CRI/T/48/88

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MOSALA LENKA

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 5th day of May, 1989.

The accused pleaded not guilty to a charge of murder in respect of which the crown alleged that he intentionally and unlawfully killed the deceased Renang Mphutlane on or about 12th March, 1988 at Phaphama in the district of Butha-Buthe.

The evidence of P.W.7 Taelo Mphutlane was admitted by the defence and accepted by the Crown. The medical report was handed in by consent and marked "A". However the evidence of the doctor who performed the post mortem was led and consequently reference was made to the post mortem report; and the doctor P.W.8 Aloyse Joseph Shayo was cross-examined on both the evidence led and on exhibit "A".

P.W.7's evidence at P.E. showed that he and deceased were brothers and he identified deceased's body to P.W.8 before the autopsy was performed.

P.W.8 testified that he examined deceased's body on 16-3-1988. He performed the post mortem examination four days after the death. He discovered a surgical wound on deceased's body. There were also two wounds.

/below

below the ribs. There was a wound on the right lower chest. There was a small wound on the right lateral aspect of the chest, possibly an entry gun-shot wound. On left posterior lateral aspect of the chest was another wound, possibly an exit gun shot wound.

Deceased had a sutured wound on the stomach. He had another sutured wound on the deodenum and one other sutured wound on the lower-most part of the gut. There was a sutured wound on the right lob of the liver. The left kidney had been removed, it seemed for purposes of operation. P.W.8 formed the opinion that the cause of death was internal organ injury and severe haemorrhage due to gun shot wound.

Evidence revealed that when taken to hospital for treatment deceased was still alive. This accounts for the many sutured wounds which were part of the treatment resorted to in an attempt to save deceased's life. It seems to me that the number of the internal organs which got injured lay in the path of the gun shot before it ultimately exited from the body.

I accept P.W.8's theory that the kidney which was removed was as a result of the damage that it had suffered. I also accept his theory based on practice that once removed damaged human organs are incinerated. This should suffice to answer the defence's query that Note K in Exhibit "A" was not complied with by P.W.8. Note K says

> "At the conclusion of the necropsy the Medical Officer should see that the organs, if not required for further investigation, are returned to their proper cavities......."

I think the procedure outlined in Note K is required where the discoveries of damaged organs are made when deceased was already dead on admission. If he was still alive it stands to reason that organs which must be removed in order to secure his life have no place in their proper cavities.

/In

In direct answer to a question put to P.W.8 under cross examination he stated that it is not possible for a person to live without a kidney. He was quick to expose the masked suggestion that deceased then must have succumbed to death due to the removal of this kidney or that there must have been pre-existing ailment which was going to coincidentally cause his death, by explaining that it is possible for a person to live even if one of his kidneys has been removed.

In the absence of any medical history to the effect that for a period spanning at least forty eight hours before being operated on deceased's condition was rendered acute by reason of kidney trouble the only common sense and rational conclusion which is free of conjecture is that the gun shot wound is responsible for the damage which necessitated the removal of that kidney.

P.W.8 was honest enough to tell the court that he does not have very great experience in gun shot wounds.

In a veiled determination to cast doubt on the causal link between the gun shot wound and the resultant death it was contended by the defence that absence of the medical evidence which was involved in the treatment of deceased before death left a gaping hollow in the case for the Crown. I am however satisfied that with regard to the cause of death P.W.8's evidence is beyond reproach. I therefore accept his evidence that the cause of death is severe haemorrhage and internal organ injuries due to gun shot wounds.

P.W.1 No. 4356 detective Trooper Tsolo who was present at the post mortem examination supported P.W.8 that the entry wound appeared smaller than the exit one.

Asked how he knew this he replied that he often saw this. He also testified under cross-examination that P.W.8 told him that the cause of death was the result of "that bullet wound tearing through the liver as it

/travelled

travelled through it". Although this is in the nature of hearsay evidence the harm in it is cured by the fact that it was elicited through cross-examination.

P.W.1 is a man of considerable experience in the police force. He told me that he has been in it for upwards of nine years and that though he only got attached to the C.I.D. section as recently as 1986 he had previously observed bodies which had sustained bullet wounds.

P.W.2 No. 6454 Trooper Makhaola testified that he and the deceased and the accused used to work together as policemen in Butha-Buthe.

On 12-3-1988 in the evening P.W.2 and Trooper Nkune and accused were at a beer drinking place at Ha Sekila enjoying their beer. Trooper Monyalotsa came to join them later.

Then Trooper Nkune drew P.W.2's attention to a woman who seemed to be running her hands in the pockets of a sleeping man. P.W.2 asked the woman if she knew this man and also woke the man up in the same instant. The man responded by hitting P.W.2 with a fist on the arm whereupon P.W.2 fought back. The fight spilled into the outside of the beer hall where Trooper Nkune and the accused tried to separate the two combatants. Trooper Nkune and the accused succeeded in separating P.W.2 and the man. It seems that immediately before the separation Trooper Monyalotsa had closed ranks with P.W.2 in fighting this man.

Then accused hit Trooper Monyalotsa with a fist on the eye region.

Thereafter accused and P.W.2 left the place for Phaphama where they were staying.

On the way Trooper Monyalotsa caught up with the two and asked accused why he had hit him. The accused replied that he was stopping Trooper Monyalotsa from fighting that man.

/P.W.2

P.W.2 appealed to the accused and Trooper Monyalotsa to let the matter be; and apparently they heeded this appeal despite that Monyalotsa had appeared to be in a fighting mood when he joined the two.

However deceased pitched on the scene. He addressed himself to the accused. Consequently P.W.2 broke company with Monyalotsaand headed for accused and deceased who appeared to be about to be engaged in a fight.

P.W.2 asked them what it was they were bent on doing as he feared they were both in a war-path. Deceased replied by saying he would hit accused along with the gun the latter seemed to have reposed so much trust in. P.W.2 intervened when angry words were being exchanged between the two. It seems that accused was stung to the quick when deceased challenged him to what could be regarded as a duel for it is said he asked accused to put down his gun so that deceased could take the S... out of him.

It was when deceased was two feet away from P.W.2, and accused was three paces away from the latter that P.W.2 who was holding a position at an oblique angle between deceased and accused that he heard the explosive sound of a fired gun and heard deceased say "he has shot me." At the very moment P.W.2 saw accused put back his gun into the pocket.

He said he was able to see these events because the participants were close to him and the place was lit up by electric lights.

P.W.2 testified that when all this was happening Monyalotsa was no longer in his company but had left though P.W.2 did not see him leave because he was engaged in trying to separate accused and deceased before the explosive sound of the gun. It was only after the gun had been fired that P.W.2 realised that Monyalotsa

/had

had left.

P.W.2 got hold of deceased and led him to the road. P.W.2 said after the shooting accused left.

Deceased was conveyed to hospital where he underwent treatment but succumbed to his injuries after the operations.

Under cross-examination P.W.2 explained that at no stage did he see any gun in the hands of Monyalotsa.

P.W.2 denied any suggestion that Monyalotsa had laid in wait for him and the accused. He said Monyalotsa who had been left at the bar happened to have approached P.W.2 and accused from their side and that he came at them in a hurry when they were only a distance of fifty paces from Sekila's bar.

Ten minutes later and after Monyalotsa had temporarily left, deceased came along with the same Monyalotsa to the scene where the fatal shot was later fired.

The missing portions in P.W.2's evidence are filled in by P.W.4 Trooper Monyalotsa who said after parting company with accused who was with P.W.2, he retraced his steps only to meet with deceased who appeared to be making for the place where accused and P.W.2 were. Deceased asked P.W.4 why he appeared to have sustained an injury in the eye, whereupon P.W.4 told him that he had been assaulted by accused who by then was not too far from the two. There and then deceased urged P.W.4 to go along with him to accused to inquire why accused had assaulted P.W.4. Apparently P.W.4 had told deceased that in an earlier inquiry about why accused had assaulted him the latter had vouchsafed him no satisfactory reply. This must have fuelled deceased's indignation at; and disapproval of accused's behaviour.

Much was made by the defence of the fact that at P.E. P.W.2 did not say he saw accused put back his gun.

/The

The relevant portion in the P.E. shows P.W.2 as having said at page 4

> "I did not notice when the accused pulled out the firearm. After the firing the accused left for Phaphama".

Regard being had to the fact that P.W.2 was being led in the court below and also to the fact that two lines earlier P.W.2 had said

> "The accused shot the deceased with a pistol 7.65 calibre,"

the concession that P.W.2 made in this Court that he "may have left that out" seems to me to be an over-concession for in this court he was not asked at what stage he noticed that the weapon used was a pistol 7.65 calibre. That he made mention earlier of the fact that the weapon used was the one he described renders his explanation acceptable as true.

Indeed the question that followed puts this point beyond dispute:

> "At P.E. you said accused shot deceased with 7.65 calibre pistol - ?
>
> Yes I said that.
>
> Did you see it was 7.65 when he shot him -?
>
> I estimated it to be, owing to its size."

No way then can it be sincerely contended that in saying he saw this weapon after the shot had been fired P.W.2 was bringing in new evidence which might not be true.

The thrust of P.W.4's evidence concerning his accompanying the deceased to the spot where they found accused and P.W.2 some time after he had left them seems to be that he wanted to furnish proof to deceased about accused's strange behaviour that when asked why he hit P.W.4 in the eye earlier at Sekila's bar he adopts a fighting attitude.

P.W.4 testified that his relations with accused had

/before

before the incident been harmonious. Hence his interest to get to the bottom of accused's curious behaviour. Indeed the fact that P.W.4 did not fight back immediately after he got hit by accused seems to lend support to his assertion that he was puzzled by accused's attitude. It also reduces to nothing the suggestion that he was later bent on joining forces with deceased in order to attack accused physically.

There is however a discrepancy between P.W.2 and P.W.4 as to what preceded the commotion that took place outside the beer-hall concerning the woman who had been in the company of these men as they were drinking. I have already outlined P.W.2's version of the incident.

P.W.4's version is that while he and P.W.2 and Nkune were drinking the strange man referred to above arrived and joined them in drinks. Two women who were also unknown to P.W.4 came to the drinking group. The stranger gave money to one of the women to buy liquor for the group. She did not return the change. Consequently a squabble arose. Thereupon Nkune approached her and ordered her to return the money. She denied having withheld the stranger's change. She made for the door and was overtaken by Nkune who tried to arrest her outside. P.W.4 followed Nkune to give assistance. P.W.4 found Nkune outside holding the woman by the jacket. P.W.4 helped hold her by the jacket on the other side; but the woman gave them both the slip with the result that they remained holding the jacket as she escaped into the night.

When P.W.4 turned his head he suffered a full blow delivered to his eye. After a momentary punch-drunkenness he realised it was accused who had just hit him for even then the accused was being restrained by Nkune P.W.2 and the stranger from further assaulting P.W.4.

P.W.4 did not there and then ask the accused why he had hit him because, according to him, there were too

/many

many people around just then. Indeed one would expect many people to have gravitated to this place of double incident involving use of physical violence happening in close tandem or almost simulteneously in and around a beer hall on a festive Moshoeshoe's Day. One would thus be entitled to think that asking accused about his behaviour there and then and in full glare of the ordinary drunken public would cause a further flare-up of violence. Therefore there seems to me to have been good reason for P.W.4 opting to question accused about the assault in the relative calm of a good distance away from the maddening crowds.

Evidence shows that these policemen who were involved in the incidents were colleagues stationed at the time in Caledons' Spoort police post on the Butha-Buthe Orange Free State border.

It seems that earlier on the day in question D.W.3 one Phera a Lesotho businessman before crossing into the Republic of South Africa had occasion to deposit his pistol with police at Caledon's Poort. This gun went missing when he came to collect it because P.W.4 had wrongfully taken it away. Police were able to retrieve it from him the following day. His explanation for having taken it away was that the key to the armoury/locker where it was required to be kept had been taken by someone who did not return it, thus P.W.4 felt the gun would not be safe if kept outside the locker at the police post.

Much was made by the defence about P.W.4's unlawful possession of this gun. The defence positively asserted that it was not the accused who fired the fatal gun shot but P.W.4.

But as pointed out earlier P.W.2's evidence on the point is irreproachable. Moreover P.W.6 W/O Khobatha's evidence based on the explanation made to him by the accused shows it became unnecessary for him to follow the red-herring across the trail posed by this gun of D.W.3.

/P.W.6

P.W.6 was not asked to elaborate on the contents of the explanation made to him by the accused hence an inference follows that pursuing that line might bring more damning revelations against the accused than had been intimated by P.W.6. For his part accused's evidence favours that of P.W.2 as to the events that triggered off the series of incidents preceding the firing of the fatal shot.

However he denies that he hit P.W.4 with a fist in the eye or anywhere. He denies that he shot the deceased. He calls in question the fact that P.W.2 never at P.E. said he saw him put back his gun after firing.

He explained that when the commotion spilt out of the beer hall he found P.W.2 and Nkune holding a woman. He advised them not to assault her; but rather to give her a charge if she had contravened the law. However P.W.4 did not pay any heed but continued assaulting the woman whereupon accused pushed him aside in order to make him stop the assault on the woman.

He then asked the woman and the stranger to report at Charge Office the following day.

Thereafter he left in the direction of his home in the company of P.W.2. Along the way they found deceased on left side of the path and P.W.4 on the right.

After passing them P.W.4 approached him and stood in front of him and asked accused if P.W.4 was the only person fit to be reprimanded at Sekila's. Accused told him that he had been unruly. P.W.4 was in a fighting mood. Then deceased said

> "Man Lenka you can't answer this man this way. You are a Seargent at the Charge Office not in the street. I am not Monyalotsa I can take the S... out of you together with your gun".

The accused then questioned deceased's involvement in the matter. The latter told him he could do what he

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liked. Saying so the deceased appeared to be coming at the accused. P.W.2 restrained him. Then P.W.4 also said

> "you think you have that small gun. We also have our guns."

P.W.4 produced a gun and pointed it at the accused.

A pause here. I heard the evidence of witnesses for the Crown namely P.W.2 and P.W.4. At no stage was it put to either of them that P.W.4 pointed a gun at the accused. Accused conceded that much. A question arises if indeed what accused alleges P.W.4 did is true shouldn't it have been put to him? Indeed accused further conceded that the purpose of cross-examining witnesses is to afford them an opportunity to admit or deny the version put to them.

I may go further and say the rationale behind this purpose is to avoid the criticism that the party who fails to put his version to the other side is fabricating. Even allowing for the latitude afforded in Criminal trials an omission of the kind manifested in this case and conceded by the accused is most telling for it relates to a very important aspect of his defence. See Phaloāne vs Rex 1981 LLR. at 246 by Maisels P as he then was. On this ground accused's veiled attempt at seizing self-defence at this late hour is flawed as a mere after-thought or fabrication.

I am not unmindful of Schutz P's warning against adoption of the unwholesome practice of hip and thigh smiting of an accused person in circumstances where the fault of failure to put pertinent questions to opposing witnesses lies with his counsel. See C. of A (CRI) No. 2 of 1983 Letsosa Hanyane vs. Rex (unreported) at 7.

To put things in their proper perspective, I recall distinctly that after much skirting by the cross-examiner of the question about what became of the gun that was taken away from the police post by P.W.4, I asked this witness whether when deceased said accused

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should put down his gun, he himself had put down his. He answered that deceased had none in his possession to put down. As a natural follow-up to this question prompted by the nature of the answer I asked conjecturally or testily if P.W.4 put his own gun down. He answered that he did not because he did not intend using it. It was then that it dawned to all in the court room that P.W.4 had after all a gun in his possession during the squabbles which took place in his presence that night.

It is this gratuitous concession that must have emboldened accused to go a step further and say P.W.4 produced the gun and threatened to shoot him with it. But as I said earlier this was an afterthought. So many fishing questions had been put to the crown witnesses that, were it part of the accused's defence that a positive move was made to threaten him with a gun it would not have escaped the cross-examiner's attention to challenge the Crown witnesses with it. Hence the inference that this obviously important fact was not put because it must have been known that it would be denied as false.

I concluded therefore that this gun played no role in the affair. P.W.2 would have seen it if it played any role because at all times he was coming between any one of the combatants who confronted the accused. Moreover he struck me as a reliable witness. That P.W.4 did not try to hide the fact that he had this gun all along places him in no less a position of honesty and reliability.

Then accused's story goes that P.W.2 went to where accused and P.W.4 were and invited accused to join him on their way home; telling accused that "these people can't be separated".

P.W.4 and deceased came following accused and P.W.2. Deceased blocked accused's way and said he couldn't do a thing. Monyalotsa who was on the war path

/was

was last seen by accused coming behind the accused. Thereafter accused heard the explosion of a fired gun. He did not know what direction it came from. He felt he was in danger he being aware deceased had been shot.

Accused said he never fired his gun that day.

It is incredible that if deceased was standing in front of accused blocking his way a gun shot possibly coming from P.W.4 whom accused said was shortly seen coming from behind him when the sound went could hit deceased who must have then been shielded by accused. More incredible is the suggestion that P.W.4 could have fired his gun without realising that because of the proximity between the accused and the deceased in trying to hit the accused he might hit the deceased or even P.W.2.

P.W.4 had exercised enormous restraint against use of the gun when he was hit in the eye with a fist. An additional restraint was that the gun was not his and should have been at the Charge office at Caledon's Poort. The fact that relations between him and accused were good is borne out by the fact that he used to jog together with him and they stayed together. The suggestion that when he wrongfully took this gun from his post was so as to use it in attacking the accused is very absurd indeed, for how would he have known at that time that either a woman would search a sleeping man or refuse with his change with the result that in his attempt to arrest her accused would hit him in the eye and become vicious when later asked why he did so etc...?

P.W.4's story that he was puzzled by accused's behaviour is strengthened by the fact that shortly after accused manifested his vicious behaviour towards the deceased he left hoping to find his girl friend but failing her, proceeded back to the Hotel.

P.W.3 Lt. Telukhunoana a member of the Royal Lesotho Mounted Police, who has undergone considerable training in the examination of firearms both in Lesotho

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at Lerotholi Technical Institute and overseas i.e. Dublin and London where he was trained as an inspector by first the Irish forensic science laboratory Institute and secondly by the guns laboratory personnel in London, testified that on 29-3-88 he examined a 7.65 Walter pistol brought to him by P.W.6. He found that it had been fired but could not say how recently. He came to the conclusion that the gun had been fired because of the presence of gun powder residue yielded through the tests he subjected the gun Ex.1 to. The accused said relations between P.W.2, P.W.4 and himself were warm. Asked why then these witnesses would falsely incriminate him he said "they did not observe."

Asked further why they wouldn't observe yet one saw him while the other felt his fist he said "They did not observe for I did not do that." I may dismiss this explanation as an engrossing lesson in obscurity.

Bewildering still is accused's story that after the sound of the gun and the firing of the shot which he has cause to believe was meant for him save that it hit the deceased whom he saw was hit, he (accused) decided to move away even though he did not know where the sound emanated from. If he did not know where the gun was fired from didn't he by moving away run the risk of moving into the source from which the firing came? How is this statement reconcileable with accused's assertion that he had last observed that P.W.4 whom he maintains fired the shot, was coming behind him shortly before the shot was fired? If that is to be believed why shouldn't his common sense prevail on him to draw away in a definite fashion from where he had last seen P.W.4 whom he suspected of having fired the shot? Strangely enough and in a manner that strengths P.W.2's version accused says he did not see P.W.4 around the scene immediately after the shot was fired.

This indeed is in my view just a ploy calculated at giving support to the contention canvassed on accused's behalf that due to the nature of the entry wound the

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shot must have been fired a considerable distance away from the deceased by P.W.4 who took advantage of that distance to melt into the night once he realised the enormity of his error and observed that his aim had gone sour with the result that he hit an ally instead of a rival.

I accept P.W.2's version that he was standing next to the deceased when the latter got hit and immediately leaned on P.W.2 as the result. Therefore no theories in trajectories, unsupported by any palpable evidence can surpass a reliable eye witness's account that the gun was fired some three paces away from the deceased. The submission therefore that it was P.W.4 who fired the fatal shot is based on a distortion of facts in the first instance.

P.W.2 said accused shot the deceased. P.W.5 Trooper Molibeli said deceased said accused had shot him. Thus deceased could not have said accused should put his gun down unless he had seen it or done something to show not only that he had such a gun but was ready and threatening to use it on him.

Accused said he had last fired the gun about a month before the incident and that he is in the habit of cleaning this gun and had cleaned it when last he fired it. The gun is accused's personal possession and not his employer's.

Asked how he explains that when examined on 29-3-88 this gun had gun powder in it; he said "I am surprised about this matter."

Needless to say it was never put to crown witnesses that they fired the gun "Ex.1" in the interval between their seizure of it and the time it was subjected to tests. Thus there is no basis for accused's suggestion that they fired it for purposes of incriminating him with the gun powder in it revealed by the tests.

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There is authority for the view that an accused person who lies in giving evidence does thereby strengthen the case for the crown.

I was referred to Ex.A2 the occurrence Book kept at Caledon's Poort police post and Ex.3 the "firearms Register."

A question put to Crown witnesses was that a page relating to the register of Ex.1 on 12-3-88 had been removed.

My examination of this book shows that whatever pages preceding 14-3-88 including those slightly appearing on the stump as at 19-9-87 have been removed or torn off.

It would in my view, in the face of so many pages covering so many dates, be absurd to suggest that all of them were removed in order to suppress information which in this case would incriminate P.W.4 instead of the accused because whoever removed the pages may have done so to suppress information relating to any other matters besides D.W.3's gun.

Furthermore D.W.3 never complained that any of the bullets he had deposited with his gun were missing. Nobody confronted P.W.4 with the possibility that he did not return the total number of bullets he had taken. He said he had taken five and he did return five. Exhibit A2 shows that eight bullets had been deposited. But D.W.3 does not remember how many had been and how many he received. Possibly, if they had been eight as the occurrence Book shows P.W.4 took only five out of them or the other three were taken by somebody else or even misplaced because evidence shows they could not be kept in a safe place for the key to it was not available at the time.

My assessment of the evidence as a whole shows that on material facts, barring minor discrepancies the crown witnesses are to be believed. It is not necessary to treat the case as one that turns on circumstantial

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evidence because as shown earlier the evidence of P.W.2 as to the shooting is direct, in that immediately after hearing the gun sound he observed accused returning the gun to his pocket. This is the direct and material portion of the evidence which I accept and therefore reject accused's version that counters it.

It was urged on me to acquit the accused from the charge or to give him benefit of the doubt. But there is authority for the view that

> "an accused's claim to the benefit of doubt must not be derived from speculation but must rest on 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."

See R vs Mlambo 1957(4) SA. at 738.

Furthermore with regard to the standard of proof in Criminal Cases it is authoritatively stated that

> "it need not reach certainty, but it must carry a high degree of probability ...."

Thus

> "If the evidence is so great against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence (of course it's possible but not in the least probable), the case is proved beyond reasonable doubt ...."

See Miller vs Minister of Pensions (1947) 2 ALL E.R. at 373.

Mr. Mokhobo referred me to CRI/T/67/88 Rex vs Ntlhola (unreported) at 12 where in relation to intention which is a requisite element in the indictment for murder this Court said

> "It is clear therefore that in using the weapon in a manner that accused did he must have appreciated that it would cause death. If he did not, then in wielding it he must have done so without regard to the consequences

/that

> that the use of this weapon might bring about."

But credible evidence showed that deceased was angry with accused. Needless to say accused who was a Seargent was the most Senior person in rank to P.W.4 and deceased who were confronting him and P.W.2 who was trying to stop the confrontation and possible reaction of the accused thereto.

The confrontation by deceased of a man senior to him coupled with a challenge to a duel on the back of which were insolent utterances manifested the type of behaviour which in our law amounts to provocation. Our Criminal Law (Homicide Amendment) Proclamation No. 42 of 1959 in section 4(a) defines provocation as follows:-

> "The word 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care ...., to deprive him of the power of self control and to induce him to assault the person by whom the act or insult is done or offered."

No submission was made to the effect that accused was provoked but abundant evidence bears this out. In any event such submission would be out of place where accused denies having fired any shot at all. Consequently for purposes of this inquiry the court was left to its own devices. While on the one hand one cannot play down deceased's and P.W.4's genuine and understandable sense of grievance and indignation which caused them to approach the accused in legitimate anger one should not, on the other hand, lose sight of the likely negative response that would ensue on deceased's effing and blinding at the accused, coupled with deceased's cocking a snook at accused's authority as a Sergeant, therefore a man senior to any of the policemen who were at the place.

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It should also be rememberdd that accused had given a warning to deceased that he would not want to have anything to do with him because accused knew the deceased to be contemptuous. No sooner had this warning been given than did the deceased act up to his reputation.

Thus words which were per se insulting were uttered at accused, almost to his beard, and were coupled with an invitation to a duel; all in the hearing and full view of accused's subordinate by a subordinate.

Sub-sections 3(1) and (2) respectively read

3(1): "A person who -

(a) unlawfully kills another under circumstances which but for the provisions of this section would constitute murder; and

(b) does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool, is guilty of culpable homicide only.

(2) The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation."

It would not be stretching the principle contained in the above law too far to find that sudden provocation would occur when the fight which so to speak was P.W.4's but was abandoned by the person affected, nevertheless was renewed by a different person who followed accused when he was on his way home. Indeed accused said in giving evidence he asked P.W.4 and deceased

"Are you still pursuing me?"

further he asked deceased

"What is your involvement here" meaning

"What stake have you in this matter"?

Common experience bears abundant witness to the annoyance that arises when a man is not able to keep his breath to cool his porridge. The attendant utterances

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only helped flip accused's lid.

Our law with regard to provocation is in keeping with the Transkeian Penal Code which is in contrast to the South African Common Law. It is for this reason that it is dangerous to follow South African case law in this respect for as Schreiner J.A.'s decision in R vs. Krull 1959(3) 392 at 399 shows:-

> "Under our system it does not follow from the fact that the law treats intentional killing in self-defence, where there has been moderate excess, as culpable homicide, that it should also treat as culpable homicide a killing which though provoked was yet intentional. Since a merely provoked killing is never justified there seems to be no good reason for holding it to be less than murder when it is intended."

This Court has drawn attention to the dangers in other cases of following South African case law slavishly even where our own statutes provide differently. See Review Case No. 717/86 R vs Thosi Andreas Molebatsi (unreported) at 6 where it is stated:-

> "The Superior Courts of Lesotho have relied and do rely on South African authorities. This is a wholesome practice. But it ceases to be so if even where Lesotho's own statute on a specific point, differs from South African's Lesotho's statutes should be applied to case law in the same manner as South African authorities are bound ....".

See also page 8 concerning the disapproval of "blind and unwary" pursuit of the South African authorities. See also page 9 concerning the fact that results emanating from two different sources can never be the same.

It is for this reason that I find that I should with respect distance myself from Mapetla C.J.'s holding based on KRULL above that in Rex vs. Lebohang Nathane 1974-75 L.L.R. at 69

> "The use of the expression "means and includes" in the definition suggests that it was not the intention to exclude the common law concept of provocation."

/Not

Not in so many words Krull seems to acknowledge that the intention in the Transkeian Penal Code was to exclude the common law concept of provocation. Otherwise it is impossible to see what remedy was intended in the common law.

Furthermore it seems to me that the purpose of section 3(2) of the above Proclamation is not self-defeating because in the event that the court finds that reliance on provocation is either fanciful or that the act which causes death does not bear a reasonable relationship to the provocation, then the Court can reject any reliance on that section and resolve the matter on consideration of available defences.

Equally I am not, with respect, inclined to the view propounded by Cotran C.J. in Rex vs 'Makhethang Setai 1980(2) L.L.R. at 378 that

> "The law, at any rate since R vs Krull 1959(3) SA. 392 seems to be clear viz. that provocation does not reduce an intentional killing to culpable homicide."

The statute says it does.

He goes further to say:

> "Upon a charge of murder where there is evidence of provocation only one inquiry need be made, viz. did the accused subjectively intend to kill? If the answer is in the affirmative it will be murder, possibly with extenuating circumstances. If the intention to kill was negatived by the provocation, it may be culpable homicide."

All this merely shows that the train had left the metals.

Were it not for the fact that our Proclamation makes a difference between the effect of provocation as it bears on common law on the one hand and on factors envisaged by the provocations of that Proclamation, no doubt because clear intention can be gathered from the weapon used and the part of the body at which the

/assault

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Equally I am not, with respect, inclined to the view propounded by Cotran C.J. in Rex vs 'Makhethang Setai 1980(2) L.L.R. at 378 that

> "The law, at any rate since R vs Krull 1959(3) SA. 392 seems to be clear viz. that provocation does not reduce an intentional killing to culpable homicide."

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All this merely shows that here the train had clearly left the metals.

Were it not for the fact that our Proclamation makes a difference between the effect of provocation as it bears on common law on the one hand and on factors envisaged by the provisions of that Proclamation on the other hand, no doubt because clear intention can be gathered from the weapon used and the part of the body at which the

/assault

assault was directed, the crime committed would be murder; and the authority of Krull would hold sway.

In deferrence to the provision of the Proclamation above I consequently find that accused is guilty of culpable homicide on the basis of provocation. The gun is forfeited to the Crown.

Accused is sentenced to eight (8) years' imprisonment of which two (2) are suspended for three (3) years on condition that he is not convicted of a crime committed during the period of the suspension and of which violence to a person is an element.

J U D G E.
5th May, 1989.

For Crown : Mr. Mokhobo
For Defence : Mr. Mphalane.