CRI/T/59/88

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

THEMBINKOSI YAWA

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 9th day of June, 1989.

The accused was charged with the murder of Tlhabeli Matabane who received injuries at Central Hotel in Qacha's Nek on the evening of 11th September 1987. He later succumbed to those injuries some few days afterwards. He had been transferred from Qacha's Nek Government Hospital to Queen Elizabeth II Hospital by plane on 14-9-87.

Accused pleaded not guilty to the charge.

The evidence of the following witnesses at preparatory examination was admitted and made part of the proceedings in the instant trial; viz:

P.W.8 Copral Matabane
P.W.10 D/Tpr. Lepheane
P.W.12 Letuka Matabane.

Although the defence had stated that it admitted the evidence of P.W.2 Dr. C.T. Moorosi, the crown refused to accept the admission. Consequently this witness gave viva voce evidence and was in due course cross-examined.

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In an endeavour to discharge the onus placed on it the crown led the evidence of two eye-witnesses, namely P.W.5 Motlatsi Rajele and P.W.7 No. 4771 Detective Policewoman Phafoli.

P.W.5 is the proprietor of a hotel called Central Hotel situated in Qacha's Nek. A short distance away from the main hotel there is also a drinking place called the White House also owned by P.W.5. The deceased was P.W.5's employee. Beer and refreshments are sold at the bar in this hotel as well as at this out-building known as the White House.

There is a big discotheque hall measuring about seven paces in breadth and fifteen paces in length at the Central Hotel. The hall is lit with four electric lights. In most days music lovers, dancers and general members of the public including members of the police force attend the disco on payment of a fee per person.

On such days the management of the hotel usually provides security from the police force in order to ensure that takings at the door are not spirited away by rowdy and unruly elements who go there under the guise of coming to enjoy amenities offered by the business.

However there are days once a week when the disco facilities are offered free of charge. On such days great crowds of people are drawn to the disco, no doubt fuelled by hopes of making the most of the free enjoyment of benefits offered there. Most ironically, it is during evenings of such days as was the case on the evening that deceased met his death, that the management never bothers to call in aid members of the police force to take specific charge of the security against elements who might endanger the safety and lives of disco-goers.

It was when P.W.5 was at his hotel in an empty discotheque hall at about 5 p.m. or 6 p.m. that he met with the accused who had an open knife in his hand.

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The knife, believed by this witness to be a clasp knife was in fact a flick-knife or switch knife which is the type whose blade springs out of the handle at the pressing of a button according to D.W.2 Tsautse Chaka's evidence. P.W.5 had only seen its blade and in his estimation it could measure up to five inches in length.

P.W.5 further testified that even though he was seeing accused for the first time, he appeared to be in a fighting mood for his brows were knitted and his utterances were not peaceful in that he was saying

> "I have come to cure the lunatics in this place Qacha's Nek."

P.W.6 Tumane Selimo repeatedly stated that at the stage where he himself had occasion to come into contact with the accused the latter was uttering the words alluded to by P.W.5 and that accused was further saying he had observed that "these boys of Qacha's Nek are full of s..."

Apart from a boy Pallo whom P.W.5 had met on his entrance at the door there were only accused and P.W.5 in the hall. Thereupon P.W.5 asked the accused why he was going about with an open knife. Accused's reply was that he had come to cure the lunatics at Qacha's Nek.

Thereupon P.W.5 referred a policeman Makhetha to the accused who was still armed with an open knife. P.W.5 then let the matter be and resumed his usual day to day routine of selling liquor in the bar. Accused and Makhetha seemed to be talking for a good part of an hour while seated somewhere at a corner in the same bar.

At the end of or during the conversation accused was no longer holding the knife. But P.W.5 could not hear the conversation owing to the distance hence was unable to say if it was interspersed with violent or

/peaceful

peaceful words.

After some time P.W.5 left the bar for the disco hall where at about 7 or 8 p.m. music was playing and hotel frequenters were dancing.

He stood at the door on a raised place towering some one half feet above the dancing floor. From this elevated position P.W.5 commanded a good view of the interior of the dancing floor.

There and then P.W.5 saw a knife drop from the accused who was next to the deceased. Deceased was standing leaning against the wall with his arms folded. He was carrying nothing in his hands.

Then Tsautse D.W.2 picked up the knife and handed it to the accused. Two or so minutes afterwards P.W.5 saw the accused executing with his knife what appeared to be sweeping movements around the deceased's face. P.W.5 was about seven paces away from the two when this happened. The lighting was good and came from four electric lights.

The deceased ran away towards the opposite wall described as the lower side of the hall. It was while deceased was running away thus that P.W.5 saw the accused stab him at the back with a knife.

Prior to the stabbing there had been no appearance to P.W.5's observation of an altercation or a quarrel between the accused and the deceased.

P.W.5 said he could have heard or even observed if there were any such. Accused stabbed the deceased once more during the latter's flight. Consequently the deceased fell on a girl called Nthabiseng who was sitting next to the wall. Accused stabbed him again at the back.

P.W.5 went to his office intending to fetch a stick with which to fight the accused.

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On his way back he met with the deceased whose white dust coat was drenched with blood at the back.

P.W.5 took him to hospital in a vehicle. The deceased seemed to have been affected by the injuries because even though he could walk on his own he did not walk steadily.

The accused had disappeared from the scene at the time. At least three witnesses who knew deceased well have told me that he does not drink.

P.W.5 testified that accused did not appear drunk.

P.W.7 corroborated P.W.5 on all material respects. She said she saw accused whom she was seeing for the first time that evening stabbing the deceased three times with a knife.

The accused after chasing the deceased across the dance hall, full of people though not congested, disappeared through the door and P.W.7's attempts at tracing and arresting him were thus thwarted.

She had seen someone push the accused outside the door on the lower side of the hall and appear to cause the accused to make good his escape.

It is on the basis of the version of these two witnesses that Mr. Thetsane submitted that despite suggestions by the defence that these two witnesses didn't see anything they were adamant that they saw.

Indeed the defence witness D.W.2 supports P.W.5 that the knife fell from the accused prior to the incident and was picked up and handed to the accused by D.W.2 himself, Tsautse.

The crown sought to establish that there was a direct causal link between the inflicting of the injuries on the deceased and his subsequent death.

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In this regard the crown relying on its witnesses pointed out that undisputed evidence showed that deceased was admitted at the hospital at Qacha's Nek on the same night he had sustained the injuries i.e, 11-9-87.

The doctor attended to him the following day.

Indeed the tenor of P.W.11 Dr. Nolting's evidence is that when he treated the deceased he had already been sutured by a sister. Relying on his experience the doctor attended the deceased to determine if the blood pressure was normal and it was. Thus the condition of the patient was stable. But the patient complained of continuous pains whereupon P.W.11 gave him some pain killers. The doctor was satisfied that the deceased was ready to be discharged on 14-9-87.

However at the time of discharging him he observed that deceased's condition was deteriorating whereupon he decided to transfer him to Queen Elizabeth 11 Hospital in Maseru because available facilities at Qacha's Nek were either limited or plainly out of commission at the time.

Mr. Thetsane conceded that the Crown did not lead evidence to show what type of treatment deceased whilst still alive received on arrival at Queen Elizabeth 11 Hospital in Maseru. But in an endeavour to establish the causal link between the stab wounds and deceased's death he relied on the evidence of P.W.2 Dr. Moorosi who performed the post mortem examination on the body of the deceased.

P.W.2's evidence was that he observed that one of the stab wounds penetrated the pleural area housing the lungs. No lung was punctured though the instrument used to effect the injury had penetrated the body cavity.

The body had three wounds at the back. Only one had penetrated the cavity.

/Asked

Asked if (under cross examination) mere penetration could result in death Dr. Moorosi promptly took exception to the pejorative use of the word "mere" in framing the question. He stated that penetration cannot be described as mere because immediately when the skin is broken germs are deposited on the raw flesh and if an instrument used is not sterile then an accumulation of the germs may cause infection which may lead to death.

P.W.2 observed hematoma around the left kidney and adrenal gland. He also observed extensive bleeding under parietal pleura opposite the 8th to 10th ribs along the wound as shown in the sketch. This wound is on the right posterior aspect of the trunk. P.W.2 further observed diffuse hematoma on lower part of the posterior aspect of the lower lobe of the right lung accompanied by greyish exudate on pleura. He also observed presence of severe congestion on both lungs.

The peritoneal cavity contained roughly 500 ml of sero sanguinous fluid.

The effect of congestion in the lungs was said to have led to failure of the heart to pump blood resulting in the failure of that organ to maintain the circulatory system in a condition that could sustain life.

It was therefore P.W.2's opinion based on his examination of the body of the deceased that death resulted from the effect of the wounds referred to above.

Asked if it is possible for a person to die after a long time following the factors he outlined in his evidence P.W.2 said it is possible for a person to die after a few minutes, hours or even days. He stated that it is not unusual for a person to live for a long time without dying because suddenness of death depends on how much blood collected in the body cavity.

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The crown accordingly submitted that accused is to be found guilty of murder for had he not inflicted the injuries deceased would not have died. Having made this submission Mr. Thetsane for the crown was quick to submit further that the onus rests on the Crown to exclude actus novus interveniens. See R vs. Sekati 1980 (1) LL.R. at 214.

At page 216 of Sekati above under 3 is said regarding causation :

> "Where x assaults y and causes him injuries (and) then y is admitted at a hospital where he eventually dies, x on a charge of murder contends that the death of the deceased had not been caused by the injuries he had inflicted upon y but by the medical treatment which y received after his admission at the hospital. There was medical evidence as to the treatment y received at the hospital; there was evidence, also, as to y's cause of death. It was held that x who inflicts injuries is not entitled to expect that y will receive medical attention or such attention as is available, he is not entitled to escape responsibility for y's death if that attention is unsuccessful in saving y's life. However, there must be evidence to exclude the:'possibility of incompetence or negligence or dereliction of duty of professional medical men'....."

per Cotran J. as he then was in Rex vs Tlali & Others CRI/T/27/74 (unreported) at 17.

The crown sought to persuade the court to distinguish the instant case from that of R vs Ntloana 1967-70 LL.R. 48 at 58 where Evans J. observed that

> "..... furthermore, in the absence of medical testimony there was nothing to satisfy the court that the hat or 'doek' snatched from the head of a woman by Teboho Baholo was not itself a source of the infection which could have been the actual cause of death although probably most unlikely. Then there is the question again of a further actus interveniens as it appears that an operation was performed on the deceased at the Maseru Hospital presumably to remove the bullet; but no medical evidence was

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> called by the crown, which was most essential in order to indicate whether, in fact, a nova causa did arise and was the actual cause of death; or whether the actus interveniens had no connection with the subsequent death of the deceased."

Thus Mr. Thetsane submitted that unlike in Ntloana where a layman tried to staunch the flow of blood, in the instant case a nursing sister applying her techniques obtained through training sutured the stab wounds. Thus it cannot be said she did not use sterile instruments in suturing the wounds.

The crown relying on P.W.11's evidence that it is not unusual for a patient to be treated by a nurse, submitted that in this case the patient was treated by a more qualified person namely a nursing sister who, however, did not testify.

The crown reposed a lot of reliance on the fact that after treatment the patient's condition satisfied P.W.11 that it had become stable. Further that P.W.2 indicated that the type of stitching used to suture the wounds, together with instruments i.e. forceps used ruled out possibility of infection resulting therefrom because they were sterilised. On the other hand accused's knife was not, and could not have been, sterilised.

The crown further indicated that the submission by the defence that P.W.11 should have entertained fear that infection might affect the wounds was goundless in the light of the fact that under cross examination there was not even the slightest suggestion that death might have resulted from negligence of those who treated the deceased.

In R vs. Du Plessis 1960(2) SA. 642 it was held that

> "Where a wound is inflicted and the person is placed in the care of a medical practitioner and the person dies, then the person who

/inflicted

> inflicted the wound is responsible for such person's death unless the medical practitioner by his negligent or intentional act introduced a nova causa which is actually the cause of death. The causal connection between the infliction of the wound and death which resulted is broken thereby. Where there is no nova causa introduced from the outside by a third person and the death results as a natural consequence of the infliction of the wound ..... then the person who inflicted the wound was the cause of death ....."

A different position is illustrated by R vs Motomane 1961(4) SA 569 (WLD). In giving a summary of the facts in this case Evans J. in Ntloana at 57 said:

> "The accused on a charge of murder, stabbed a woman with a knife. He had injured a vein but the bleeding had stopped, a clot had formed and the woman would probably have recovered in the ordinary course. But the course which would probably have led to a natural recovery had been interrupted. A medical practitioner had decided to operate - a prudent decision but not a necessary one. The clot had been disturbed and the woman had bled to death."
>
> "Held, that the causal chain had been broken and that the Crown had failed to prove that the accused was responsible for the death of the deceased.
>
> "Held, further that the accused should be convicted of assault with intent to do grievous bodily harm."

Even without paying much attention to the speculative evidence by P.W.2 about the effect of infection that accused's knife could have had, and his exclusion of germs that might have been introduced into the wounds by the nursing sister who sutured them, I am of the view that his testimony that a 500 ml mixture of blood and water fluid could with the passage of time cause heart failure which might result in death, is satisfactory. P.W.2 said the suddenness of death would depend on how much blood had collected in the body cavity.

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It would seem therefore that the suggested and conjectural fear that the nursing sister's intervention might have precipitated or caused the death while on the one hand possible is not in the least probable on t other hand. Hence, but for the wounds inflicted by the accused, the deceased would not have died.

Moreover in R vs Adams 1957 CR. L.R. 365 in his charge to the jury Devlin J, as he then was said:

> "Cause means nothing philosophical or technical or scientific. It means what you twelve men and women sitting as a jury in the jury box would regard in a common sense way as the cause."

Adopting the same attitude Cotran C.J. in Thabo Tsomela vs Rex 1974-75 LL.R at 99 said

> "I am unable to subscribe to the view that a court of law is precluded from coming to a conclusion about the cause of death by reason only that no medical evidence was available, or if available, was not satisfactory or not (scientifically) conclusive."

Referring to Ntloana above this Court in CRI/REV/1/86 Rex vs Mabilikoe & 5 Others (unreported) at 8 said

> "Evans J. ..... was basing his doubts on the role played by a lady who tried to extract a bullet from deceased's wound by inserting a finger into it. In other words novus actus interveniens was shown to be a positive act based on a demonstrable action by a participant whose attempt at bringing relief to the deceased could not be excluded as a new thing that caused the death of the deceased independently of the accused's initial act. In other words if sought to be relied on novus actus interveniens must be shown to have been an effective cause not imagined or invented."

At page 9 of the above case this Court observed that

> "..... It is indeed vain to speculate about causation to such an extent as to grab at any fanciful one in the process."

Rooi vs Regina P.H. weekly Legal Service, July-December 1952(2) H. 119 p. 242 heard by the

/Transvaal

Transvaal Provincial Division on Appeal laid down that:

> "A person who assaulted another has no right to expect that the latter would receive medical treatment to repair the injuries so inflicted. If death was caused by the wound, it was no defence to say that if a doctor had intervened, the natural result of the assault would have been averted ....."

The crown stressed that the eye witness P.W.5 emphatically showed that no hostile altercation between deceased and accused took place prior to the stabbing. While deceased was unarmed accused had a knife whose blade was exposed.

P.W.5 saw accused stab deceased with this knife even as deceased was fleeing to avoid the danger posed by the accused.

P.W.7 didn't see where the accused and the deceased were standing. She only saw accused chasing after the deceased and stabbing him during and after the flight.

Mr. Thetsane accordingly submitted that these witnesses' testimony has not been shaken or shattered.

He pointed out that the defence strained to indicate that these witnesses were either absent or did not see what occurred. He questioned this attitude by the defence and submitted that the only conclusion to be reached concerning why the defence is anxious to say these witnesses did not see is that they should be removed from the scene and discredited thus leaving accused's sole testimony to be tested against none.

Referring to the attempt by the defence to suggest that accused had reported to P.W.5 that some people had been taunting him and twitting him with being an alien and a Xhosa at the White House, the Crown submitted that P.W.5 on the contrary said when he first saw the accused the latter was brandishing and wielding a knife saying he had come to Qacha's Nek to cure the

/lunacy

lunacy among young men there who were full of S ....

Indeed it was my view that P.W.5 was a cool witness who suffered from no stage fright while giving evidence and being cross-examined. He narrated his story calmly; and could not be branded as deliberately incriminating the accused falsely.

Despite the searching cross-examination concerning why he did not pursue the matter which seemed to unsettle him when he saw the knife in the manner he described, P.W.5 stated that he drew the police attention to it and they asked the accused to stop causing trouble. P.W.5 was very candid. He readily admitted that his major concern regarding the invitation of police at his premises was to ensure not so much the security of the disco attendants as to ensure that the inflow of the takings beneficial to him was not interrupted.

Indeed even though P.W.5 did not see the policeman who was in private produce his identity card to the accused the fact that this policeman had seen that the accused was unruly and had an open knife with him absolved P.W.5 from further care and worry, for it was the policeman's duty to disarm the accused and cool him down. P.W.5 had done his part by handing the accused over to the police.

The defence argued that the crown had called in evidence a police woman who must have been told about the events but did not see any. Mr. Thetsane accordingly submitted that the crown is not so inexperienced in its conduct of the case as not to know that it requires first hand witnesses to testify. I agree with this submission and would go further to say there does not seem to be any basis for the view that the crown erred in calling P.W.7 to testify.

There does seem to be substance in the crown's observation that the defence seeks to remove crown

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witnesses from the scene so that what remains should be the accused's version, which, if it is successful, should be regarded as reasonably possibly true.

I have not come across any suggestion that P.W.7 for any specific reason was implicating the accused falsely. She testified that she saw accused for the first time that day. Accordingly she bore him no previous grudge. Her evidence is thus free from any stigma that on account of some previous differences she had with the accused, today finding him in circumstances of agony and travail, it is justifiable to suggest that she is having her own back. In short her evidence is without taint of vengeance.

In his defence the accused said that while at the white house he and his company consisting of Ntaote otherwise known as Moeti and one Tsautse D.W.2 were attacked by some four boys armed with panga knives.

The source of the attack according to the accused was that these boys found him sitting next to a girl and asked her why she was sitting next to a person who was alien in that area. She replied that she knew the accused. But the boys said

> "This man is a Xhosa. He has no right to bring the Transkeian cleverness here. This is not Transkei but Lesotho".

One of the boys lifted the accused by the shoulder. The accused fearing that his cloths might get torn rose to his feet. The accused brought to Ntaote's attention his fear that these boys might injure him. However Ntaote intervened and the accused together with his two companions i.e. Tsautse and Ntaote left for the Hotel. Along the way they met three people one of whom was the deceased who pointed at the accused and said "This is the boy who is full of s... and has been causing trouble."

Needless to say D.W.2 Tsautse denies all this

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version that was portrayed by the accused. Crown witnesses who testified i.e. P.W.6 denied that deceased had in any manner provoked the accused.

I have no hesitation in rejecting the accused's tale as a mere figment of his imagination.

Accused went further in his evidence to say that deceased's company tried to stop D.W.2. But the accused and his company left deceased there and his companions. When the accused reached the hotel he went into the bar getting in there through the door leading from the hall.

He met P.W.5 the hotel proprietor otherwise known to the accused as Montgomery and reported to him that he was being fought.

There is not much use really in pursuing this aspect of the accused's version about the report and the fight because it is denied not only by P.W.5 but by accused's own witness D.W.2 who denied that anybody in deceased's company tried to stop him.

The accused said P.W.5 did nothing about the report he had made to him. He contented himself with saying nobody would do anything to the accused. However P.W.5 acted on the information that accused gave to him about a dark-complexioned boy whom he pointed out as being one of those who had been pestering him at the White House. This he did by taking the boy to the other side.

Even at this stage it is impossible to find what story accused wishes to be believed between the two versions that he gave namely that P.W.5 did not do anything and that P.W.5 did something following accused's complaint to him. Furthermore P.W.5 was never taxed with the version under cross examination that he heeded accused's complaint by even taking the dark complexioned boy to the other side after accused had pointed him out to P.W.5.

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The accused further told the court that he went to the disco hall and joined in the dancing and beer-drinking. It was when he, Ntaote, Tsautse and others for whose drinks he had been paying were sitting, that accused saw six men coming to him at the corner where he had been sitting. These six men consisted of the deceased, the dark complexioned boy and four others. One of these six men tapped and shook cigarette ashes into the accused's beer. Two of these men were armed with Panga knives while deceased and the rest were armed with knives.

The accused's version is very difficult to follow. Despite saying in his evidence in-chief that deceased was the man who pointed at him and said he was full of S... and causing trouble he conceded to the suggestion under cross examination that he gave an impression that it was P.W.6 Tumane Selimo who was responsible for those utterances.

The accused conceded that it was never put to P.W.5 that he called P.W.6 following the fact that the accused had complained to P.W.5 about him. This serves merely to show that the accused is so thoroughly entangled in a web of his own making that he maintains any answer which he instantly invents would do despite its inconsistency with his own tale.

The accused said he was being tormented by boys with being a Xhosa. I may just make an observation though that he seemed to be more at home with a Xhosa speaking interpreter than a Sesotho speaking one who was replaced when it became obvious that he could not understand proceedings easily when conducted in Sesotho. Of course this is not to say he does not understand Sesotho. It does not mean that the court accepts that anybody attacked him and called him a Xhosa from Transkei. These are all things that accused has been shown to have imagined or invented.

He denied that he ever said within P.W.5's hearing

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that he had come to Qacha's Nek to cure the lunatics there. He denied that while saying so he was holding a knife with an open blade. He explained that P.W.5 implicated him falsely because he observed that the accused is now facing a criminal charge.

He conceded that it was never put to P.W.6 that P.W.5 called P.W.6 following accused's complaint to P.W.5 about P.W.6. He attributes the failure to put such a question to the witnesses to his lawyer.

I have no hesitation in rejecting accused's version as a mere fabrication. See Phaloane vs R 1981(2) LL.R. at 246. The accused further stated that one of the six men who came to him said

> "We shall stab you even while you are still seated if you don't stand up. This is Qacha's Nek in Lesotho if you don't know."

This utterance was in response to the accused's query about why cigarette ashes were being tapped and peppered into his drink.

There and then the men lifted accused by his shoulders. Deceased fetched the accused a slap in the face. The accused jumped.

It is important to give his version verbatim at this stage:

> "I jumped. I was holding a knife. I even sustained a stab wound on the left. It is still there. I don't know who stabbed me. It was one of them.
>
> I had no option but to stab whoever was near me. I did not know who it was I stabbed.
>
> I didn't know the deceased. I was seeing him for the first time. I didn't see who I stabbed. I stabbed the one who was in front of me when I was being fought by men who had stabbed me on the left arm.
>
> It is not true that I stabbed the deceased even when he was running away. I am only implicated for I didn't belong to that place."

In the light of the above verbatim account of the

/events

events as narrated by the accused, it becomes clear that Mr. Thetsane's remark that accused has denied the court a very import aspect namely how in the face of six men armed with deadly weapons accused managed to unclasp his knife and wield it so expertly that they all made way for him with the result that he was able to freely stab deceased three times, becomes pertinent. Accused says only God knows what happened.

Credible witnesses deny any attack on accused by anybody. D.W.2's evidence that accused 's knife was not a clasp knife but a flick knife accounts for the speed with which the blade sprang into action against the deceased. The accused did not tell the court that this knife was a flick knife even when asked how in the circumstances he described he could have managed among other things to unclasp it. A simple answer that the knife is a flick one instead of a clasp one would have thrown much better light on the issue because it goes without saying that unclasping a clasp knife requires far more elaborate effort and incurs much longer time than pressing a button on a flick knife to make the blade spring out.

It is noteworthy that the court learnt for the first time when the accused was in the witness box that he was ever slapped in the face by the deceased. Mr. Moorosi in argument tried to show that neither Crown witnesses nor D.W.2 was always with the accused throughout. But this argument in so far as it relates to events which took place in the disco hall runs counter to accused's own version. First because he included P.W.6 among the six men who attacked him in there. Next because D.W.2 denied that deceased ever slapped the accused in the face. Furthermore it was never put to P.W.6 who according to the accused was close to him when he was slapped in the face that in fact such a thing occurred and that by reason of his proximity to the participants at the time P.W.6 must have witnessed the event. See Phaloane above.

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It was only when accused was in the box that the court learnt for the first time that he was in the company of Ntaote and Tsautse in the hall drinking beer in a relaxed atmosphere as imagined and purveyed before this Court by the accused.

Mr. Moorosi in argument contended that P.W.11 even if he could be said to be competent in his profession was nonetheless negligent in that he failed to exercise his skill with competence. He pointed out that because there was possibility of infection caused by the germs on the weapon used to cause the wounds P.W.11 should have entertained legitimate fears and administered appropriate medication. Needless to state this question was never put to P.W.11. Classen J. in Small vs Smith 1954(3) SA 434 put it succinctly at 438 that :

> "It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case of 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."

The defence's submission is accordingly rejected on the score of absurdity. Needless to say, even as important an event as the allegation that accused was stabbed with a knife by one of the six men who attacked him was only heard for the first time when accused was giving evidence on his own behalf. This in my view is what would bring grist to the mill if it was at all true. The accused's lawyer would then have had no problem at all in putting it to the crown witnesses in order for the court to realise as early as possible in the case that it grounds the accused's defence. But it was not done.

I have no hesitation in rejecting this as an afterthought. Accused struck me as a total stranger

/to

to the truth.

I endorse the crown's submission that the court may not convict an accused person simply because the defence version is improbable. C.F. R vs Monyako CRI/T/7/75 (unreported) at 6.

By token of the same rule the court should look at the possibility of the defence version being true. Thus it should weigh the merits and demerits of either version and make a finding.

Presence of six men all armed with knives and bent on attacking the accused without prior warning while the latter was sitting and relaxing with friends, but being so outwitted and outmanoeuvred by the accused in the manner that he wishes the court to believe defies all reasonable probability.

The question put to P.W.5 under cross-examination was that to the best of accused's recollection deceased was one among those who had been taunting him. But in his evidence in chief accused is positive that deceased was in fact the man who even hurled abuse at him. Clearly P.W.5 was in this way denied as clear an opportunity as was desirable, of denying this subsequent positive version of the accused. C.F. Phaloane above.

I find that accused's story that he was stabbed in the front of his left shoulder in the encounter he outlined is devoid of all truth because credible evidence showed that no one but the accused was armed with a knife during the attack in the disco hall.

I reject his story that he even stabbed one of his attackers as a mere product of his fertile but wild and misguided imagination.

Describing the incident in the disco hall accused said when confronted by the six men he had no option but to stab whoever was near him. He thus stabbed somebody who was facing him. He stabbed him on right

/front

front arm. Thereupon the attackers stood aside and Ntaote arrived and said he and the accused should leave. After the people had dispersed to the sides accused ran away and noticed someone in front of him and statabbed him three times at the back as the latter was running away. Then accused ran outside. The accused was hard put to it to give a satisfactory answer to the question why he stabbed a man who was running away. He instead contented himself with saying he stabbed him because the man was fighting him. I reject this as totally nonsensical.

Mr. Moorosi strained in an attempt to persuade the court that there might have been circumstances which influenced the accused to behave as he did. Evidence showed that whatever those circumstances might have been, there was no palpable cause for his unlawful conduct. Any that existed was in his imagination. The accused said he had been drinking but was not drunk. P.W.5 said he did not appear drunk. D.W.2 said he wouldn't be able to say if the accused was drunk for though they are friends they lived apart for eight years. D.W.2 said even though he himself was drunk he was conscious of his own acts.

Since they had taken more or less equal amounts of drink it would not be wrong to resolve the issue in favour of P.W.5's observation of the accused's appearance.

Hence I agree with Mr. Thetsane's submission that ordinarily speaking surrounding circumstances in a case where there are eye witnesses are an incidental issue which is residual. Unlike in a case of circumstantial evidence where motive is to be supplied by the crown, in this case people who testified that they saw the events have been cross-examined. Hence the evidential burden shifts to the defence to say why incidents surrounding the event occurred. See CRI/T/37/88 R vs Ramatla (unreported) at 14. C.F. R vs Mlambo 1957(4) SA 728 at 737 that :

/"Failure

> "Failure to furnish absolutely convincing proof (of motive) ..... 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 ....."

Credible evidence showed that after being stabbed while fleeing from the accused, the deceased was stabbed at least once after he had fallen on the girl Nthabiseng who was sitting along the lower wall of the hall. The accused's version is not true that he completed the stabbings while deceased was still on his feet. A distinct feature worth mentioning is the accused's level of intelligence which, on all accounts, is very low indeed. For example when asked who the six people were who attacked him he said he did not know them, but that Tsautse appeared to know them. Asked whether he asked Tsautse about their identity he said he did not because Tsautse appeared to know them and instead he asked Ntaote because they were unknown to him.

Asked how he hoped to get their identity from a man who did not know them he said that's why he asked him.

He however conceded that it would be impossible for him to get their identity from someone who did not know them.

I am alive to the statement of the law by Hoffmann and Zeffertt in the 3rd edition of South African Law of Evidence at 409 that

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

I have no doubt that accused's version is false beyond reasonable doubt. In this view I am further fortified by the principle highlighted in CRI/T/17/88 Rex vs Phepheng (unreported) at 8 that there is

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> "in Broadhurst vs Rex 1964 AC 441 at 457 that save in one respect an accused who gives false evidence is in the same position as one who gives none at all and that in reaching a conclusion in a case where the jury can make two inferences the fact that the accused has given false evidence serves as a factor in strengthening an inference of guilt. Of course the onus rests on the Crown throughout to prove its case beyond reasonable doubt."

It was more or less in recognition of the above principle that Jacobs C.J. as he then was in CRI/T/80/71 Rex vs Moroka Mapefane (unreported) at 8 said

> "..... but an accused, giving evidence from the shadow of the gallows so to speak, should not and cannot be convicted merely because he is a liar. His lies might in certain circumstances sufficiently swing the balance against him ....."

I can hardly think of any reason why such circumstances can be said not to be reflected in the instant case

I am satisfied with D.W.2's evidence that accused was particularly rowdy that day. For no apparent reason he assaulted Pitso and Fuma whom he took to be soldiers because of their manner of dress. I learn that one of them was in fact a soldier while the other was not. D.W.2's narration of the events to the extent that they fell within the time frame of the incident described by the crown witnesses is not only reliable but most satisfactory. It disproves accused's story. D.W.2's evidence cannot be tainted with lies arising from any ill motives because he is accused's friend. I am satisfied that D.W.2 was wrongly recorded at page 8 of the P.E. record where it is said he saw a knife drop from deceased. Further that the manuscript relating to the above page shows that D.W.2 said accused was very angry for he saw him holding a knife "yet with deceased I didn't see any weapon."

Mr. Thetsane in an attempt to show that accused

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was in no fear for his life when he embarked on these dastardly and nefarious acts, referred me to authorities which relate to self-defence. See R vs Attwood 1946 A.D. 331 quoted with approval in R vs Molato 1974-75 30 at 33. But Mr. Moorosi in reply indicated that it is clear that no case of self-defence can stand in the circumstances revealed in this case. I am thus relieved of the necessity to deal with that branch of law. I may in passing make an observation that Mr. Moorosi's view in this connection is well conceived because in my opinion accused's plea raised for the first time in his evidence in chief apart from appearing to be a fabrication, in its nature defies all cognisable elements of self-defence as understood in our law.

To expect that three unprovoked stab wounds at the back of an unarmed assault victim, effected while the latter was in full flight and when he had already fallen, can ground self-defence on the part of the perpetrator thereof truly beggars description.

The accused has used a lethal weapon on a man who posed no danger to him. The stab wounds are sited on the upper back of deceased's body. On all accounts this is a vital part of the human body. Surely it must have occurred to the accused that in inflicting those stab wounds serious injury or death might occur.

It is not wrong to say people don't always mean to carry out serious threats that they utter against others. It is not wrong to say where an assault is immediately preceded by a threat to kill, such a threat then assumes a definitive character. In a trial by jury, it would not be wrong for the jury to regard such a threatening utterance as a pointer to accused's premeditated intent.

In this case the accused prior to the assault on the deceased had been seen attacking other people.

/His

His friend D.W.2 had to even be called to cool him down.

In S vs Mini 1963(3) SA 188 at 192 Williams J.A. neatly summed up the position as follows :

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

In the same case Holmes J.A. said at 140

> "..... if a person forsees the possibility of death resulting from his deed and nevertheless does it, reckless whether death ensues or not, he has in law the intention to cause death. ... . It is not necessary that he should have a desire to cause death."

R vs. Jolly 1923 AD 176 at 187 is authority for the view that :

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

In keeping with this view expressed in R vs Butelezi 1925 A.D. 169 at 194 that

> "the knife went through the chest wall ..... any person pushing a knife through the chest wall, must have had the intention of causing serious injury to the person receiving the wound."

C.F. CRI/T/36/85 R vs Lebitsa (unreported) I find that the crown has discharged the onus cast upon it.

The accused is accordingly found guilty of murder as charged.

J U D G E.

9th June, 1989.

JUDGMENT ON EXTENUATING CIRCUMSTANCES

Even though the accused was at liberty to give evidence with regard to extenuating circumstances, he chose to rest that aspect of the matter on the eloquence of his counsel who, in his address notwithstanding that the accused had told me under oath before conviction that he was not drunk, sought to persuade me to the view that the accused was in fact drunk.

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 on presence of extenuating circumstances is a subjective one. The matters to which the court will have regard in considering the question of extenuating circumstances are well summerised by Holmes J.A. in S vs Letsolo 1970(3) SA. 476(A).

The learned Judge said at pp. 476E-477B:

"Extenuating circumstances have more than once been defined by this court as any facts, bearing on the commission of the crime, which reduce 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."

In deciding (c) the trial court exercises a moral judgment.

It should suffice that even though an accused

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person may be said to have taken liquor, that in itself does not entitle him to the benefit that otherwise the existence of extenuating circumstances can endow on him unless the intoxication had a bearing sufficiently appreciable to reduce his moral blameworthiness.

Evidence led coupled with his own evidence that he was not drunk tends to disqualify accused from the benefit that extenuating circumstances generally hold under that heading. The fact that immediately after achieving his purpose he discreetly decamped from the scene speaks volumes for the view that he was not drunk. He took precautions immediately to avoid arrest. Could he have instantly become sober? The fact that an innocent and defenceless man was a victim of the accused's unprovoked act disqualifies him from the benefit that provocation under (a) holds. The accused is a mature man therefore the question of immaturity does not feature.

In R vs. Naro Lefaso CRI/T/8/89 (unreported) at 16 this Court pointed out that :

> "The purpose of an inquiry into the existence or otherwise of extenuating circumstances is to afford a person convicted of a capital offence an opportunity of escaping the ultimate penalty where such circumstances are shown to exist."

If I may use the parallel by Isaacs J.A. in Piet Mdluli and Mandie Alfred Mdluli vs The King CRI. APP NO. 7/79 (Swaziland Court of Appeal decision) (unreported) at 6 extracted from Mbombo Dlamini and Others vs R 1970-76 Swaziland Law Reports p. 42 that:

> "It is wrong to believe that belief in witch-craft can never constitute an extenuating circumstance but it is also wrong, even though it would be merciful, to say that belief in witchcraft always extenuates ....."

I would say it is wrong to believe that intoxication can never constitute an extenuating circumstance but it is also wrong especially because it would be weird

/perverted

perverted and untenable, to say that intoxication always extenuates.

It would be a sad day when sober and 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.

It has been argued that the accused has been found in judgment to be unintelligent. I don't think that even taken in conjunction with the fact that he had taken some beer that would act as a factor in reducing his moral blameworthiness. Otherwise a proposition would find favour in some quarters that unintelligent persons be kept in an asylum and away from normal communities.

Although the accused has been shown to have imagined all the torments by the people who he said were calling him an alien Xhosa, it is a fact that he was much better at home when proceedings were conducted in Xhosa than in Sesotho.

From this it cannot be farfetched to come to the view that when going through life, people noticing this disability made a butt of him or teased him.

It would seem he suppressed his dislike and intense resentment of that practice. However it tormented his mind to the extent that whenever he imagined that anybody was taunting him with being a Xhosa he felt that he must be punished.

Coupled with the drink that he had taken that day and the fact that police instead of disarming him did something akin to paying homage to him, his imaginations sought an instant outlet and the deceased was the unfortunate victim thereof. The accused seized this opportunity to unleash his pent-up emotions and wielded his knife against the innocent Tlhabeli Matabane with fatal results.

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This factor taken along with drink is what in my view has sufficient bearing on the accused's state of mind in doing what he did to enable him to escape the extreme penalty which he otherwise most richly deserved.

Sentence : Sentenced to 14 years' imprisonment

J U D G E.

9th June, 1989.

For Crown : Mr. Thetsane
For Defence : Mr. Moorosi.