.

P.W.7 recognised the deceased's black pair of shoes at T.Y. Charge Office.

From there she left with her party in the company of some police officers who led her to the T.Y. Government mortuary where she identified the body of the deceased dressed in the short-sleeved blue scotch shirt and the navy blue pair of trousers. The deceased was by then not wearing any shoes.

P.W.7 testified that to the best of her knowledge

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the deceased and the accused had never had any quarrel.

Even though agreeing under cross-examination that since she had never seen the truck that she said her husband bought she could not be positive that he had such a truck she was adamant that her husband would never lie to her and say there was such a truck if there hadn't been any.

In her desparate search for the accused P.W.7 went at some stage to Lesotho Freight Services Centre but once more found that the accused was not there. She however did not leave any message with the employees of that company for the accused to contact her because she intended contacting P.W.2 and asking him to lead her to the accused's home which was unknown to her.

Evidence showed however that the accused's home is at Lithabaneng and that in order to reach that place from T.Y. one has to go through Upper Thamae which is the village where the deceased's home is; therefore a place to go to if one wished to inform the deceased's wife about the startling disappearance of the deceased from one's company immediately after such disappearance - or indeed to find out if perchance the deceased being weary of the wait did not retrace his steps home by some other means than the Toyota van which had conveyed him to T.Y. hotel.

I allude to the question of the wait because in his evidence the accused said at one stage the deceased left him remaining behind in the Toyota van where the two had spent a long time drinking and went into the hotel in the company of the stranger who had come back from the hotel where he had earlier disappeared after delivering beer to the deceased and the accused. The accused seized this moment of the deceased's departure to go to a filling station in order to put some petrol into the tank of the Toyota van, and came back; waited in the van for a long time for the deceased, alighted

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from the van and went looking for the deceased in the hotel; and, failing him there, decided to drive back to Lithabaneng in Maseru without the deceased.

Having received the report of a dead body found in the veld at Ha Sakoane P.W.1 set about making investigations.

On the same day i.e. 28.10.85 he went in company of P.W.10 to the place where the body was lying. The villagers were already gathered some 45 to 50 paces away from the body.

The place was free of stones but grassy. The body was lying three paces away from the scarcely used road leading to Ha Rakolo in the Leribe district. The body was near a hill called Thaba Bosiu in the T.Y. district.

P.W.1 approached the body and found it lying face up. Near it i.e. some five inches away from it on either side were empty cartridges numbering five in all.

It is my considered opinion, buttressed by P.W.5 Lt John Hlabi Telukhunoana, that the gun shot wounds sustained by the deceased could not have been inflicted at the place where the deceased was found or that the cartridges fell when ejected from a fired gun at the exact spot where they were later found.

P.W.5 said if fired from a standing position the cartridges would fall some two or three paces from the person holding the gun. Hence if fired 5 inches away from the body one would expect them accordingly to fall two or three paces away from the body. Furthermore, basing myself on the fact that the gun Ex."1" was seen by the Court and estimated by P.W.5 who is very familiar with firearms and ammunition to be five inches in length, one would expect the entry wounds to reveal considerable burns and the shirt to bear sizeable quantities of soot opposite the entry wounds.

P.W.1 testified that with the exception of the gun

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shot wound apparently fired at the region of the deceased's mouth there were no indications of exit wounds. P.W.4 Dr Totinkes whose P.E. depositions were admitted did not give evidence in this court. He owned up though that he was not an expert on gun shot wounds. He however testified that he discovered the wound on the face to relate to the one on the right side of the neck but could not say which was an entry and which an exit wound. P.W.1 said the exit one was that which was on the right side of the neck.

It is not clear what degree of thoroughness was employed by P.W.4 in an endeavour to find bullets which must have remained in the body in view of the fact that P.W.1 found no exit wounds relating to the four other entry wounds. It is thus startling to learn from P.W.4's evidence at P.E. that in his post mortem report regarding examination of the body he is recorded as having said

> "I did not find any bullet within the deceased's body."

His evidence was too sketchy and lacking in necessary or useful details to be of much help.

In his pöst mortem report Ex."A" P.W.4 at P.E. indicated that death was due to multiple gun shot wounds.

In the remarks portion of the report form P.W.4 shows that

> "death occurred apparently of gun shot wounds of which the most lethal one is located in the head. No bullets could be recovered."

It would appear therefore that from the last sentence it can safely be concluded that attempts at recovering the bullets which were in the deceased's body were not successful. This is in stark contrast with this witness's oral evidence that no bullets could be found. At first blush it implies that there were no bullets. The truth appears to be that although bullets must have penetrated

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the body and got inbedded in it they were not retrieved. P.W.1's evidence then is corroborated on this score that there were no exit wounds in respect of four other gun shot wounds.

P.W.4 further observed that the maxilla was destroyed and that the right lung tissue was also destroyed. It is regrettable that P.W.4 was not questioned about his basis for saying in the Additional Observation portion of the report form

> "It seems that all the wounds except the one through the mouth were caused by firing a gun from a distance, and that "the work" was finished by a shot close through the mouth."

Although on the basis that there is nothing in evidence to support the view that the killing was effectively accomplished by means of the gun shot wound fired through the mouth , P.W.5's evidence lends support to the view that the bullets fired at the deceased must have been fired from a distance before the empty shells were later collected and placed on either side of the body five inches away.

Nothing in the evidence shows the order in which shots were fired at the deceased. But the fact that the post mortem report indicates that the pupils were wide, to me conveys the horror that remained indelibly stamped on the deceased's eyes before life expired from his body.

P.W.4 also observed

> "multiple penetrations through the maxilla and upper lip; one on the right infraclavicular region, one just above the right hepa(?) and right inguinal region and penis (small wounds) Outshot opening visible on right side of neck behind right ear."

P.W.1 testified that he collected the empty shells which were lying on either side of the body one by one. On each of this shells he observed that it was written 7.65.

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From this figure i.e. 7.65 he concluded that the shells belonged to a 7.65 calibre pistol. He kept them in his possession.

He undressed the body and observed a wound above the right breast. He observed another wound on the right side of the chest. There was another in the pubic region. There was another on the lower inner lip. He observed two other wounds behind the left ear.

All these were small narrow and open wounds. This witness who has been in the police force for upwards of 16 years concluded that these were gun shot wounds.

It should be observed though that there are some discrepancies between his evidence and that of P.W.4 as to the locality and number of wounds behind the ears. P.W.4 referred to only one wound behind the right ear. P.W.1 refers to two behind the left ear.

However through my calculations I have been able to make out five entry wounds from the doctor's observations.

In response to a radio message about the discovery of an unidentified dead body kept at T.Y. Government mortuary of someone answering the deceased's description P.W.2 set out for T.Y. in the company of Mrs Malikeleli Mokokoana. P.W.2 in his evidence mentions only Mrs Mokokoana. It would appear then that P.W.2 made a second trip to T.Y. in the company of the deceased's wife and 'Malikeleli Mokokoana on Sunday 3.11.85. See page 40 of my notes regarding P.W.7's evidence.

According to P.W.2 he went there with Malikeleli on Friday 1st November 1985. This may account for his mentioning Malikeleli's name only when the first occasion for the identification took place. According to P.W.1 this was two days after the dead body had been collected from the veld. It would appear the body was

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collected from the veld on 28.10.85.

Indeed on page 4 of my notes in reference to people who came to identify the body P.W.1 mentions only two; namely P.W.2 and 'Malikeleli Mokokoana. P.W.1 went further to say "the two persons knew the deceased. They were friends apparently."

I may just add that on page 23 of my notes P.W.2 is recorded as having said

> "The deceased owned a car and a Mercedes Benz truck. This was in 1985. I came to know on Friday 1st November 1985 that he had died when I went to T.Y. to identify his dead body. I was in company of Mrs Mokokoana. I identified it before Mr. Mpopo P.W.1. It was at T.Y. I drove back to Maseru after identifying the body. I went to inform the wife of the deceased at Upper Thamae where they used to stay."
> (Underlined for emphasis).

It was during the course of his investigations that P.W.1 eventually confronted the accused on 5th November 1985. Significantly throughout the period between 27th October 1985 and the time of his arrrest on 5th November the accused had never set foot at deceased's home. His explanation was that he used to either knock off late or had to put up some nights in the out-stations far away from Maseru in the course of his employment as a truck driver for Lesotho Freight Services.

P.W.1 having identified himself to the accused at the place of the latter's employment, informed him that he was investigating circumstances surrounding the deceased's death.

P.W.1 after giving the accused the usual warning took him to T.Y. C.I.D. office for thorough interro-gation concerning the deceased's death.

The accused gave P.W.1 an explanation following which he led P.W.1 to Motimposo where they came face to face with P.W.2 Makhama Raliile at the latter's home.

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This was on 9.11.1985.

P.W.1 had already met P.W.2 for the time on the occasion when P.W.2 had gone to identify the deceased's body at the funeral parlour.

P.W.1 formally told P.W.2 that he was a policeman and had been led to him by the accused. During this occasion P.W.1 was in the company of P.W.12 and P.W.3 Det/Tpr. Lelala.

According to P.W.1 on arrival at P.W.2's place in the company of the accused and the two other policemen the accused spoke to P.W.2. Following that conversation P.W.2 produced a gun Ex.1 from the grocery unit which was in a single roomed house serving as both a kitchen and living room.

P.W.1 then took this gun from P.W.2 and observed that it was a 7.65 pistol.

This pistol actually belonged to P.W.2. It was a licenced firearm. P.W.1 opened the firearm and noticed that it was unloaded. He showed it to the accused and asked him if it was the firearm he had earlier spoken to P.W.1 about and the accused acknowledged it as such.

P.W.1 took the gun to T.Y. C.I.D. office. On arrival there he gave the accused a charge of murder of the deceased Thami Madona. It is to this charge before this Court that the accused pleaded not guilty.

The gun and the five empty shells were sent to P.W.5 for ballistic examination in an endeavour to determine if the shots matching these shells were fired from this gun. The shells were handed in by P.W.1 marked exhibit 2. In his examination of the gun and the cartridges P.W.5 was positive that the cartridges were fired from Ex."1". I have no hesitation in accepting his evidence on that score.

It is worth noting that at page 361 of his invaluable

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book Firearms Investigation Identification and Evidence Major General Julian S. Hatcher says :

> "Bulletsare slightly more important than cartridge cases, since bullets actually do the physical injury."

I refer to this quotation only bearing in mind that no bullets were extracted either from the deceased's body or collected anywhere around the place where the deceased was found lying.

But taken along with the response elicited from P.W.1 under cross-examination the absence of the said bullets from the course of investigation till this trial to some extent makes the Crown's task less burdensome. In this connection P.W.1's response to the question put will help clarify the issue. This is at Motimposo at the home of P.W.2:-

> "You got there. The accused spoke to P.W.2 Makhama there - ?
> Yes.
> What did he say to Makhama - ?
> He said to him 'the gun you had lent me is the one used in the death of Thami Madona'"

The importance of the responses in the above quotations cannot be overlooked first because they were elicited under cross-examination and secondly because in his submissions in argument Counsel for the Crown pointed out that he delibertately refrained from leading this witness along such paths as he feared the contents of the accused's reported statement hovered dangerously near inadmissible confession.

However if the words grounding the crown's fear were rendered in P.W.1's examination in chief it would appear that such fear was unnecessary in view of the fact that the Court of Appeal constituted by Schreiner P., Maisels J.A. and Milne J.A. (as they then were) in a judgment delivered by the last-named in David Petlane

vs Rex 1971 - 73 LL.R. at p. 85 held that

(i) The words used by the appellant should prima facie be given their ordinary, natural meaning and must necessarily be the prime guide to the meaning of the person uttering them.

(ii) Although the surrounding circumstances may be taken into account in deciding whether a statement amounts to a confession, the fact that the appellant knew when he made his statement that the police were looking for him in connection with the killing of the deceased could not have the effect of making his statement a confession of the offence with which he was subsequently charged, as the statement did not exclude the possible defences of self-defence or accident. Further, the fact that it traspired at the trial that if such defences had been raised they would not have been maintainable could not operate to turn the appellant's statement to the police into an unequivocal confession of murder."

Much was made about the fact that things said in this Court by P.W.1 do not appear in the P.E. record. But the text of the P.E. record if anything is very sketchy as against the record in the instance court where more detailed questions were put to the witness. I have no hesitation in finding that he is a truthful witness who did not in my view try to say things which falsely implicate the accused. He mentioned that he has lost his note book on which he had written serial numbers of the gun. He was taxed about the fact that nothing appeared on record to show he used his note book to refresh or fillip his memory regarding numbers of the gun taken from Makhama. But at page three of the P.E. record the numbers appear as reflected on "Ex.1" itself. Regard being had to the fact that the P.E. was held almost nine months after the event and the figure is so long i.e. No. 646547 the witness unless he had a very good memory for figures could not have landed on the correct figure of that length after so long if he did not refer to the note book that he told me he did. Moreover the record shows in respect of the wounds; he referred to a note book. See page 2 of the P.E. record. I doubt if he kept more than one note book for recording events surrounding the

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investigation of this case. In any event in relation to the question that P.W.1 does not appear on record to have refreshed his memory with respect to serial numbers of the gun, he did not say yet another of his note books got lost, nor did he give me such an impression when giving evidence in this court. This however is not meant to encourage police to carelessly discard notebooks which they would later be called upon to resort to in an attempt to substantiate their testimony or test their memories.

P.W.12 corroborates P.W.1's evidence that the accused was brought to C.I.D. office on 5.11.85.

He told the court that he also participated in the investigation of the crime leading to today's trial. One other participant was policeman Seboka.

On 9.11.85 Troopers Mpopo, Lelala and P.W.12 Det/W/O following the explanation given to them by the accused set out from T.Y. for Motimposo in Maseru.

They came to the home of P.W.2. Prior to that none of them knew P.W.2's home except the accused who led them to it.

P.W.12 corroborates P.W.1's evidence with regard to P.W.2 taking the gun from the grocery unit and handing it over to P.W.1 in the presence of the accused.

His own version of the words allegedly uttered by the accused when coming face to face with P.W.2 is "Makhama bring that gun which you had lent me."

P.W.12 corroborated P.W.1 as to the identity of the pistol namely that it was a 7.65 calibre gun bearing serial numbers 646547.

He further testified that on 11.11.85 he received information regarding a Mercedes Benz Truck which was at Tsikoane.

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This truck was parked at the homestead of Foto Ramaqabe the husband of P.W.11.

At this home P.W.12 found P.W.11 and her son P.W.8. The truck was a drop-side white Mercedes Benz type bearing Maseru district Registration Letter and Numbers A-4523. Its buck had been removed. P.W.8 and P.W.11 confirmed that they told P.W.12 that the truck belonged to the accused who had brought it there at night.

P.W.12 said he examined the truck and found nothing untoward about it with the exception of the fact that its buck had been removed.

P.W.12 said he drove it to Hlotse police station. He doesn't remember where he got the keys from nor indeed if the truck was not merely kept in motion by connecting its electrical wires. He however recalls that it was push-started as the self-starter didn't help turn the engine.

It turned out though that P.W.8 had been forced by P.W.12 to drive that truck from his home up to a certain fraction of the road leading to Hlotse. P.W.8 who was not acquainted with driving a truck switched places with P.W.12 who took the steering wheel and drove the truck to Hlotse Police Station.

P.W.12 told the court that on 12.11.85 he detailed P.W.3 who left T.Y. in the company of P.W.9 Senekane Raliile to fetch the truck from Hlotse Police Station and bring it to T.Y. police station.

On 13.11.85 P.W.12 fetched the accused from the T.Y. prison cells and questioned him about the truck.

The court was told by this witness that the accused said he knew the truck and that it was the deceased's truck - further that the accused said he didn't know where it came from.

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Thereafter the accused was returned to prison. Prior to the investigations P.W.12 said he didn't know the accused. It was only later that he gathered that the accused had been or was a soldier.

Under cross-examination P.W.12 said he must have made a mistake when he said in 1985 he was stationed in Leribe and not T.Y. He maintained he was stationed in T.Y. then.

Confronted with the legitimate question that at the time of giving the evidence at the Preparatory Examination before the magistrate events were relatively much fresher in his mind than today he conceded that that was so but explained that the wrong information supplied to the magistrate might have been a slip of the tongue - this being that in 1985 he was still stationed in Leribe.

I think his explanation is reasonable regard being had to the fact that in this court P.W.12 said under cross-examination that he had been transferred from T.Y. to Leribe in July 1986.

Both this date i.e. July 1986 and the 24.12.87 appearing on page 9 of the P.E. record the latter of which dates shows that the proceedings at P.E. were postponed to 30.12.87 occurred before P.W.12 was called as a witness at the P.E.

Confusion may have arisen here because the P.E. record appears to suggest that the accused at the completion of proceedings at that level was committed for trial before this court on 16.6.86 whereas the truth of the matter is that proceedings at P.E. were only started on that date i.e. 16.6.86. It is not shown when the proceedings were completed.

However it is clear that at the time P.W.12 was giving evidence as to events which occurred in 1985 while he was still stationed at T.Y. he had subsequently been

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transferred to Leribe.

P.W.12 was adamant that he was not present at the place where and at the time when the body was found. He had only issued instructions from his office for the junior members of his staff to attend to the matter.

P.W.12's attention was brought to a statement appearing in the P.E. record on page 10 where this witness is recorded as having said the following in reference to the accused "He (meaning the accused) was not threatened or assaulted."

P.W.12 was asked if when he told the magistrate those words in quotations he was at that stage being led by the public prosecutor or had uttered them voluntarily. He replied that he said them on his own accord. He was told that he was prompted to say those words by the fact that he knew he had assaulted the accused and was thus adopting a pre-emptive defensive attitude. P.W.12 denied this accusation and explained that he volutarily uttered those words to show that the accused had not been assaulted when he in turn made a statement before the police regarding the whereabouts of the weapon alleged to have been used in the killing.

In the same manner that P.W.1 denied that he had received information or clue from P.W.2 leading to accused's arrest, P.W.12 also denied this proposition when the question was put to him.

P.W.1 had also denied that after arresting and interrogating the accused he told the accused that P.W.2 had told P.W.1 that the accused was the one who had shot the deceased.

He further denied that the accused replied that since P.W.1's informer told P.W.1 about the gun that informer would be a better able person to reveal the whereabouts of the gun. He denied the suggestion following from the above line of questioning that this

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accounts for his party going to Motimposo. He buttressed his denial by explaining that he went to Motimposo following the explanation given to him by the accused.

P.W.12 denied that his investigating team told the accused through P.W.1 that P.W.2 had said the accused had shot the deceased.

He denied that during the investigations the investigators asked the accused to produce the gun.

He denied that the accused said P.W.2 could know better the whereabouts of the gun. He denied that it was on the basis of information obtained from P.W.2 that the party ended up at Motimposo.

Asked why he did not in his evidence in chief P.W.12 say that the accused had said in reference to the gun "it was the gun I used to kill Madona" he replied that he thought he would be disclosing a confession. Regarding this aspect of the matter the authority of Petlane cited above is conclusive.

It seems from the above that P.W.12 has corroborated the material and salient aspects of the evidence given by P.W.1.

The reason why P.W.12 set out for Tsikoane where he found a truck was elicited from him in the form of a general question, namely:

> "Say what relevance had the truck to the death of Madona - ?
>
> Deceased Thami Madona left in a truck to go where the accused had found a buyer for the deceased at T.Y.
>
> You were terribly misinformed if this is the type of information you got - ?
>
> It was correct information."

Under re-examination P.W.12 stated that the accused was very free when he asked P.W.2 to bring the gun which P.W.2 had lent him and with which he said he had killed

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the deceased. He further stated that although it is posssible he didn't hear when P.W.1 asked the accused if that was the gun in question; whereupon the accused uttered his confirmation.

He stated that he might have not observed this because it may have occurred at the time when he was confused by a soldier who pointed a gun at him during that portion of the investigations. He was adamant however that the confusion he felt was not such as could make him fail to see if the accused was not freely making his statement at the time when he asked P.W.2 to produce "Ex.1".

P.W.2 Makhama Raliile testified under oath that he lives at Motimposo, Maseru. He is an aircraft engineer working at Moshoeshoe 1 airport under the employment of Lesotho Airways Company.

P.W.2 and the accused are related. They are also known to each other. Their fathers are brothers. He knew that the accused was a driver and had gone through various forms of employment. He knew that at one stage the accused was employed by the Highland Water Project. At another he used to work at Ficksburg. At some other he was a soldier. P.W.2 does not know what the accused is employed as now; impliedly by "now" I am made to understand that the witness refers to the period that the accused is spending on bail while awaiting trial.

P.W.2 knows the deceased very well. He told the court that the deceased and the accused were close friends.

The court learnt from P.W.2 that the deceased used to repair and maintain motor craft. The deceased had a car and a Mercedes Benz truck.

On Friday 1st November 1985 P.W.2 left for T.Y. to identify the deceased's dead body.

On 9th November 1985 at about 1 p.m. or 2 p.m.

P.W.1 and P.W.12 came to P.W.2's home in the company of the accused. P.W.2 only got to know P.W.12 on that day whereas he had known P.W.1 earlier when he reported himself at T.Y. Charge Office before proceeding to the mortuary in his company on 1.11.1985.

It is common cause that the accused knew where P.W.2 stayed.

After the police introduced themselves and produced their identity cards for P.W.2's benefit the accused said to P.W.2:

> "David hand over that family gun - I have already killed Thami with it - which you had lent me."

The court learnt that David is P.W.2's Christian name. Asked by P.W.2 why he did such a thing the accused is alleged to have responded by only bending his head.

Then P.W.2 opened the kitchen unit or grocery unit, took out the gun and handed it to the police.

P.W.2 told the court that this gun is a 7.65 calibre pistol with 7/8 loading capacity. He related its serial number and produced his licence for its possession. It appeared to have been licensed in 1983. The purpose for owning a gun was the result of frequent robberies at his father's shop in Maseru.

P.W.2 said this gun was at one stage in the accused's possession not as a loan but rather for safe keeping. This was in April 1985.

P.W.2 entrusted the gun to the accused's custody because there had been a misunderstanding in P.W.2's family after his mother's death. His younger sister aged 17 had become rebellious. In fact she is said to be still in that condition even today resulting from misunderstandings following on her mother's death. She manifested this rebellion and or nervousness by driving

a van at one lady trying to knock her down with it but missed her.

It is for this reason that P.W.2 decided to take the gun to the accused for safe keeping, first because the accused had been a soldier and as such would presumably know how to keep it. Next, because the accused was virtually P.W.2's brother and he trusted him.

It was drawn to P.W.2's attention that this gun was taken to the accused almost a year after P.W.2's mother's death which presumably triggered the dangerous attitude that the 17 year old sister manifested. P.W.2 replied that the degree and intensity of her danger was only manifested when she missed the other lady with a van. It was then that P.W.2 became even more aware that his sister's disturbance might lead to the death of one of the members of the family. Made aware that the robberies for which the gun had been bought would continue unabated if the gun was in the accused's custody. P.W.2 said there would rather be robberies than death in the family caused by his sister with that gun.

P.W.2 said he learnt that P.W.7 had come to his place in his absence looking for the deceased on 29.10.85. He took notice of the seriousness of the deceased's disappearance when P.W.7 came to him crying and saying that her husband had gone missing. This was on 30.10.85.

Then at about 9 p.m. while P.W.2 who apparently does not take liquor, was enjoying his soft drinks at the Lake Side Hotel in Maseru he met P.W.6 Michael Matsai. He told P.W.6 that he was looking for the deceased who had gone missing. Then P.W.6 told P.W.2 that he had last seen the deceased in the accused's company at Blue Moutain Inn at T.Y. Further that P.W.6 had said it was about 8 p.m. on Sunday 27.10.85 when he last saw the accused with the deceased.

When P.W.2 left the Lake Side Hotel for his home he met with someone who intimated to him a death announcement

/by

by the T.Y. police over the radio. The description of the subject matter of the announcement left P.W.2 in no doubt that it fitted the deceased. The following day i.e. Friday 1.11.85 P.W.2 asked to be freed for a day from his work and left for T.Y. in the company of Mrs Mokokoana. Apparently he had met with P.W.6 on Thursday 31.10.85 at the Lake Side Hotel.

On that Friday 1st November 1985 P.W.2 identified the body of the deceased in the presence of P.W.1.

P.W.2 suspicious that his gun might have been the one used to perpetrate the crime told me that he went to the accused at the Lesotho Freight Services to retrieve it from him on 7.11.85.

The gun was duly handed over to him by the accused. It however did not have the number of bullets it had had when first handed over to him for safe keeping. Only two live bullets out of the previous seven were handed over along with the gun to P.W.2.

Asked where the rest of the bullets were the accused is said to have said that he had them elsewhere and that he would produce them in due course.

P.W.2 said he did not believe his suspicion that his gun had been misused. That is why he did not take the gun to the police after retrieving it from the accused.

It would appear that P.W.2 is not accurate concerning the date that he says he retrieved the gun from the accused on.

There is incontrovertible evidence that on 7.11.85 the accused was already in detention having been in police custody from the date of his arrest on 5.11.85. Nohow therefore could he have been at the Lesotho Freight Services, the place of his employment on that day.

In short P.W.2 took the gun to his place and placed it hidden and unloaded back into the kitchen unit. He

/hit

hid the two live bullets somewhere under the carpet in the house. Thus rendered it ineffective even if it were to fall into his sister's hands for ill motives.

Under re-examination P.W.2 indicated that the manner in which he was asked questions at P.E. differed from the manner questiions were asked in this court. He further stated that he was questioned for a very brief period by the prosecutor who was leading him then. He further stated that the accused when handing the gun back to him had undertaken to bring back the other five bullets from where he stayed. However though he was at the time staying at Lithabaneng the accused nevertheless did not bring them.

P.W.2 said he did not get an opportunity to ask when the accused would bring back the other five bullets for on 9.11.85 he came to Motimposo at P.W.2's place in the company of police investigators.

P.W.2 was adamant that before the accused asked him to produce the family gun he had not discussed the question of that gun with the police, either at T.Y. or at Motimposo.

He conceded though that Mpopo and Mokhele the two policemen spoke about the gun but only after the accused had introduced that topic about the gun. He also conceded that he has related more things in his evidence in chief in this court than he did at P.E.

This witness is abundantly corroborated in his concession that more things were asked of him in his evidence in chief today than in the lower court. For instance with a view to finding out how the deceased could have fared in a man to man fight with the accused the court asked this witness how the deceased looked physically and the answer which does nt appear in the P.E. record was that "He was a good looking guy. Well built physically and of medium size."

/Confronted

Confronted with the fact that things were closer to the event then than they are now he said he had more time to prepare and reflect on them in the meantime. However I am satisfied that the fact of the matter is that P.W.2 was asked to give more details today than was the case at P.E. The only point where he faultered, as it indeed even did escape the keen attention of the learned counsel for the Crown, is the date when he purportedly retrieved the gun from the accused. In argument this discrepancy was not exploited by the other side nor was the witness asked to explain it. The submission by the crown seems legitimate that this was obviously a mistake. It would seem therefore that P.W.2 retrieved the gun before the accused's arrest.

The question of the accused's conduct when asked by P.W.2 why he did what he said he did - that he bent his head and said nothing has a parallel in the well-known authority of Jacobs vs Henning 1927 T.P.D. 324.

Referring to the same authority Hoffmann in the 2nd edition of South African Law of Evidence at p. 143 says:-

> "Thus in Jacobs vs Henning the plaintiff's father met the defendant and accused him of being the cause of the girl's pregnancy, at which the defendant lowered his head and made no reply. Tindall, J. said:-
>
> 'In my opinion, an innocent man, however unassertive he might be, would deny the charge as soon as the plaintiff's father made it.'"

I have no doubt in my mind that P.W.2 stood the cross-examination well. Some importance is to be attributed to the fact that he said apart from him and the accused noone else knew about the movements of the gun Ex."1".

P.W.5 gave his evidence in connection with the tests that he undertook to determine whether Ex.2 were ejected from Ex."1" when it was fired. I am

/satisfied

satisfied that his evidence left no doubt that this was so. Much of the cross-examination to which he was subjected was devoted at questioning his qualification to holding himself out as an expert in this regard and the consequent reliability of the results of his tests in the event that he was shown to be an inexperienced or only an amateurish tiro in his professed field.

He has been a member of the police force for upwards of 12 years. He is attached to the ballistic section of the Police Technical Service Department. He was trained as a firearms examiner in the Republic of Ireland. Before then he trained as a Laboratory Technician. His total qualifications consist of a certificate in Laboratory Technology and a certificate in firearms examination. The thrust of his evidence was that no two firearms can leave identical marks or impressions on cartridges fired from them.

His experience in the field as a qualified examiner as at the time he conducted tests in this case was admittedly minimal, having previously dealt with only one case. However his overall experience gained from his training and the manner he conducted tests in the instant case leave me in no doubt that they admit of no error.

Of importance is that it is today common knowledge that no two individuals dead or alive have exactly identical sets of finger prints. On the back of this Hatcher in his book referred to earlier says at p. 377:-

> "No two bullets from different barrels ever are similarly marked. We cannot say this after examining all the bullets in the world, any more than the Fingerprint Expert can say from actual experience that no two sets of fingerprints are ever identical. However, bullets are even more variable in their characteristics than fingerprints."

/It

It was testified by P.W.5 that the range of Ex.1 is 40 metres. He also said that entry wounds are usually smaller than exit wounds irrespective of the range from which the gun has been fired. He further stated that in order for a fired shot to exit from a human body, it would depend what part of the body is hit for if the bullet hits a bone it may change direction and lose power of further penetration and thus remain in there. But if fired at soft flesh the shot will penetrate and exit on the other side. P.W.5's evidence was largely scientific. It held the court spell-bound. Even though he stood in solitary isolation in this court as a man who had some training in ballistics, the quality of his evidence however showed that the description of a mere Triton among the minnows would not sit well on him. As I said earlier the evidence of this witness is so satisfactory that it is accepted in its entirety.

P.W.8 Sekonyela Ramaqabe who was utterly at a loss regarding dates when matters he testified to occurred, and who further compounded this particular defect in his testimony by denying that he gave evidence before a magistrate at the preparatory examination of this case told me that he has read only up to standard 1. He told me he was notorious for forgetfulness and attributes this handicap to motor accident which he was involved in.

However he said there are things which he remembers perfectly well even if their occurrence is further removed from the date he related them at T.Y. than today in this court.

He told me he knows the accused. Further that the accused is his brother-in-law. P.W.8 lives at Tsikoane in the Leribe district.

He said that the accused called at his place some time in 1985 towards the end of October. The accused arrived there at about 9 p.m. driving a white

/Mercedes

Mercedes Benz Truck.

P.W.8 only remembers that there was a letter "A" preceding the registration numbers of this truck. He does not know if the accused owned a truck. However he knows that the accused has a white Toyota van.

The accused came to P.W.8's home, blew his hooter and the latter saw through the window that there was a truck outside. P.W.8 went outside and recognised his brother-in-law; the accused.

The accused told him; "Brother-in-law this vehicle is about empty of fuel. I have thus come to leave it here."

The accused didn't say where he came from nor did P.W.8 inquire of him about that. The accused was alone when he thus arrived.

After leaving the truck there the accused went towards a vehicle parked some 80 to 90 paces away from P.W.8's homestead.

P.W.8 did not bother to see what this vehicle was that was parked at the T-junction 80 to 90 paces away, moreso because it was raining heavily. However the vehicle looked to be a kombi. The accused didn't say in whose company he was save that the kombi had escorted him.

The path leading from where the kombi was parked to P.W.8's home was slippery but notwithstanding that it was so, P.W.8 said it was nonetheless usable even granting that the truck had made it somewhat more slippery. P.W.8 has a vehicle himself and usually drives it on that path even though it is slippery.

Prior to the accused's coming there on that night he had only come there driving a van a long time before and it was not raining.

When the accused left P.W.8 with the truck it was

/raining

raining heavily but he nonetheless braved that heavy down pour and made for the kombi parked 80 to 90 paces away.

P.W.8 fearing that he himself would get soaked didn't ask why then the kombi couldn't come to rescue the accused from the rain yet the accused had said this kombi was escorting him. The accused was not putting on any rain cloths though.

The following day the accused having collected the fuel for the truck came alone in his Toyota van. He filled the tank with some diesel and started the truck.

He then asked P.W.8 to accompany him to his parental home at Hleoheng near Hlotse so that the latter could help him remove the buck of the truck as he wanted to convert it into an improvised bus.

However P.W.8 declined to accompany the accused as requested. The accused then asked P.W.8 if he could think of a spot outside the village where the buck of the truck could be removed.

The spot was located. Boys came and helped the two remove the buck outside the village. This having been accomplished the buck was left there and the truck driven to P.W.8's home in a cab and chassis form by the accused.

The accused said the truck was his and that he was leaving it at P.W.8's home. He further said he would come and fetch it for purposes of mounting the improvised body for a bus next time since P.W.8 failed to accompany him for the purpose to Hleoheng.

The accused left the truck there and drove away in the van. His promise to come and collect the truck never materialised.

Indeed a week even passed after the promised day of his return. Then P.W.8 learnt that police had come to

/his

his home in his absence in connection with this truck. Be it remembered that P.W.12 said he proceeded to Tsikoane on 11.11.85 to fetch this truck; and that it was on that day that he asked P.W.8 to drive it to Hlotse.

P.W.8 when coming back from his errands and on learning that the police had left a message for him not to leave his home on a certain date, complied. It can safely be inferred from this then that the date in question was 11.11.85.

On that day the truck was driven to Hlotse. P.W.8 was in the company of two police who had come to fetch the truck from his home. They were escorted by other police in meroon four-wheel-drive van to Hlotse. The truck was parked at the Hlotse Police Station.

Police then drove P.W.8 in their vehicle to T.Y. where he spent the day.

The following day he made a statement to them. He was confronted with the accused and they both admitted knowing each other. Thereafter P.W.8 was released to go home.

Under cross examination P.W.8 was told that at P.E. he said the accused came to his home in November but to-day he said it was in October. He replied that the Crown Counsel had said it could have been in October or November whereas he himself thought it could have been in September. P.W.8 insisted that the accused when he came back the following day after leaving the truck at his home was driving a Toyota van bearing the letter "A" as against "D" in front of the registration numbers.

He admitted not having told the magistrate that it was raining heavily on the day the accused left the truck at his home. His explanation is that he had forgotten about the heavy down pour.

/Asked

Asked to account for the fact that he remembers today what he had forgotten at P.E. when his testimony was closer to the events he was testifying to he said

> "it does happen that as you recall things gradually there would be those which you find had occurred but you had forgotten but only to remember them now."

He testified that visibility extended only as far as 15 to 20 paces that night.

Asked how then he could have seen a kombi parked 80 to 90 paces away he said the courtesy light inside it showed that it was a kombi. He went on in his explanation:

> "that distinguishes between a big and a small vehicle."

Asked to explain why the accused could have braved the heavy rain despite having the escorting kombi in tow, he said "I am still asking myself why it did not reach my home."

Asked to account for the fact that despite his insistence that he had previously made mention of the fact that there was a kombi in that vicinity such a statement does not appear in the P.E. record he said he made only one statement; and it was before the T.Y. police. He said he doesn't remember repeating such a statement anywhere else.

> "Is this the first time you remember giving evidence before a court of law today apart from the police - ?
>
> I remember so.
>
> There is a P.E. record here today. In it you are shown as having given evidence before a magistrate - ?
>
> I was called with my mother to the office. I never gave evidence in court.
>
> In that office did you give evidence presided over by a magistrate - ?
>
> We were that day told of the hearing date and given our allowances."

/Under

Under re-examination P.W.8 told the court that prior to the night the accused came driving a truck in a heavy rain fall the accused had never come there during the night of a heavy rainfall; nor did he come on any subsequent occasions at night driving a truck in heavy rains.

He also said he remembered giving evidence only before the police at T.Y. and that what he told them is substantially the same as what he told this court, although he has been asked certain other things here under cross-examiantion including what he said he was told outside court. If anything this last bit serves to highlight the degree of his naivety.

P.W.8 told me his accident which apparently affected his memory occured in 1979. As a result of it he told me he even passed out and only came to in Hospital in the Republic. The accident is said to have occurred at Hielbron.

He however said the statement he remembers giving before the police was a sworn statement.

P.W.11 Malineo Ramaqabe is P.W.8's mother. The accused is her son-in-law. She lives at Tsikoane.

She corroborates P.W.8's evidence that it was raining heavily when a truck came to her forecourt at night on an unremembered date in October, she however recalls that it was during the end of the month. She further said "I don't remember what day of the week it was. It was the end."

She also said the accused did not put up at her place. Nor did the truck leave.

The following day the accused arrived in the morning.

P.W.11 corroborates P.W.8's evidence that the accused had a van in which he arrived that morning.

/The

The truck was driven away by the accused. When it came back it was no longer having a buck mounted on its chassis.

The accused left the truck at P.W.11's home, and drove away in the van. She says he didn't even greet her when during these two occasions he saw her at her place on that day. Before then on the occasions he used to come there he usually greeted her and come into her house. She however did not ask him about this strange attitude.

During the second week of the accused's departure police came. Since the accused's departure and before the arrival of the police the accused had not set foot at PW 11's home. On the day the police arrived P.W.8 was absent from home. P.W.11 told him that police had been there.

Then the following day which according to P.W.12 was 11.11.85 the police collected both the truck and P.W.8. The truck was driven by P.W.8 whom P.W.11 had never seen driving a truck before. P.W.8 usually drives P.W.11's husband's van.

The police that came there that day according to P.W.11 were P.W.12 and P.W.6 Mokhele and Lelala respectively.

P.W.8 arrived back home at Tsikoane after three days of his departure in the company of the police who had come to fetch the truck.

P.W.11 told the court that she is now aware that P.W.8 is a forgetful person. She regarded herself as the one who is forgetful. Her evidence however showed the contrary at least in so far as material issues are concerned.

Under cross-examination she said she did not remember at P.E. being asked if it was raining heavily on the day in question. But she remembers distinctly that it was.

/She

She said that when the accused arrived the following day P.W.8 was not present. When told that P.W.8 said he was present she explained that she might have not been at the actual spot herself because she keeps two places which are far apart. These are her own house and one of the houses belonging to her parents-in-law. She occupies these places on an alternate basis; meaning that when the truck arrived she was at her in-laws place sleeping in there. Her in-laws are no longer living.

Contrary to what P.W.8 said P.W.11 said that on the following day when the accused arrived he was with some stranger.

There is also the discrepancy between P.W.8's and P.W.11's evidence. P.W.8 said he was present when the accused arrived that morning but P.W.11 says P.W.8 was not there. Further that when he drove away and came back with the truck without a buck P.W.8 was not there. But P.W.8 said he was actually with the accused when going to dismount the buck and coming back after that.

However P.W.11 conceded that she may have forgotten for these things happened a long time ago.

P.W.8 told me he gave evidence before a female member of the police. I see on P.E. record that he gave it before Mr. Mctinyane the magistrate. At the same time I observe with regret that the P.E. was conducted by no fewer than three different magistrates. One of them is a lady magistrate. I should not be understood to say it is regrettable that she conducted the P.E. though. All I am trying to say is that this may well account further for the confusion that P.W.8 seemed to have laboured under in regard to questions put to him in an endeavour to establish if he was aware what the sex of the magistrate who conducted the P.E. was. It appears on P.E. record that P.W.8's mother's evidence was taken

/by

by a lady magistrate Mrs Machaha. Be it remembered that P.W.8 and P.W.11 said they responded to the subpoena together and waited for each other after their evidence was taken at P.E.

P.W.9 Senekane Raliile testified that he resides at Motimposo, Maseru. He is a businessman and knows the accused whose mother is P.W.9's aunt.

P.W.9 knew the deceased also. He knew him from the time when the deceased and he used to live in Germiston together. The deceased was his employee driving his trucks from Lesotho to Germiston and back conveying goods and groceries for P.W.9's shop in Lesotho. He actually brought the deceasded to Lesotho and in this respect regarded him as his own son.

Shortly before he died the deceased had vehicles of his own; namely a Jaguar car and a 1417 Mercedes Benz Truck. The truck was white, had a buck and is described in commercial language as drop-side type.

The deceased used to park this truck at P.W.9's place at Motimposo.

When P.W.9 left Motimposo for Germiston on a Friday in October the truck was still parked at his home. (It would seem according to calculations this was on 25.10.85).

The deceased had intimated to P.W.9 that he intended disposing of this truck by sale. Further that the accused had secured him a buyer for it. The deceased had told P.W.9 that the accused and he intended going to T.Y. either the following day i.e. a Saturday or Sunday to have the truck sold. The prospective buyer was supposed to be at T.Y.

It was part of the arrangement between P.W.9 and the deceased that the deceased should meet P.W.9 in Germiston on the Monday following the prospective sale of the truck. However the deceased never came to P.W.9 in Germiston.

/P.W.9

P.W.9 learnt on a Tuesday that the deceased had died. Then he proceeded from Germiston to Lesotho either on Wednesday or Thursday. He ultimately went to T.Y. where he also identified the body of the deceased. Then he went to the police who had called him to T.Y. police station. They took him to Hlotse Charge Office where he found the same Mercedes Benz truck which he knew parked at Hlotse Police Station.

A word of caution here. Be it remembered that the truck was only brought to Hlotse police station on 11.11.85 according to P.W.12. Be it remembered also that P.W.2 only knew for certain that deceased had died between 31.10.85 when he heard of the description answering the identity of the deceased and 1.11.85 when he positively identified the dead body at T.Y. mortuary. These factors taken along with P.W.9's reply to a question put by one of the gentlemen assessors that he learnt from P.W.2 on a Tuesday following the Monday of the aborted meeting between P.W.9 and the deceased in Germiston, would tend to show that P.W.9's recollection of the dates is inaccurate. If the Tuesday that immediately followed his parting with the deceased is 29.10.85 (and I can think of no other) how could P.W.9 have learnt of deceased's death on that day from P.W.2 who only knew of that death two or three days after it?

It is not clear though, how long the deceased's body remained at the T.Y. mortuary. However I entertain no doubt that P.W.9 saw it at the T.Y. mortuary. But it seems it was much later than the dates which the purport of his evidence tends to convey. I am fortified to this end by the fact that he said the body was already decomposing and smelly hence he could not examine it as closely as he would have desired. Whereas other witnesses who saw it between 1st November and 3rd November had no complaint about the stench of the body. Moreover in his evidence P.W.9 makes no break between his identification of the body and his setting out for

/Hlotse

Hlotse Police Station where he identified the truck without the buck.

Even at the cost of precious time I wish to repeat and emphasise the point by reference to his evidence in chief, viz:

> "I identified the deceased's body. I went to the police who had called me to T.Y. police station. They took me to Hlotse Charge Office.
>
> I found the same mercedes benz truck which I knew at Hlotse police station."

It should be borne in mind that the truck was brought there only on 11.11.85 hence P.W.9 couldn't have seen it there before that date. Furthermore the above extract from his evidence implies that the events he relates i.e. identifying the body and the truck constituted a continuous occurrence.

Barring these discrepancies as to the date I have no doubt concerning P.W.9's identity of the truck and its buck.

Moreover it had been suggested to him that the truck he identified at Hlotse was different from the one parked at his place for the latter had not "budged" from his place. But credible evidence showed that it had not only budged but had had its buck stripped from it at one stage way out near P.W.8's village at Tsikoane. The same truck was identified by P.W.9 at P.E. as the one that the deceased had parked at P.W.9's place.

Bearing in mind that both P.W.2 and P.W.9 are related to the accused and no hostility surfaced as likely to have affected their relations with the accused, the words of Schutz P. in C. of A. (CRI) No. 3 of 1984 Thebe vs Rex (unreported) at p. 20 are worthy of mention, namely:-

> "To my mind the evidence should be accepted as true. It is very difficult to believe that the witness

/would

would have fabricated this story against his own cousin to whom he bore no hostility."

It is also noteworthy that after confessing to the court that he deliberately withheld the information that the deceased had placed M10,000 on that truck as its prospective sale value he divulged that information.

P.W.6 Michael Matsai gave evidence which showed that he was the one who found the deceased and the accused seated in the accused's van drinking beer near the Blue Moutain Inn at T.Y.. He observed that they were engaged in a hearty conversation. It was around 6 p.m. when he came next to the van and leaned against its door to greet the occupants who were in its cab. He did not know if the two were friends but, had seen them walking together on at least four previous occasions.

P.W.6 went into the hotel leaving these two seated in the accused's van. When he came out of the hotel on his way home at around 7 p.m. on that day he didn't see any of them, nor the van in which they had been seated.

Although P.W.6 is not sure of the date, he remembers that this was during a weekend in October. He does not remember the year either. But of significance is that some five days or so thereafter he learnt that the deceased had died.

It is P.W.6 who, even though he had known that P.W.2 had intimated to him that he was looking for the deceased, did not inform P.W.2 with whom he was at Lake Side Hotel that from a conversation held by some people four paces away from where he was, he overheard them say that the deceased was found dead somewhere. He however stated that due to P.W.2's proximity to those casual conversationists P.W.2 might also have heard the sad news.

P.W.6's failure to confirm that P.W.2 had heard the startling news was based on the fact that he was staying

/far

far in the mountains and because it had been raining heavily the roads were very bad.

The startling thing about P.W.6's evidence is that in answer to the following question

> "you stayed for two hours after hearing the startling news without telling P.W.2 notwithstanding that you feared that the roads were bad - ?"

he replied that

> "Well when I heard the startling news P.W.2 was not there".

Then came the following :

> "But did I hear you properly in answer to gentleman assessor's question to say when you heard report of this news P.W.2 was present - ?
>
> May be I didn't hear properly. The truth is that P.W.2 was absent when I learnt that the deceased had died."

If indeed this is the position one wonders what becomes of this witness's elaborate and factual picture he painted of the scene where the following is revealed in his evidence under cross-examination :-

> "You said you later learnt after three days or so at Lake Side that deceased had died - ?
>
> True.
>
> Where was P.W.2 - ?
>
> I was with him at Lake Side Hotel.
>
> Could P.W.2 have heard - ?
>
> He could have heard. The voice was loud. He was only four paces away from me.
>
> Was it before or after he said he was looking for the deceased - ?
>
> I don't remember.
>
> Did you approach him about the startling information

/you

you had heard - ?

No.

(Court) Did it startle you - ?

Yes.

(D.C.) Why did you not approach him in view of the fact that .... he was looking for the deceased - ?

He asked where I had seen deceased last. I said at T.Y."

Whatever the case may be the upshot of this witness's evidence is that he was the last man who saw the last man who was with the deceased before the latter was found dead the following day i.e. 28.10.85.

P.W.3 Detective Trooper Lelala's evidence supports that of P.W.12 as to the events which took place at Tsikoane on 11.11.85 and at Hlotse later that day. He is the one who clarified the position by stating that whereas P.W.8 initially drove the Mercedes Benz he failed to maneuver it properly. Consequently P.W.12 took over after some estimated distance of 200 metres. P.W.12 had said he had driven it all the way. His lapse of memory in this regard is pardonable. P.W.8 said he himself drove it all the way. His mother carries modesty to excess when she holds her son's memory in higher esteem than hers.

P.W.3 also supports P.W.9's evidence as to trips which were taken the following day between T.Y. and Tsikoane for purposes of collecting the buck from outside the Tsikoane vilage. That is 12.11.85.

This is the witness who handed in the truck as exhibit before the court below.

His evidence is important in that he maintained contact with this truck and focused his gaze on it at three different places i.e. at Tsikoane where it had been left without a buck; at Hlotse where it was brought and taken back to Tsikoane to have the buck mounted; at

/T.Y.

T.Y. where he ultimately handed it in as an exhibit.

His evidence is important in that his contact with the truck ensures that the truck that was exhibited is the same one that he had seen in the various places. This evidence is important standing as it does in stark contrast with that of the accused who wanted this court to entertain doubts that the truck that was exhibited was merely similar to the one which had remained parked without a "budge" from P.W.9's home. The accused further wanted the court to entertain doubts that the truck that was exhibited at T.Y. was only similar to the one that he left parked at P.W.8's home.

It is common cause that P.W.3's evidence in this court is more detailed than that which he gave in the court below. His explanation for this is most satisfactory; namely that the public prosecutor in that court did not lead him on finer details of what he otherwise knows. It is for this reason that he did not tell the court below that he was among the party who went to P.W.2's home at Motimposo on 9.11.85.

This is the summary of the crown evidence at the end of which an application for the discharge of the accused was made but turned down on two grounds :-

First that on the basis of the ruling in R vs Herholdt and 3 Others 1956(2) SA. the test to be applied in deciding either to grant such an application or refuse it consists in the view that if attendant circumstances

> "might be such that a failure of justice could possibly result if an accused person were to be discharged at the close of the prosecution even though (the prosecution) has failed to present a necessary degree of evidence"

the application should be refused.

Next that :-

> "... the test to be applied in an application of the present nature is not, whether there is evidence upon which a reasonable man should

/convict

appear he had met this stranger at the deceased's forecourt.

Asked where he met the stranger the accused said

"I explained that after parking my vehicle in front of the deceased's house I got into the deceased's house with him."

"The way you explained it I took it that it was in the forecourt -?

I said it was in front of the house for I even said it was as far as that table (i.e. estimated as 5 - 6 paces)

(the accused was in apparent agony and took an unduly long time before giving this estimate).

You heard P.W.7 give evidence -?

I did.

She said you came in the same vehicle with the stranger -?

She has to say that because we got in together into deceased's house.

The witness did not say she supposed you came together with the stranger. She positively said you came driving in the same vehicle with the stranger -?

I don't deny she said that.

Nor do You deny the correctness of her statement - ?

That I came along with him in my vehicle I deny.

... Yet this witnesswas never challenged under cross examination - ?

It is true but when I arrived P.W.7 was in the house not outside. So she didn't see when I arrived in the vehicle.

Why didn't you gainsay her on that aspect when she gave evidence - ?

I didn't get the chance for I was still in that dock.

What's the role of my learned friend on my left hand side - ?

He is my counsel.

Then yoursaying that you didn't have the chance is neither here nor there, for you should have told him

/your

your own side of the story - ?

I didn't know that if someone lies about me I have to call him to say that the witness is not telling the truth ....."

The accused answered that his counsel is competent; and I fully agree with him. For this reason it becomes doubtful if his counsel would not have challenged P.W.7's version on behalf of the accused if the accused's version before this court were true. It is also to be wondered why a distance a fifth or sixth pace away from the front wall of the deceased's house should not be regarded as part of the deceased's forecourt.

In his evidence in chief the accused proceeded to say that from the deceased's home the three of them left for T.Y. hotel via Motimposo to check on P.W.2 who apparently was absent. They reached T.Y. at 2.oo p.m.

On arrival at T.Y. they remained in the accused's van for a while before the deceased asked the stranger to go and buy beer for the accused and the deceased.

The stranger who had been given money for the purchase of beer handed a dozen cans of beer to the two who had remained in the van. The stranger went back to the hotel while the two remained drinking the beer.

The deceased alighted from the van after the stranger had deposited the purchase of beer in the cab. The deceased and the stranger went into the hotel. But before the deceased went into the hotel P.W.6 had found the accused and the deceased seated in the van and drinking.

After the deceased had gone into the hotel the accused says he left in his van to fill in petrol about one kilometre or two away.

/The

> convict, but, whether the evidence presented by the prosecution is such that a reasonable man, acting carefully, might properly convict."

That application failed to meet either of the tests referred to above, hence was refused.

The accused then gave evidence in his own defence.

By way of introduction to the accused's testimony it is important to mention that during the course of his evidence the accused revealed that the deceased used to deal in stolen vehicles. Despite the accused's knowledge that this was the position he told the court that he nonetheless bought the mercedes benz truck from the deceased. He did not bother to report these illicit transactions to the proper authority because the police to whom the deceased was used knew of this practice. It never occurred to the accused to report to the other police whom the deceased was not used to.

The accused told the court that he is 28 years of age; and that he is a licensed lorry driver.

On a Saturday either in October or November 1985 the accused met the deceased who asked him to accompany him to T.Y. where the deceased had told the accused that he was due to meet someone who was interested in buying the deceased's truck.

The accused and the deceased left for T.Y. in the company of a stranger who appeared familiar to the deceased.

On page 125 of my notes on the accused's evidence he is recorded as having said

> "I met this unknown man on my way to the deceased's place. He was next to the deceased's home. He asked if I was going to the deceased's home. I said yes. So we proceeded together to the deceased's home."

The distance where the stranger was from the deceased's home when the accused met him was estimated at 5 to 6 paces. Yet the accused vehemently denied that it would

/appear

The accused then returned after some thirty minutes and remained in the vehicle hoping that the stranger and the deceased would come back to him in the vehicle where he had parked. He stayed for a long time in that van till he decided to enter the hotel looking for them but to no avail.

He then sat down and took some beer drinks. He no longer saw P.W.6 in the hotel. The accused remained there until 11.00 p.m. when he realised that the deceased and the stranger could not possibly still be in the hotel hence left for Maseru in his van.

The following day (i.e. Monday) the accused left early for Mohale's Hoek where he was to make some deliveries in the Lesotho Freight Services lorry. He didn't return till Tuesday the following day.

He explained that the Lesotho Freight Services trucks one of which he drove, are not allowed to go anywhere besides where they are assigned to go.

The accused never saw the deceased again after parting with him at T.Y. He got to know about his death when he went to T.Y. under arrest. He was informed of this by P.W.1, The accused was arrested at his place of work by P.W.1 in company of some two other policemen.

P.W.1 took the accused to T.Y. while the other two policemen remained at the Maseru Central Charge office.

When he and P.W.1 came to T.Y. P.W.1 asked the accused if he knew Thami. The accused said he did. P.W.12 and P.W.3 were present together with some other policemen at this stage.

The accused was asked where Thami was. He replied that he didn't know. Further questioning revealed that the accused and the deceased were last together at T.Y. hotel and that the accused saw the deceased and the stranger get into the hotel there.

/P.W.1

P.W.1 asked the accused if he knew Thami was dead. When the accused replied that he didn't, P.W.12 said to him that he had not yet told the truth and that he was yet to tell it.

After a short break for the day meal the police resumed the earlier questioning. When the same answers were given the police then ordered the accused to lie face down on a bench and assaulted him. The accused said he was assaulted to the extent that he was unable to walk. When he asked P.W.12 to allow him to consult a medical doctor P.W.12 said he would shoot him if he could learn that the accused saw a doctor at all.

Then P.W.1 said the accused should admit that he had killed the deceased for then the police would pardon him.

P.W.1 went further to tell the accused that he had learnt from P.W.2 that it was the accused who had killed the deeased. Nonetheless the accused denied this allegation.

I need but at this stage just observe that it was never put to P.W.12 when he gave his evidence that he at any stage threatened to shoot the accused if he consulted a doctor about the alleged assaults. I have earlier dealt with P.W.12's reaction to the charge that he participated in the assaults on the accused.

Then a somewhat curious and rather incomprehensible statement was made by the accused allegedly being the answer he gave to P.W.1 when P.W.1 alluded to the fact that the information that the accused had killed the deceased was obtained from P.W.2.

The statement goes:-

> "I told Mpopo that I didn't have any gun. Maybe the person who told him that is P.W.2 for he is the one who owns a gun."

/The

The accused's tale proceeds that thereafter he was taken from T.Y. to Motimposo and he thinks that it was on the following day which he reckons was a Wednesday. But incontrovertible evidence by P.W.12 P.W.2 and other witnesses shows that the trip from T.Y. to Motimposo was undertaken on Saturday 9.11.85.

When the party came to P.W.2's home at Motimposo, P.W.1 and some other man said to the accused that he should tell that man meaning P.W.2 to produce a gun. The accused complied with the instruction. P.W.2 produced a gun and handed it to P.W.1. The accused didn't know this gun. The accused denies that P.W.1 asked him if that was the gun. He denies that he admitted it to have been the one when P.W.2 handed it to P.W.1.

The accused denies that P.W.2 ever gave that gun to him to hide from P.W.2's worrying sister.

He denies that the gun was fetched from him after the owner suspected that it had been used for some unlawful purpose. He denies that he was ever questioned about the five missing bullets nor that he undertook to return them as he had left them at home. In his evidence in chief the accused said they were friends with the deceased. But at paragraph 6 of his affidavit in CRI/APN/243/85 Sehlabaka vs Rex (a bail application) the accused said that he (the petitioner then) and the deceased were used to each other but not friends. The accused's attempt at reconciling these starkly conflicting statements given by him both under oath to this court at different times was a pathetic welter of meaningless verbiage. See page 157 of my notes. Contrast with 131.

The accused said the deceased had motor vehicles namely a Jaguar car and three Mercedes Benz trucks.

Despite his denials that P.W.2 ever gave the gun to him and later fetched it from him with only two bullets

/out

out of the seven which P.W.2 said he had given to him it was never put to P.W.2 that his allegations to that effect were false. The accused acknowledged that P.W.2's evidence in this regard was not gainsaid but nonetheles wishes the court to reject it in favour of his own fresh version of denials.

I may just make it plain that the court's credit to a witness's testimony is never given out with the rations. Hence the court cannot therefore say ditto to a submission seeking all the same to support the accused's wish.

It will be remembered in this connection that the court had to read back the entire evidence of P.W.2 under cross-examination and at the end of it all the purported challenge to P.W.2's statement was found conspicuously wanting. Asked to account for this painful hollow in his defence the accused embarked on a pitiable exercise in evasion.

The accused admits as true the evidence that he was seen at Tsikoane driving a Mercedes Benz truck.

He goes further to say when he left for T.Y. with the deceased and the stranger he had had this truck for two weeks . He had bought it for M7,000 from the deceased and had already paid M4,000 in the transaction.

He also said that when he left for T.Y. he had already left this truck at Tsikoane for about two weeks.

Under cross examination he admitted that it is possible he could have bought this truck around 13th or 14th October 1985.

The accused is adamant though that when the deceased died i.e. around 27th or 28th October 1985 the truck had already been at Tsikoane for two weeks.

But incontrovertible evidence shows that the truck

/was

was fetched from Tsikoane on 11.11.85. Further evidence shows that by that date the truck was enduring the second week of the duration of its stay there. Calculating backwards two weeks from 11.11.85 it would seem the first week of the truck's stay at Tsikoane could not have been far earlier if at all than 28.10.85. Regard should also be had to the fact that on 26th October 1985 P.W.9 had left it still parked in his yard at Motimposo. Further that on 27.10.85 when the accused and the deceased left for T.Y. the truck had not "budged" from P.W.9's place.

It is palpably false therefore to say this truck had been at Tsikoane two weeks before the accused and the deceased set out for T.Y. on 27.10.85.

But is it the same truck?

The argument has merit that the accused was not obliged to challenge P.W.12's evidence that P.W.9 identified the truck as the deceased's because P.W.12's statement to that effect was in the nature of hearsay. However in his turn P.W.9 positively identified it.

But again is it the same truck? The following will show it is. At page 171 of my notes it appears that the accused admits that he is the only one who speaks about the deceased having had three trucks; namely

(a) the one that used to be parked at P.W.9's place;
(b) the one sold to Khotso at Mohale's Hoek, and
(c) the one the accused says he bought.

He admits that if the deceased had three trucks P.W.2 and P.W.9 would know.

The verbatim account will help clarify the issue therefore :

"If deceased owned 3 trucks P.W.2 and P.W.9 would know - ?

/They

They know them very well.

P.W.9 only talks about a truck the deceased was running and it was identified by him to the police. The other is the one the deceased had sold to Khotso in Mohale's Hoek - ?

He said so.

Can you say why P.W.9 subtracts one and says the deceased had only two trucks - ?

I know the one I bought, another that was sold to Khotso and the other one that the deceased ran.

(It should be clear that once more in this answer the accused manifests his persistence in giving evasive answers).

You forgot the one that you said was left at P.W.9's place - ?

I can't say if it is the one at (T.Y.) Charge Office.

Are you not somersaulting now - ?

No.

I thought you said the truck left at P.W.9's place never 'budged' from there - ?

I said I didn't know if it moved from there for I have not gone there since.

And you knew it - ?

Yes.

Why then wouldn't you be able to identify it at Charge Office as a truck that you left when you and deceased went to T.Y. -?

I saw a truck similar to the one left at P.W.9's place.

Why then when I asked if the truck at P.W.9's place had moved, didn't you say: 'I saw a similar one at the Charge Office - Similar to that I left at P.W.9's' - ?

I saw one similar at Charge Office.

(Question Repeated - ?

It didn't occur to me to say so."

In his haverings and evasions the accused is hard put to it to deny that he has now forgotten the truck which he said was left parked at P.W.9's place. This truck would bring the total of the trucks he mentioned to four. Be it remembered that the one he says he bought

/from

from the deceased he mentioned used to be parked at Masianokeng - hence P.W.9 or anybody would not know about it.

I should mention here that the court was informed from the bar that this truck was released by order of the High Court to the purported owner from the Republic of South Africa. Unfortunate as that seems to be it does not seem to affect the identity of this truck because the various places it was taken to provide an unbroken silver thread through evidence before me.

Finding that he has hopelessly entangled himself in a web of lies of his own making he impliedly admits that the truck parked at P.W.9's had "budged" from its parking place by saying

"I can't say if it is the one at the charge office."

But it is now known that the one at charge office is the one that was once at Tsikoane driven there by the accused and later brought to Hlotse Charge Office by P.W.8 and P.W.12; then ultimately to T.Y. Charge Office by P.W.3, P.W.9 and another policeman.

Meantime the accused denies, even in the face of this admission forced on him by very rational and logical questioning by Crown Counsel, that he is somersaulting. This obviously placed the accused in a cleft stick and he couldn't say why P.W.9 should not be believed when he said the deceased had this truck that the accused claims as his and the other that was sold to Khotso and none else. Hence the one that he could possibly sell at the time was the former and not the latter.

Why then should the accused purvey all this tissue of lies regarding the truck that was at Tsikoane?

It seems to me that the reason for lying thus can be none other than that the accused wishes to show

/that

that during the last two weeks or more of the deceased's life the accused's title to this truck was never disputed by a man who could possibly have had the right to do so. In an attempt to buttress this attitude the accused seeks to create and convey an impression that, if during the two days he was seen with this truck at Tsikoane even treating it as his own by openly dismantling it, unchallenged by the man from whom he purportedly bought it, who then would be there to challenge his right to it after the deceased's death? and on what grounds!

Be it remembered that at page 173 of my notes the accused says he had bought it 2 weeks before leaving it at Tsikoane for two weeks before the deceased's death. This would mean he bought it around the beginning of October. All this has been shown to be false beyond doubt.

The portion of the accused's alleged statement which was elicited from P.W.12 by the defence in its cross examination of that witness was corroborated by P.W.2 to the extent and effect that the accused said he had used "Ex."1" to kill the deceased.

When the accused allegedly made this utterance and the one preceding it namely that P.W.2 should produce Ex."1" which P.W.2 had lent him the accused was not being assaulted.

There was persistently a suggestion put to crown witnesses concerned that they had learnt from P.W.2 that the accused is the culprit in the killing of the deceased. This suggestion, it is alleged, derives from the fact that P.W.2 had had previous contact with the police when he had gone to identify the body at T.Y., thus implicitly this suggestion derives from the fact that P.W.2 said he suspected that his gun had been used in the commission of a crime.

/The

The first branch on which this suggestion is based is flawed on the ground that if the police had had such prior contact with P.W.2 on the basis of which they would have known it was his gun which had been used they would not have required the accused to lead them to P.W.2's place, for by its nature the type of information they would have got from him would have required them to find out his residence from P.W.2 direct.

The second branch is self-defeating because if P.W.2 suspected that his gun had been used mischievously then he took steps to ensure that it did not cause any further mischief. In his own words when his nose was rubbed in it that through his negligence his gun had been misused, P.W.2 said "once beaten twice shy".

It was never put to P.W.1 that he promised the accused that the police would pardon him if he admitted that he had killed the deceased. This was heard for the first time in this court when he gave evidence in his defence.

As proof that the accused was prevaricative when giving evidence, he admitted that the simple answer to have given to the police - who he alleges told him - that P.W.2 had told them that the accused had killed the deceased - would have been "he is lying. I didn't," instead of the one that he allegedly gave, namely "(Mpopo) I don't have any gun. Maybe Makhama who told you that is the one who owns a gun." He admits that it would have been easy to say the former statement.

Asked then why he didn't give that simple answer but instead introduced the question of the gun he said

> "I said he might be having a gun because police said he saidI had a gun."

The question was repeated and his answer was :- "Because he implicated me about the question of the gun so I also had to introduce it."

/Asked

Asked again if it was not easy to have said "Makhama was lying. I didn't shoot a person" he admitted it was easy.

"Why didn't you say so then - ?

I don't know why I answered that way.

I have an answer; it is because if this is what you told the police then you knew the gun was at some stage in your possession - ?

That is not so. It never.

I'll show: Following the reply you gave to the police, would they have taken you to Makhama - ?

Still they would have taken me to Makhama for they said Makhama said I shot the deceased.

Why would they have to go in your company to Makhama - ?

They required to go in my company because I said I had no gun maybe Makhama -----

By Court:

Why would they have required you to lead them to Makhama's place when from your own version they must have spoken to Makhama about you in which case they must have known the identity or locality of Makhama's place - ?

I don't know.

By C.C.:

What did you say to Makhama - ?

That he should produce a gun.

Stopped there - ?

Yes.

Did you know him to own a gun - ?

No.

Why did you say he should produce one then - ?

Because he said to the police I had shot a person."

The defence did not challenge the evidence of P.W.12 which showed that the accused said P.W.2 should produce the gun. The only challenge that emerged was in regard to the fact that P.W.12 had not in his evidence in chief stated that the accused had also said he had killed the deceased with it. Cross examination is in many ways similar to the art of fishing. Sometimes it is the fish that takes the bait, at other times it is the serpent.

/In

In both cases the fisherman should be content with the catch with which he is saddled. Taking the fish and the serpent thread and thrum is the rule of the game.

The accused said he and P.W.12 are not enemies and could not say why P.W.12 should implicate him falsely.

He acknowledged contents of his affidavit which he swore to in an application for bail heard by the High Court on 15.11.85. He acknowledged that in paragraph five of that affidavit he had sworn that he parted with the deceased very late at night on 27.10.85 - Yet in these proceedings today he said he last saw the deceased only at 6 p.m.

The court took judicial notice of the fact that the hour six strikes while it is still very light on 27th of October. See "Time of sunrise and sunset at Johannesburg Standard Time of South Africa" in the Hortors' Legal Diary for South Africa for 1985 page 18. The time difference in sunrises and sunsets between Johannesburg and T.Y. would be a matter only of seconds.

Confronted with the two conflicting sworn statements as to when he parted company with the deceased he gave a garbled account of the issue mixing it with rambling irrelevancies.

"Paragraph five reads '

'I parted with the deceased very late' - ?

That late was when I left because of not seeing where he was.

How do you part company with one who is not with you - who was not physically present - ?

I was with him. Till going. I don't deny that I parted with him but ....(inarticulate mutterings followed by silence showing obvious inability to give satisfactory reply).

Why deny the obvious. Isn't it because you bear a hand in the death of the deceased - ?

No."

/The

The accused said he was concerned about the welfare of the deceased when he left T.Y. at 11.00 p.m. Yet he did not report either to the hoteliers there or to the police charge office which is near by that he was worried that the deceased was nowhere to be seen. He said he didn't do this because he thought the deceased had hired transport and left for Maseru. In the same breath he said he thought the deceased was with friends at T.Y. Asked why he didn't then go to the deceased's house to at least let his wife know about this matter which had aroused his enxiety he said it was too late; moreover he did not want to "fink" on (meaning inform on) the deceased in case he had : slipped off to spend the night with girl-friends.

Confronted with the question that the lateness of the hour didn't appear to bother him for he had, according to his version, spent no less than five hours awaiting the deceased's re-surfacing at the T.Y. hotel - so how could a further fifteen or so minutes affect him if he spent that amount of time reporting to the deceased's wife at Upper Thamae on his way to Lithabaneng, he said this did not occur to him.

Granting then that he went to Mohale's hoek on Monday and did not come back till Tuesday in the evening he was asked why he didn't that Tuesday or on any subsequent days before his arrest take steps to either find out from the deceased's wife if he had ultimately surfaced, or inform her of the circumstances under which the deceased and he had parted, he said he was usually tired as he knocked off around 6 p.m. or 7 p.m.

It would seem then that the accused valued his sleep or leisure far above his so-called friend's welfare or the latter's wife's anxiety. Thus it would seem the deceased's wife's anxiety would be an unwelcome infliction on his leisure or sleep. Regard being had to the fact that unassailed evidence showed that the accused used to visit the deceased's home once or twice a week, and that more than a week

/interspersed

interspersed by a weekend had elapsed before the accused's arrest, his failure to show up at the deceased's home could not be solely attributable to exhuastion after work or the baseless belief that the deceased might have surfaced. Especially when account is taken of the circumstances he alleges he parted with the deceased under. Hence the submission is legitimate that the accused avoided going to the deceased's home because he knew what had occurred to him.

In my view it cannot do to say the accused need not have got unduly flustered about the deceased's non-appearance because in Maseru he and the deceased used to part without any ceremony or ritual. T.Y. is not Maseru. T.Y. is more than 25 km away from Maseru. The accused knew that to get to T.Y. the deceased depended entirely on the accused's transport. Likewise, to get back from T.Y. to Maseru he should have expected that the deceased would depend on the same transport. In this connection the accused's attitude towards the deceased smacks of unwholesome callousness. Such callousness coupled with the fact that the accused did nothing for more than a week to allay P.W.7's fears or P.W.2's anxiety about the deceasedis not inconsistent with the proposition that the accused knows more than he is willing to reveal about the deceased's fate.

Of a piece with his prevarications, when asked :

"Accprding to you who led the police to Motimposo - ?"
he replied
"I went with them."

It was after the question was repeatedly put and only when the court warned him to answer it that he said

"I led them".
"For what purpose - ?
Mpopo said Makhama had said I had shot a person. I said it was Makhama who had a gun.

/Why

Why did you say so - ?

Because police said Makhama said I had shot a man and I said he might be the one who had a gun.

Court :

But police were not asking if Makhama had a gun - ?

No.

C.C.

The problem is; What you say is illogical and untenable - ?

To me it is logical."

The accused wants the court to believe that it was out of his concern for preservation of the deceased's marriage that he did not wish to say anything about the deceased's disappearance lest he arouse suspicion in P.W.7 about the deceased's deviation from the path of marital virtue, yet for a whole week and some days he didn't bother to at least meet the deceased and admonish him about the awkward position the deceased had put him in by his philandering habits.

The accused told me that he was careful not to get drunk because he knew he was going to drive from T.Y. to Maseru before giving up hope that the deceased would join him. On his own evidence it would seem he was not drunk that day despite the intake of beer he had had. It may be so in view of the length of time spent in drinking the quantity given.

It is interesting or even amazing to note that at page 64 of my notes when being cross-examined about the kombi that P.W.8 said had escorted the accused to Tsikoane it was vehemently put to him that

"the allegation that there ever was a kombi in the vicinity is a figment of your imagination - ?

I deny what you say. I am telling the truth.

Moreso because before the magistrate you did not say there was a vehicle in the vicinity - ?

At the place where I made my statement I said the

/accused

accused had left a vehicle on the way. I even said I didn't know in whose company he had been in that vehicle."

Yet on page 175 in sharp contrast to the question that one would expect the accused to back up about the absence of the kombi in the vicinity, the accused nevertheless under cross examination reacted as follows to the question put :-

"You were being escorted by a kombi - ?

It never escorted me. What happened is that when I came to Tsikoane I asked the owner of the kombi to wait for me so that I could park my truck which was in distress, as I wanted to go with him for he was going to Maputsoe."

It stands to reason that the accused's counsel in telling P.W.8 that there was no kombi in the vicinity had been given false instructions by the accused.

This coupled with the fact that P.W.8 is still puzzled to this day why the accused braved a heavy down pour even though there had been a kombi escorting him would lead to only one conclusion that an attempt by the accused was made to hide the identity of this kombi and the identities of its occupants or occupant.

The fact that the accused on that day was in the company of at least two different strangers at different times but comfortably travelled with them without inquiring about their identities makes his conduct highly suspect. It would be a different thing if he said the identities were revealed but unfortunately forgotten through the lapse of time.

Earlier in this judgment I charitably took for granted that the accused set out early on Monday for Mohale's Hoek on his master's errands and did not come back until Tuesday. But credible evidence shows that he was on the same Monday at Tsikoane where he arrived in the course of the morning and spent the day dismantling the buck of the truck.

/Be

Be it remembered that he seized on this trip to Mohale's Hoek in an attempt to escape the question why he didn't take steps to report to P.W.7 about the disappearance of her husband from his company.

It does appear that it cannot be true that the accused had gone to Mohale's Hoek early on Monday never to come back the following day for evidence shows on the morning of that Monday he was at Tsikoane where he surprised P.W.11 by failing to say good morning to her. I need not mention that Mohale's Hoek is 214 km distant from Tsikoane and no man can be at two different places at once.

The accused's falsehood as to the time frame within which the truck remained at Tsikoane, the fact that he dismounted its buck from the chassis - no doubt for purposes of confusing or destroying its identity - coupled with various instances of what palpably appear to be after thoughts in his evidence; and the fact that he has been shown to have lied in his denial that he was in possessin of P.W.2's gun which on retrieval had only two live bullets out of the seven which had originally been given to him; buttressed by five empty cartridges near the deceased's body out in the veld; his falsehood as to the time of his parting with the deceased as shown in his affidavit that conflicted with his testimony in this court, plus the fact that those shells were ejected when no other gun than Ex."1" was fired, culminating in the discovery of the deceased's body killed from gun shot wounds; and that he was the last man seen with the deceased before he met his tragic death all account for the milk in the coconut; namely that he knew how the deceased met his death.

I am strengthened in this view by the fact that in his own words the accused said he knew the deceased to deal in underhand motor sales. Further that he remained in the van and hotel for not less than five hours. Surely through common sense the long passage of time should

/have

have made the accused stir because often in the shady deals violence or trickery in the form of drugging is used. Hence this consideration should have prevailed over the fanciful restraint based on the imagined fear that the deceased might get embarrassed or his wife enfuriated if it turned out that the report about the deceased's disappearance would lead to the discovery that he was engaged in compromising circumstances with girl friends that night.

Credible evidence shows that the deceased was tempted to go to T.Y. that day at the instance of the accused who had told him that he had secured him a buyer for the truck. If there was such a buyer or not an inference remains irresistible that the accused lured the deceased to his fate.

P.W.9 told the court that the deceased used to attend auction sales for motor vehicles in Johannesburg; and that he bought some vehicles from there including the truck in question.

P.W.12 testified that the accused was confronted with this truck on 13.11.85 at T.Y. and the accused identified it as the deceased's, further that he did not know how it came to be there. This evidence went unchallenged. It should not be overlooked that the presence of the accused at P.W.11's and P.W.8's place at Tsikoane in October or November 1985 occurred a long time since he had last been at that place. It seems that the accused was eager to keep this truck at an obsure place where it would be difficult to trace coupled with the fact that the removal of its buck would serve to disguise its identity. An attempt was made to tell P.W.9 that the truck was the accused's, but that was too late because the crown was at that stage denied the chance to lead evidence in rebuttal by asking P.W.12 whether he took every step to ascertain that it was the deceased's.

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Be it remembered in this connection that the court heard for the firt time when the accused was in the witness's box that he had kept documents proving his ownership of the truck in its cubby hole. Yet when P.W.12 testified that the accused said the truck was the deceased's at that stage there was no suggestion that the accused was laying any claim to it supported perhaps by the documents said to have been kept in its cubby hole.

Even the incoherent statement that "(it) maybe it is Makhama for he might be the one who has a gun" implies that the accused knew that P.W.2 had a gun. Yet when asked if he knew the gun before court or whether he knew P.W.2 to possess one he said no.

It would seem from the position of the wounds that the deceased sustained that the assailant was on his right hand side for most wounds as shown in the medical report were on the right .

That the cartridges were collected and placed near the body of the deceased suggests that the shooting was effected with the aid of some light that enbled the killer to collect them after being ejected from the gun. It is not far-fetched then to imagine that the shooting was effected in some lighted enclosure. It is significant that neither the accused's white toyota van is available nor is the kombi he travelled in from Tsikoane traceable.

With regard to pointing out, it should be recalled that on 9.11.85 P.W.1, P.W.12, and P.W.3 proceeded to P.W.2's home led by the accused. This was consequent upon an explanation given to them by the accused. Over and above the pointing out reliance was reposed by the crown on evidence elicited from crown witnesses under cross-examination.

The legal position with regard to pointing out is that the pointing out has to be satisfactory in every

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respect. To satisfy this requirement it is necessary to show beyond reasonable doubt that the only inference to draw is that the accused had foreknowledge because he took part in the offence. See State vs Gwevu & Another 1961(4) SA. 536. See CRI/T/41/88 R vs Mafatle & Others (unreported) at 24. Significantly then the police officers who proceeded to P.W.2's home with the accused did not know that place. Suffice it to say then because of his foreknowledge the accused led them there and the gun was produced through his own request from P.W.2. None of them except P.W.1 knew P.W.2.

It was contended on behalf of the accused that when P.W.2 deposed that on arrival at his place the accused said P.W.2 should produce the gun he had lent him P.W.2 and the police must have put their heads together to implicate the accused falsely and must have planted the gun there. But P.W.2's evidence contradicting this view went unchallenged.

See Small vs Smith 1954(3) SA at 434 saying:

> "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."

See also Phaloane vs Rex 1981(2) at 246 saying :

> "It is generally accepted that the function of counsel is to put the defence case to the crown witnesses, not only to avoid the suspicion that the defence is fabricating, but to provide the witnesses with the opportunity of denying or confirming the case for the accused. Moreover, even making due allowances for certain latitude that may be afforded in criminal cases for a failure to put the defence

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> case to the crown witnesses, 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."

The logic of the submission therefore based on the proposition that the court should believe the implication that the gun was planted at P.W.2's place with the collusion of the police escapes me.

Indeed the fact that the accused had no prior quarrel with the deceased is a factor in his favour. But it in no way prevails against evidence showing he nonetheless manifested an attitude that shows that considerations on which friendship is based sit loosely on him.

Indeed the fact that he converted the deceased's vehicle into his own and that he made no scruple to refrain from reporting to P.W.7 about the deceased's disappearance are factors by means of which it can be said he showed his cloven hoof towards the deceased or his wife.

The crown submitted that by some strange coincidence the empty shells found near the body showed when examined by the ballistic "expert" P.W.5 that they were fired from no other gun than Ex."1". It submitted further that P.W.5's conclusion was backed up by scientific tests that he carried out. His conclusion was correct. Possible error in the results obtained from his tests was excluded by experience gained during his training. Any doubt concerning his expertise would be entertained only by evidence adduced in rebuttal by the party holding otherwise.

The possibility that empty shells were planted around the body by someone wishing to implicate the accused is excluded by the credibility of the crown witnesses.

In Marcus Leketanyane vs Regina 1956 H.C.T.L.R. at 2

/Elyan

Elyan quoting with approval the dictum in Rex vs de Villiers 1944 AD 493 said :-

> "In a case depending upon circumstantial evidence ... the court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together
>
> and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way, the crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."

Put in another way by Darling J. in Rex vs Armstrong, Herefordshire Assizes, April, 1922 the position is :-

> "Circumstantial evidence going to prove the guilt of a person is this : One witness proves one thing and another proves another thing, and all these things prove to conviction beyond a reasonable doubt; but neither of them separately proves the guilt of the person. But taken together they do lead to one inevitable conclusion."

In Tatolo Phoofolo vs Rex 1963-66 H.C.T.L.R. 5 at 6 Watkin Williams P. as he then was reported Lord Hewart L C J as having said in relation to circumstantial evidence :

> "It is evidence of surrounding circumstances which by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics."

See Taylor and Others vs Rex (21 C.A.R. 20). Compare the shells with the gun and consider the fact that within the time frame of the incident in the instant case both the gun and seven bullets were in the accused's possession. But latr though not before the deceased's death, only two live bullets were returned with the gun

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to P.W.2 while five empty shells were found around the body of the deceased who was last seen alive in the company of the accused.

When the body was discovered on 28.10.89 P.W.1 said it had rained the previous night. By some strange coincidence on the night when the accused came to P.W.8's place at 9.00 p.m. it was raining heavily. P.W.6 had seen the accused and the deceased together at 6 p.m. When he came out at 7 p.m. they were no longer there. Where could they have been between the time preceeding 7 p.m. and 9 p.m. The deceased was definitely not with the girl-friends. The accused was shown to have lied regarding the time of his parting with the deceased as amply shown by his affidavit when contrasted and compared with the evidence he gave before this Court. It thus was by token of this fact conclusively established that it cannot be put past him to give false testimony if he thinks the falsity cannot be discovered.

In this regard the words of Lord Devlin in Broadhurst vs Rex 1964 AC 441 at 457 are worthy of note, namely :-

> "It is very important that the jury should be carefully directed on the effect of a concusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is not different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness."

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In Rex vs Blom 1939 AD 188 at 202 Watermeyer J.A's direction is both enthralling and unassailable. He said

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored :
>
> (1) The inference sought to be drawn must be consistent with all proved facts. If it is not, the inference cannot be drawn.
>
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

In V vs A The Zimbabwe Law Reports 1984 (Part 2) McNally J.A. demurring application of dicta to facts in piecemeal and mechanical manner taking no account of the totality of the facts said at 143

> "The proper approach, it seems to me, is to look at the totality of the surrounding circumstances and independently established facts ...."

Mr. Thetsane for the crown submitted that the motive for the crime seems not to have been proved, and contended however that this can be inferred from the facts.

To my mind the concession made by the crown seems more than charitable to the accused for the truck in this proceedings, truly sticks out like a sore thumb. If it does not provide the motive for the crime committed then there is no need to engage in speculation about what possible motive there was because in R vs Mlambo 1957(4) SA. at 737 Malan J.A. points out that

> "Proof of motive for committing a crime is always highly desirable, more especially where the question of intention is in issue. Failure to furnish absolutely convincing proof thereof, however, does not present an insurmountable obstacle because even if motive is held not to be established there remains the fact that an assault of so grievous a nature was inflicted upon the deceased that death resulted either immediately or in the course of the same night.

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> If an assault ... committed upon a person causes death either intanteneously or within a very short time thereafter and no explanation is given of the nature of the assault by the person within whose knowledge it solely lies, a court will be fully justified in drawing the inference that it was of such aggravated nature that the assailant knew or ought to have known that death might result."

In making the submission aforementioned the crown relied on CRI/T/37/88 Rex vs Molahlehi Ramatla (unreported) at 13 where this Court said

> "Motive for the killing has not been established in this trial. The fact that the bag the deceased was last seen carrying disappeared without trace may provide the motive for the killing as robbery but there was no evidence of this."

It was shown in R vs Ndhlovu 1945 AD 369 at 386 that legal authorities disapprove of indulgence in speculation.

> "on possible existence of matters upon which there is no evidence, or the existence of which cannot reasonably be inferred from the evidence."

In submitting that absence of motive should redound to the accused's benefit the defence relied on C of A CRI No. 2 of 1983 Letsosa Hanyane vs Rex by Schutz J.A. as he then was. At page 8 the learned judge (now President of the Lesotho Court of Appeal) said.

> "The one real difficulty that there is in 'Mamaipato's evidence is the lack of motive for the appellant's attack. It is true that it is not essential for the crown to establish motive, but its failure to do so may cast doubt upon its case....."

I am not unmindful of the remarks of the learned judge in the above case at page 7 where in considering the fact that it had been urged on him obviously by the crown that the other side had not put its case to the crown witnesses said :

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> "From the above analysis it emerges that many at least of the trial court's criticisms of the appellant may properly belong to his counsel at the trial (I do not say that they do). But when at least one instance seems to have been shown to be the fault of counsel, I think that it would be dangerous to embark on the hip and thigh smiting of the appellant that the trial court embarked on."

But in this trial as I earlier pointed out the defence counsel conducted the defence of the accused in a manner that left me in no doubt that he was utterly faithful to the instructions he had received from his client.

With regard to the inculpatory statement which the accused is said to have made at P.W.2's place, and the fuller text of which might not have been admissible except as it had been elicited from the police under cross examination it would seem provisions of section 228 and 229 of the Criminal Procedure and Evidence Act 1981 suffice to cover the point. C/F CRI/T/18/84 R vs Lawrence Phasumane (unreported) at p. 39 paragraph 2.

Submitting that the test to apply in order to determine whether the accused's alibi might possibly reasonably be true counsel for the crown urged that the court is enjoined to consider the entire evidence led. Reference in this regard was made to R vs Hlongwane 1959(3) SA at 370-1 where it is stated:

> "The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted..... But it is important to point out that in applying this test, the alibi does not have to be considered in isolation. .... The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the court's impression of the witnesses."

Arguing in the same vein Hoffmann and Zeffert at p. 407 of South African Law of Evidence 3rd Ed. say

> "... no onus rests on the accused to convince

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> the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

But Mlambo at 738 is authority for the view that

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

Urging the court that the accused should be given benefit of doubt the defence buttressed its case by relying on a passage where the danger of convicting an innocent man was highlighted as follows in Khotso Mahata vs R 1926 - 53 H.C.T.L.R. at 178 :-

> ".... If there had been definite evidence that his father died before 1941, then his story that he inherited these cartridges from his father cannot be true. But as stated, the difficulty is that there is something wanting in the evidence. When he said that he inherited it from his father and it was found that the cartridges were made in 1941, there would have been no difficulty to obtain evidence to show that his father died in 1941, but that evidence was not produced. There is thus possibility that his story as it stands may be true. In the circumstances the court can't convict a man upon evidence which is doubtful, which leaves the possibility that he is innocent ...."

I have also had regard to Scoble's words in The Law of Evidence in South Africa 3rd Ed. at 250 in relation to the possible factors which might have led the accused to make the statement he is alleged to have made at P.W.2's house at the time the gun was produced. They read:-

> "the statements, although actually made as deposed to, may be false, for the prisoner, oppressed by the calamity of his situation,

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> may be induced by motives of hope or fear to make an untrue confession, and the same result may have arisen from a morbid ambition to obtain an infamous notoriety ... or from anxiety to screen ..... a comrade .... or it may even be the result of the delusion of an overwrought and fantastic imagination."

But reliable and available evidence in the instant case excludes the above set of possibilities.

In S vs Jaffer 1988(2) SA 84 at p. 88 Tebbutt J. (previously a Judge of our Court of Appeal) in dealing with the question of probabilities extracted a passage from the magistrate's court and criticised it. It went

> "Now the court has now two single witnesses telling different stories in certain aspects. The court must now decide whether one of the stories can be rejected. If the court now looks at the probabilities, the State's version seems to be the most probable."

The learned judge pointed out that

> "This approach by the magistrate was incorrect. It is, of course, always permissible to consider the probabilities of a case when deciding whether an accused's story may reasonably possibly be true. .."

The story may be so improbable that it cannot reasonably be true. It is not, however, the correct approach in a criminal case to weigh up the State's version, particularly where it is given by a single witness, against the version of the accused and then to accept or reject one or the other on the probabilities. This approach was considered by Van der Spuy A.J. in S vs. Munyai 1986(4) SA. 712 at 715 where he said :

> 'There is no room for balancing the two versions, i.e. the State's case against the accused's case and to act on preponderances!'

Dealing with (S vs Singh 1975(1) SA 277) Van der Spuy A.J., with whom Klopper A.C.J. concurred, said that the proper approach was for a court to apply its

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mind not only to the merits and demerits of the State and the defence witnesses, but also to the probabilities of the case. This was to ascertain if the accused's version was so improbable as not reasonably to be true. This, however, did not mean a departure from the test as laid down in R vs Difford 1937 AD 370 at 373 that, even if an accused's explanation be improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

Van der Spuy A.J. went on to say at 716 B-C:

> 'The fact that the court looks at the probabilities of a case to determine whether an accused's version is reasonably possibly true is something which is permissible. If on all the probabilities the version made by the accused is so improbable that it cannot be supposed to be the truth, then it is inherently false and should be rejected. But that offers no answer to the approach adopted, in my view quite properly, by Slomowitz A.J. in the case of S vs Kubeka (supra).'

In S vs Kubeka 1982(1) SA. 534 (W) at 537 F - H. Slomowitz A.J. said in regard to an accused's story:

> 'Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists anreasonable possibility that his evidence may be true. Such is the nature of the onus on the State :

Referring to this passage Van der Spuy A.J. said at 715 G

> 'In other words, even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demostrably false or inherently so improbable as to be rejected as false.'

I agree. The test is, and remains, whether there is a reasonable possibility that the appellant's

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evidence may be true. In applying that test one must also remember that the court does not have to believe her story; still less has it to believe it in all its details. It is sufficient if it thinks there is a reasonable possibility that it may be substantially true (R v M 1946 AD 1023 at 1027)".

The accused acknowledged albeit grudgingly and with great reluctance that he would not be surprised if the deceased's wife approached him inquiring about his non-appearance regard being had to the fact that she knew that the deceased and the accused left together for T.Y.

It follows from this that likewise P.W.2's suspicion that his gun had been misused was reasonable as it arose from his knowledge that it had been in the accused's possession and only after his hearing of P.W.7's anxiety.

The words appearing as a quotation in Leketanyane above at p. 3 in relation to circumstantial evidence are worthy of mention. They read :-

> ".... Such evidence is more aptly compared to a rope made up of strands twisted together. The rope has strength more sufficient to bear the stress laid upon it, though no one of the filaments of which it is composed would be sufficient for that purpose."

Mr. Nathane relying on S vs M 1946 AD 1023 at 1028 urged that the court has the discretion to consider whether evidence left unchallenged is worthwhile or not. I agree. Referring to Small vs Smith he also made a submission with which I agree, namely that where a point is deliberately left unchallenged the party calling the witness who so testified can assume that his story is true unless no credence can be attached to it.

In his reply to the defence's submissions Mr. Thetsane pointed out that the defence cannot be heard to raise possibilities as to the conduct of the accused by explaining at this late stage that the accused didn't

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go via Upper Thamae or Motimposo because possibly he did not want to disturb the deceased's wife at some late hour.

He submitted that this should have been given as evidence by the accused himself.

He buttressed his submission by relying on CR/T/37/88 Rex vs Molahlehi Ramatla (unreported).

In this regard he told the court that

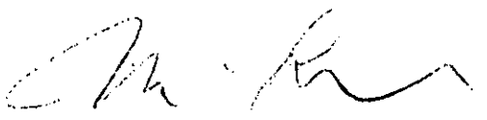
> "a criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side ..."

See Rex vs Hepworth 1928 AD 265 at 277.

He challenged the submission that the accused's story be regarded as reasonable possibly true by reposing his reliance on Miller vs Minister of Pensions 1947(2) ALL. E.R. 372 and 373 where Lord Denning warned that fanciful explanations should not be allowed to deflect the course of justice. It is my considered opinion that the accused's version has been shown to be false beyond a reasonable doubt and hence reject it.

Having considered all the evidence and authorities referred to including the submissions made by both counsel I have no doubt in my mind that the accused is guilty of the murder of the deceased Thami Madona and I so find him.

The gun is forfeited to the crown.



J U D G E.

17th October, 1989.

JUDGMENT ON EXTENUATING CIRCUMSTANCES

In CRI/T/59/88 R vs Thembinkosi Yawa (unreported) at p. 26 it was observed that :

> "It is trite law that the onus of showing, on a balance of probabilities, the presence of extenuating circumstances rests on the defence. The test to be applied by the court in deciding whether (extenuating circumstances) exist is a subjective one."

In S vs Letsolo 1970(3) SA 476(A) at 476E to 477B Holmes J.A. summarised the position relating to the subject of extenuating circumstances as follows:-

> "Extenuating circumstances have more than once been defined by this court as any facts, bearing on the commission of the crime, which reduce the blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial court has to consider
>
> (a) whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhuastive).
>
> (b) whether such facts in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;
>
> (c) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused's doing what he did."

Even though the accused was entitled to give evidence in extenuation of the crime of which he has been convicted he entrusted that task to the eloquence of his counsel. In the result the court was denied the opportunity to determine whether money ever exchanged hands between the purported buyer of the deceased's truck and the deceased. This then would in my view dispose, as baseless, of the submission by the crown that perhaps out of jealousy of the amount scored by the deceased the accused decided to kill the deceased in order to pocket the proceeds of the sale; for this submission is based on sheer speculation.

It was urged on me that the accused had consumed

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good quantity of beer - hence on that score his moral blameworthiness was reduced. But in Yawa above this court gave very stern warning that it is wrong to believe that intoxication always extenuates for

> "It would be a sad day when .... innocent lives can be randomly taken away by drunks who embark on the senseless killings with a full assurance that the law would not subject them to the same fate that their victims suffered."

The judgment that the court is enjoined to deliberate on at this stage, as properly submitted by both counsel is a moral one. Hence the court is called upon to exercise its discretion judiciously to come to a final decision. In that regard then, if there is no limit to the horror that murderers subject their victims to, why should justice impose on itself limits beyond which a perpetrator of a murder on an innocent victim should be absolved from consequences of his acts?

A moral absolute is erected around the sanctity of life. Is it not Utopian and even dishonest to remove the infallible checks which preserve that sanctity and replace them with something which undermines the absolute deterrence against perpetration of murder?

I have been asked, against manifest pointers in evidence, not to infer that the accused even before taking drinks at T.Y. had already made up his mind that the deceased was going to meet his death that day.

How can I help making such an inference in the face of the fact that the accused has not come forth to say that in fact the prospective buyer was there at T.Y.? Surely the onus is on the accused to establish this. Failing that then an adverse inference drawn against him is not out of step.

It would seem to me to follow that when the accused asked the deceased to go and meet a non-existent

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prospective buyer his malicious intent had become manifest at the time he made the proposition to the deceased to go and meet this buyer. The question of drinks which the accused and the deceased were seen taking was part of the cunning plot to make the deceased think that all was right whereas the worst fate was to befall him later at the hands of his own friend against whom he would entertain no suspicion that the 27th October 1985 would be his last day this side of the grave.

With regard to the accused's conduct after the commission of the offence it seems authorities suggest that this can be taken into account in considering whether his moral blameworthiness can be said to have been reduced, for in S vs X 1974(1) SA (R. AD) 344 at 348 Beadle C.J. said

> "One thing, however, seems to me to be guite clear and that is that where the acts performed by an accused after the commission of the murder indicate what the state of mind of the accused was at the time when he committed the murder, then these acts can clearly be taken into account in considering the moral blameworthiness of the accused at the time when the murder was committed."

In the main judgment the accused's state of mind after the commission of the crime was shown to have been bristling with wickedness.

I have had regard to authorities cited. They indeed make instructive reading but hardly have relevance to what appears to me to be the focal point in this inquiry, namely whether any factor even if remotely related to the accused's subjective state of mind can be said to be sufficient to reduce his moral blameworthiness.

Learned Counsel for the crown told me he thought there were some extenuating circumstances. Learned Counsel for the defence urged that it would be better to err on the side of liniency. Very grudgingly I feel I

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should accept these final submissions on the ground that the breadth of a hair's difference may not be equated to the length of a hangman's noose around a man's neck.

Sentenced to 25 years' imprisonment.

My assessors agree.

J U D G E.

18th October, 1989.

For Crown : Mr. Thetsane

For Defence : Mr. Nathane.