CRI/T/58/90

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

MONYAMANE SIBETE MOHOLA

HELD AT QUTHING

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 14th day of December, 1990

Nothing untoward seemed to foreshadow the breaking of dawn of the day 7th September, 1989. Little did the policeman Motlatsi Mahomo know that this would be his last day alive, less still had he cause to think that his death would be marked by a variety of strange coincidences. Indeed had he foreknowledge of what fate had in store for him he would not have ventured out to Lepule's Hotel where he was seen taking draughts of beer in the company of jolly friends.

Lepule's hotel and Bottle store hardly a stone's throw from the deceased policeman's station at Quthing camp, are situated at Lower Moyeni where civilisation is vigorously engaged in a tug of war with primitivity. Morning hours are reckoned not by the clock but by the cock-crow. Evening hours are reckoned by the closure time of Lepule's Bottle store,

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usually 7.00 p.m. if precision is of any consequence. Otherwise the intervening times between the above time pegs become exceedingly erratic as they are reckoned from the closure time of Lepule's Hotel bar which sometimes occurs at midnight whereas at others the bar remains open the whole night.

It is against this background that on the day in question before Lepule's Bottle Store closed, the accused and P.W.2 Khauhelo Mahitle and others were engaged in a game of cards and dice within the unroofed walls of Sello's parents' home.

The game became lively and the participants merry because the accused was providing money to buy beer to be drunk by him and those present. P.W.2's role was to fetch and carry this beer bought by him with the accused's money from the Bottle Store. He performed these errands faithfully on bare feet.

At the end of the card and dice game, the accused whose financial resources seemed to be inexhaustible that evening suggested that P.W.2 and he should repair to the bar at Lepule's Hotel for further drinks. P.W.2 accordingly went home to put on shoes and came back to join the accused on their way to the Hotel bar.

The accused then in keeping with his previous generosity gave P.W.2 money to buy a quart of beer to which they treated themselves.

At this hotel they found the deceased and Williams and others sitting at one table and they joined some others at the next table. Members of both tables were drinking.

P.W.2 testified under oath that after some time the deceased rose from his table and went to the toilet. No sooner had the deceased gone there than P.W.2 saw the accused rise and also go to the same toilet. What transpired between them in there is unknown to P.W.2. This is an interval regarding whose goings-on would best be left to the accused.

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The accused testified that the deceased did not go ahead of him into the toilet. Instead, he says, someone he had never seen before, but who was putting on a grey jacket came into the toilet after him. While in there this stranger accosted him by asking what his name was. The accused told him he would not say his name to the stranger for the latter had not volunteered his. The accused is adamant that it is not true that he followed the deceased into the toilet and buttresses his contention by stating that when he got into the toilet he found nobody in there.

However P.W.2 went on to say that the deceased who was wearing a blue and white jersey and another coloured largely blue with tiny streaks of red (Exhibit 2 collectively) came out of the toilet followed by the accused. The two took their respective seats at their respective tables.

It is common cause though hesitantly conceded by the accused that he engaged in Xhosa conversation with Williams in the course of which P.W.2 heard William saying to the accused in Sesotho "This is my child. I know him from Johannesburg". P.W.2 did not know what the conversation in Xhosa was about for he does not know that language. The accused's reluctant concession to the fact that he was speaking in Xhosa with William is grounded on the fact that because both he and William know Xhosa it is possible that they spoke in it. Moreover he was drunk. P.W.2 later saw the accused produce a brown okapi knife Exhibit "1" clasp it and pocket it. The accused denies ever doing any such thing.

He however conceded that while at the hotel he had this knife in his possession. Asked how P.W.2 would have known or seen that this knife was in the accused's possession, and further whether it was not possible that P.W.2 had seen it unclasped as he claimed, the accused said the only occasion P.W.2 might have seen this knife was

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at Sello's parents' home where it was being used to open beer quarts. Asked why it was not put to P.W.2 that this was a possibility the accused was clearly in a cleft stick.

P.W.2 proceeded to say that after the deceased and his party left, he and the accused rose and left. When P.W.2 and the accused reached the steps outside the hotel the deceased was lagging behind having separated from his party who had taken the direction leading to the upper part of the village.

In a voice low enough not for the deceased to hear though the latter was nearly (10 paces away) the accused was heard to say "these police dispute over things which are ours and not theirs". P.W.2 didn't know what things the accused was referring to. He inquired but was vouchsafed no reply by the accused. The accused denies this. He fortifies his denial by saying he didn't even know the deceased, less still that he was a policeman. Moreover he says P.W.2 is lying for he did not tell the accused that the deceased was a policeman.

P.W.2 stated that in the hotel the deceased did neither speak nor have a quarrel with the accused. Furthermore at all material times when they were in there the accused never broke company with him save the occasion when the latter went into the toilet following the deceased.

P.W.2 said when he and the accused had reached a point beyond the hotel lights and P.W.2 was following the accused who was following the deceased the accused caught up with the deceased. At a distance of about 5 paces away from P.W.2 saw the accused get hold of the deceased by the collar of the latter's jersey, and heard the accused say to the deceased "do you know me?" This witness made a demonstration of how the accused did this by grabbing the lapels of the accused's jacket in one hand and pressing it tightly against the accused's chest.

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He testified further that it was at night though he could see clearly what the accused did for he was close by. He however could not say what the time was for he was not wearing a watch. Nevertheless he reckons the Bottle Store which closes at 7.00 p.m. had closed. It was useless to reckon the time from closure time of the hotel bar for at times it takes the whole night open.

The deceased's answer to the question posed by the accused was "I don't know you". The accused is said to have adopted an aggressive attitude towards the deceased when he said this. Thereafter P.W.2 saw the accused's free hand execute a stabbing motion towards the deceased who immediately and without saying a word ran at a jogging pace towards the hotel. P.W.2 did not see what the accusedhad in his hand.

P.W.2 joined the accused on their way to the accused's home. It was immediately after the deceased had left this point that the accused told P.W.2 that he had stabbed the deceased. The accused of course denies having stabbed the deceased but the man who had earlier been pestering him in the toilet about giving him his name.

On his part the accused said he did not leave the hotel in P.W.2's company. On the contrary he left P.W.2 finishing off a half quantity of beer as he had run out of his Mills cigarettes blend and had to go to Maculu's to buy some and was afraid that the place might be near closing as it closes at 9.00 p.m. and it might be too late for him. It was when he had thus left P.W.2 behind and had made his way to the steps that he observed the stranger who had pestered him in the toilet break company with his mates after he had gone past them. When the accused had gone downwards and had about reached the aloes this grey-jacketed stranger who kept coming up like a bad penny caught up with him next to Terika's home and said "Hey man. Why take offence when I ask your name". The stranger got hold of the accused in a manner demonstrated by the accused.

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The amazing thing about this demonstration was its similarity to the manner in which P.W.2 had demonstrated to show the manner the accused had grabbed hold of the deceased.

In reply the accused said to the stranger "you keep following me why. Why pester me so?" The stranger in turn said to the accused "I have heard that you are full of S.... you boy. When I ask your name you take offence". Needless to say this though appearing to be the source of the quarrel between the stranger and the accused was never put to P.W.2 who claimed he was there when the accused was seen to be interfering with the deceased.

The stranger according to the accused slapped him on the face. This I may add was heard for the first time when the accused gave evidence in the box. Asked why this should be so he said he forgot to tell his counsel about it. Asked if he didn't realise it was important in his defence he acknowledged it to be, but was dumb-founded how he possibly could have forgotten it despite its importance.

Then the accused said he unclasped his knife with his teeth and stabbed the stranger. However because he was confused he had no clue how deep he went. However he said the stab was effected around the front of the left shoulder as he demonstrated to Court.

Asked if he didn't see any strange coincidence between the fact that the stab he claimed was effected on the stranger's left shoulder's front and the fact that the deceased's stab wound was above the left breast he acknowledged the coincidence after beating about the bush.

He further testified that the stranger went back at a run after being so stabbed. Asked if he found no further strange coincidence between the behaviour of this stranger as portrayed by him and the deceased's behaviour as portrayed by P.W.2 in that both after being stabbed ran towards the

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hotel the accused acknowledged that this was miraculous.

Immediately after stabbing this stranger the accused said he looked back and saw P.W.2 who was approaching him some 10 paces away. He further said positively that P.W.2 saw this stranger. Indeed he says he even told P.W.2 as follows "This man you just met has just attacked me. He is the one who was with me in the toilet and I stabbed him".

P.W.2 testified that the accused said to him, after P.W.2 had seen the accused's hand lunge into the deceased's chest and the deceased jog away "I have stabbed him. I have stabbed him".

It is a strange coincidence that the accused's own acknowledged report to P.W.2 about stabbing the stranger and P.W.2's testimony about the accused's stabbing the deceased should fall within the same time frame.

It is common cause that after someone had been stabbed the accused and P.W.2 went together to Maculu's where the accused asked the butcher's handmaid to supply them with cooked meat.

The strange thing though is that while all along the two had been together except when the accused went into the toilet, it should so happen that according to the accused when the stabbing was effected P.W.2 should conveniently be away from the scene yet immediately after the stabbing P.W.2 should appear to have been not so far from the scene as not to have at least had a glimse of the event when it occurred. In other words according to the accused P.W.2 had been left in the hotel when the stabbing took place but near enough to the scene to have met the stranger when running away from the scene, near the scene at that.

In this posture of events it seems that the Crown's observation or indeed the Crown's question to the accused that he introduced this question of going to buy cigarettes

and leaving P.W.2 in the hotel drinking the remaining good quantity of beer, in order to distance himself from P.W.2 hoping that the only version at the scene should be that furnished by the accused and witnessed by no other thus standing a good chance of not being contradicted, is good.

Because of the extent to which this case is bristling with strange coincidences the accused was not to be behind hand in professing his own observation of some strange coincidence in reply to a question intended to highlight his tendency to create false situations. This is borne out in the following text :-

> "Because of the excuse you have advanced namely that you were going to buy cigarettes you want to create an impression that your left P.W.2 behind, and in the course of your departure this whole episode started in his absence .....? It is a coincidence for I didn't expect to be attacked".

P.W.2 testified that when he and the accused came to Maculu's the accused asked the butcher's handmaid to sell him cooked meat but before he could be supplied with any he changed his mind and the two went to the accused's home.

The accused's version was that he actually bought meat and he and P.W.2 ate it.

The accused says he had told P.W.2 to remain at the hotel while he was going to buy cigarettes P.W.2 denies this and buttresses his denial by stating that there couldn't have been any reason for the accused to have done so because he had still many cigarettes which P.W.2 saw the accused smoking while they were together.

It is common cause that the accused and P.W.2 on leaving Maculu's went to the accused's home where they fed on meat and bread. Their point of diversions crops up again

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when P.W.2 says the accused kept executing stabbing movements directed at P.W.2 with the knife held by the accused to demonstrate how he had stabbed the stranger. The accused admited that he showed P.W.2 the knife but denied that he kept scaring P.W.2 by executing those movements against him.

P.W.2 testified further that he saw the blade of this knife and examined it closely while the accused was playing pranks with it. He observed nothing peculiar on it. There were no blood stains on it.

When asked to scrutinise this knife P.W.2 said he observed something like rust which he felt he could not have observed while the accused was playing pranks with it and saying in accompaniment thereof "I stabbed him, I stabbed him" for that scared him.

P.W.2 further stated that when the accused first told him that he had stabbed him he had reason to believe he was referring to the deceased for no one besides the deceased was there. He however thought the accused was joking for the deceased said not a word when he left the scene running nor did he observe anything on the knife to support the accused's claim at a later stage when the accused was fooling with the knife.

Much was made of the accused's chopped off fingers - two from one hand and three from another - in an endeavour to play down the accused's ability to execute gripping movements and to wield a knife.

P.W.2 had indicated that the accused's ability to perform these tasks was beyond doubt for he had observed him even pushing a wheelbarrow dispite the alleged disablement. I must say P.W.2's testimony was supported by the demonstrations that the accused performed first when he showed how the alleged stranger grabbed hold of him and next

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how he plunged the knife into that stranger's upper body. It was, I must say, with amazing dexterity. Furthermore the accused himself testified that although these fingers are cut he is able to grip. To his credit he conceded that it was due to his ability to do these things that he did not allude to any disability in his evidence in chief. It stands to be wondered therefore why P.W.2 was taxed about the accused's hands and so-called disability to use his fingers.

The evidence of P.W.3 Detective Trooper Mohlouoa showed that he went to the Hotel area where he found the body of the deceased and was only able to identify it by the Identity Card and the deceased's note book on account of the manner that the face was soiled with blood and earth. He observed a wound on the deceased's chest. He took the body to the mortuary. At early dawn at about 3.00 a.m. he and fellow officers went to the accused's home where they were denied entry. Consequently they deviced a plan whereby they sent for P.W.2 to help them bait the accused out of his house. When this stratagem failed also he and his colleagues forced the door open and thus gained entry. The accused complains that they asked him questions at gun point. But I am satisfied that the police had no option but to force their entry as they did when they were obstructed from performing their duty in any other way acceptable.

I am also satisfied with P.W.3's evidence that he gave the accused sufficient and relevant caution before obtaining an explanation from him concerning the deceased's death.

Although the accused complained about having been forced to admit the killing of the deceased it does not seem to me tenable that after a knife had been obtained from him which bore the blood stains as observed at the accused's home by P.W.3, which knife was an essential part of the evidence to connect the accused with the killing, he could

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have been tortured to admitting guilt which depended on the weapon used and which was in their possession with all the incriminating ~~strains~~ which they hoped to bring to Court in due course.

If I could interpose here. In submissions learned counsel for defence took P.W.2 to task for the fact that in this Court he claimed he was scared when the accused was poking the knife at him,. whereas in the Court below he never mentioned that point. First P.W.2 said he mentioned it. But confronted with its absence he said the Magistrate had not written it down. Pressed further with why he didn't remind the Magistrate when his deposition was read back to him he said that either it had escaped his mind or because this is an old matter he did not even remember if it was read back to him.

But it should be borne in mind that a witness is being led by a public prosecutor who directs him along the areas he favours. The matter of whether a knife being weilded so dangerously close to his body was a question raised by this Court having observed the demonstration effected by this witness. Had he said this did not scare him he no doubt should have been regarded as a liar. The Court was satisfied with his forthwright answer. A witness cannot be faulted in respect of a matter that was not in the record on grounds that it is an afterthought.

It would be fruitful while on this point to borrow Kheola J's observation in an identical point in CRI/T/73/89 R. vs Letsola-Kobo Lephoto (unreported) at 17 -

> "It is quite true that 'Mamahali did not mention the threat in her evidence-in-chief in this court. However, that does not necessarily mean that she is telling a lie. At the Preparatory Examination and in her evidence-in-chief in this Court she was led by the public prosecutor and the Crown Counsel respectively. They put specific questions to her and expected her to answer, them accordingly. In cross-examination

/a witness

> a witness must answer the questions put to him and in the course of answering such questions he might come up with something completely new, something both the public prosecutor and the Crown counsel never raised when they led the witness. The purpose of cross-examination is to raise new but relevant matters which may have been overlooked by the witness in his evidence-in-chief. In answering such questions the witness cannot be accused of lying. In a proper case it can be argued that something is an after-thought. It must be shown that the same issue was raised but the witness did not say what he later says".

With respect this is not such case. Nowhere was it shown P.W.2 answered this question differently at P.E. from here.

Although the accused's narration of events is in large measure on all fours with the Crown's eye-witness's it however conflicts with it at the two crucial points. First where the order of entry between the accused and the deceased alias stranger into and exit from the toilet is involved - and next at the scene where the accused claims P.W.2 was absent as he had remained in the hotel.

It is significant also that the accused when giving his evidence nor in questions put on his behalf to P.W.3 never alluded to the charge preferred against him being prejudicial to him on the grounds that he was not put to his rights. Thus I am satisfied that he is not prejudiced by the charge confronting him on grounds of police ill-treatment of him because in questions put on his behalf it had been suggested that he was ready to give medical certificates to support his claim that he had been physically molested but none were produced till he closed his case. No other inference can flow from this claim than that it is not only improbable but beyond all doubt false.

Again despite the accused's pretence that the deceased was some strange man other than the policeman he stabbed it becomes clear that he cannot hope to get away with this pretence in the light of the fact that the so-called stranger whom he admits stabbing was seen running

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towards the hotel along the direction in which, after being stabbed, one would expect him to stumble and fall should he have succumbed to his injury. Yet by some strange coincidence the man who is found there dead is not the stranger but the deceased.

Furthermore evidence was elicited from not only P.W.3 but also P.W.2 including the accused that at no time around the period immediately surrounding the incident that befell the deceased was there a report or rumour of anyone alleged to have been stabbed by anyone known or unknown at or around the place that the accused claims to have stabbed someone other than the deceased.

It stands to reason therefore that introduction of a grey-jacketed stranger into these proceedings is a mere red herring across the trail if not a spurious creation of the accused's imagination.

Sooner rather than later his imagination should be awakened to the tough and uncompromising reality that the strange coincidences and the dream-land which he wishes to pin his faith on point to just one thing and one thing alone, namely that by the light of true reality and not some strange coincidence the stranger that he believes he stabbed and is without trace turns out to be the deceased Motlatsi Mahomo the policeman whom he found at the hotel and followed into and out of the toilet and whom he further followed out of the hotel to the place next to the aloes near Tikera's house where the accused was seen by none other than P.W.2 executing a stabbing movement towards him whereupon the deceased trotted to the hotel near where he dropped dead.

I have no hesitation in finding that the evidence of P.W.2 is impressive not only as to its content but the manner in which it was given. It was unbiased, clear and devoid of exaggerations and of any tendencies to fabricate while under cross-examination.

/P.W.2

P.W.2 frankly stated that he is no friend of the accused's but would not thereby give false evidence against him. He gave evidence in a monotone of voice that was barely audible to the public sitting at the back of the Court room. But when a false question was put to him under cross-examination his voice was heard to be raised in an obvious pique of annoyance towards the cross-examiner and the ultimate source from which that falsity was alleged to have emanated.

I have observed the demeanour of the accused and formed the opinion that while he is generally calm and reassuring he suddenly became shifty and incoherent when the crucial factors pointed out above were raised against him.

The difficulty that bedevils the accused's version occasioned by his introduction of the stranger that he claims he stabbed is that because this stranger after being stabbed, according to the accused, ran towards the hotel it would seem natural that if he stumbled and fell being overcome by the injury, one would expect to find him around the hotel area dead or alive. But if the nature of the injury was such that he could manage to walk about on his own one would expect him to report the attack on him to the authorities. The untenability of the accused's position in either situation is that none of them obtains save that the person that is found fallen in the area where one would naturally expect the stranger to be, is the deceased.

In all this one sees in the accused a veiled attempt to seek to be convicted of a lesser offence yet there is authority for the view that :-

> "Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime, or even, perchance, escaping conviction altogether and his evidence is declared irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that,

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> notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so". See R. vs Mlambo 1957(4) SA 727 at 738.

It was argued for the accused that he be given benefit of doubt but the above authority succinctly states:

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

In this case the claim is wrongly founded.

The explanations he gave in regard to these factors were not only improbable as shown above but palpably false.

The accused's version of the man that he stabbed with a knife is rejected as false beyond reasonable doubt.

The reason therefore that he banked on for saying he entered the toilet first and came out first each time before the deceased was to reverse the roles played by the culprit and the victim. In other words he wanted to make it appear as though the deceased was pursuing him. But the lie in this whole episode was exposed at the place of the stabbing where the words that the accused wished the Court to believe were referred to him by the deceased were clearly heard by P.W.2 being uttered by the accused who said to the deceased "Do you know me?" And the deceased said "I don't know you". Coupled with the rough manner the accused had grabbed the deceased and the aggressive attitude with which he was addressing himself to the deceased followed by the stabbing movement towards the deceased's chest I have no doubt that it is for very sinister motive that the accused wishes to conceal the truth in this matter by exchanging his role with that of the deceased in respect of words uttered and their respective order of their entry into the toilet and out of it including

their short trip to the place where the deceased received a knife blow that ended in his death.

P.W.3 conceded that the accused told him that he had stabbed someone unknown to him that night. The accused either then or before produced Exhibit 1. The accused said that he was forced into incriminating himself. But the authority of S. vs Ismail 1965(1) SA 446 at 449 shows that admissions by pointing out are always admissible however improperly induced, hence Milne J.P's dictum showing that the effect is to admit evidence of a pointing out

> "even though the relative confession was obtained as a result of gross cruelty inflicted upon the person making it".

I have considered R. vs Difford 1937 AD 370 at 373 along with R. v. M. 1946 AD 1023 at 1027 where it is stated:

> "..... the court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true".

To the extent that the accused's story in the instant case is largely in keeping with the Crown's, to an unwary eye it might seem to pass the above test. But in my view it is the quantity that makes it to look to be on all fours with the Crown's. But when it comes to the essential quality which can be equated to substantial truth it is definitely and lamentably wanting.

Even if it were to be said P.W.2 did not see the stabbing the circumstantial nature of events immediately following that occasion can lead to the drawing of no other inference than that the subsequent fate of the deceased is ascribable solely to his act. The accused said he went out of hotel alone to buy cigarettes at Maculu's but P.W.2 testified credibly that the only occasion the accused went out intending to go there was for the purpose of buying meat and at that time P.W.2 and the accused were together.

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The admitted medical evidence briefly shows that the instrument used to cause the deceased's death is a sharp one that perforated the left lung and the aortic wall resulting in haemorrghagic shock with pericardial tamponade and extensive haematothorax.

There is authority for the view that if a man thrusts a knife into the chest wall in an act of unlawfulness against the other then the legal inference to be drawn is that he intended the other's death. To arrive at this inference the Court has to consider the nature of the weapon used, the part of the body to which the lethal weapon has been applied and the force applied to inflict the injury.

In the instant case these factors are present in a manner that is not favourable to the accused. What is more he demonstrated utmost callousness towards his victim immediately after effecting the fatal injury. See S. v. X 1974 (1) SA 344 at 347 H to 348A where the importance of an accused's conduct immediately after the offence has been highlighted.

It is the feature of this case that only one witness testified to seeing the offence committed. However our Criminal Procedure and Evidence lays down that it is competent to convict on the evidence of a single competent and credible witness. The credibility of P.W.2 is beyond reproach. See Section 238. The defence complained that none of the members of the deceased's party had been called to testify. But in my view it seems that the solid ground on which our Criminal Procedure and Evidence is based in this regard is that "it is not so much the number of witnesses as the weight of evidence that should be had regard to".

Needless to say P.W..2's testimony was not shaken under cross-examination. Indeed it is the mark of the quality of this witness's evidence that he did not commit himself by saying he saw the accused stab the deceased. He only said

/he saw

he saw him take his hand towards the deceased. It was only the demonstration that he executed that led the court to observe that the motion was a stabbing one. If he meant to exaggerate he could have easily said he saw the accused stab the deceased with a knife.

Furthermore the accused said he was alone when he went to the spot where he was allegedly disobliged by the deceased from reaching Maculu's where he intended to buy Mills cigarettes. But P.W.2 is adamant that this was not true. Hence an inference should follow that the accused had something to hide.

It would seem therefore the accused had already plotted this offence when he went to the toilet following the deceased. Thus even if it could be said he was provoked by the deceased in there the accused had had more than sufficient time to cool down regard being had to the length of time the deceased and he spent sitting down after coming back from there and subsequently following the deceased to the spot where he caught up with him and stabbed him. But even indulging oneself this speculation it would seem unwarranted for there was no suggestion that on coming out of the toilet the accused was in any angry mood.

I consequently find that the charge preferred against the accused for the intentional and unlawful killing of MOtlatsi Mahomo on 7th September 1989 at Lower Moyeni Quthing has been properly supported despite his plea of not guilty given at the start of these proceedings.

The accused's guilt has been proved beyond reasonable doubt. He is accordingly convicted of Murder as charged.

My assessors agree.

J U D G E

14th December, 1990

JUDGMENT ON EXTENUATING CIRCUMSTANCES

I have heard the accused's evidence given in extenuation. In the case of Thembi Nkosi Yawa that's CRI/T/59/88 this Court had this to say :

> "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 summarised by Holmes J.A. in S. v. Letsolo 1970(3) 476(A)"

Referring to them he said :

> "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 exhaustive)
>
> (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 exercised a moral judgment. Going further in that Judgment i.e. Yawa this court had to say the following :

> "It should suffice that even though an accused 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".

In the case before me I am told, and it is in evidence, that the accused is said to have taken liquor. But

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there is a difference here. Evidence adduced by the accused here shows that he hates police so that one would not be wrong in coming to the view that even when sober he has a general malice against this class of people. In my view a situation of that nature is no different from a situation where with an intent to murder or to kill, an accused person goes and fortifies himself with liquor in order to give himself Dutch Courage for perpetration of the wrongful act.

In this case the accused resiled from the stance that he had adopted throughout. Regarding such a position at page 242 of Criminal Law and Procedure Through Cases by Judge Mofokeng under (c) the learned Judge says :

> "It is clear that an accused may, if he so elects, resile from a position taken during the trial and adopt a completely different stance".

But this position is not without its own hardships or difficulties as will presently be shown by reference to Khoabane Sello vs Rex a Court of Appeal matter decided in C. of A. (CRI) 5/80 by Schutz J.A., as he then was. He had this to say regarding that case on a similar situation :

> "This leaves the question whether he has discharged the onus of proving extenuating circumstances. After his conviction he resiled from his previous version and gave evidence in which he conceded complicity in the attack on the deceased".

The position in the instant case is no different in so far as this Court observed that the accused having resiled from the previous position supported almost in toto the evidence that was given by P.W.2.

The learned Schutz J.A. in the case just referred to said -

> "When weighing this version the appellant is in difficulty, onus apart, which so often arises in this kind of case. But because of his radical change of version the appellant is a self confessed perjuror".

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It was patently clear that when he gave evidence in this Court in the main trial the accused was still under oath to tell the truth. An oath will remain an oath and binding on the conscience of the person who takes it whether at full or main trial or at extenuating stage. To my mind it serves hardly any purpose at all to take an oath again and then go against the evidence that under oath one had given earlier to the Court; and even considering the question which might well be the case in the particular case that I am dealing here with that dolus eventualis might be the type of intent in point [illegible]. The learned Schutz J.A. said -

> "..... that would lead to a finding of dolus eventualis. Such a finding is sometimes a basis for finding extenuating circumstances , but in my view it is not sufficient in this case. At best for him the appellant was the initiator of the mortal attack the object of which was plunder. His amoral blameworthiness is not reduced by such a finding in the case before me."

The accused's sole purpose for attacking this innocent man was to feed his malice and hatred against the police in that manner. A situation of that sort would never never reduce the accused person's moral blameworthiness. In that Thembi Nkosi Yawa case this Court had also had this further to say:

> "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 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 victim suffered."

It goes without saying that the role of a police-man in society is to keep law and order but the accused's sole purpose was to ensure that, and he would be happier if the entire police force was exterminated. Needless to say

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that would lead to a chaotic state of affairs as far as the administration of justice is concerned and I don't think people with that kind of attitude deserve to live. However as Holmes J.A. said whatever factor can be said to constitute extenuating circumstance cannot be discarded if it is not too remotely connected with the offence insofar as the Court is called upon to consider the degree of the moral culpability of the accused in a subjective sense. This is not to say fanciful factors can be allowed to pass for extenuating circumstances.

Coming again to this question of drink it is patently clear that when the accused went there he had not reached the stage of drunkenness that his fill for the day before he committed the offence had eventually come to; and it is patently clear that apart from his general malice against the police the intention to kill was formulated or made manifest by the time he went to the toilet following the deceased and that he nursed and nurtured this evil intent and meantime continued drinking. Now I would say therefore that the state of drunkenness that he was in at the end of the day did not come before he had formed his intention. So, conversely it would seem that when he formed the intention to kill he was in a relatively moe sober state of mind. I want to emphasise this because I wish to indicate that the law reprobates the type of attitude that however little one has taken of drink he would be entitled to extenuation. Furthermore the accused sought to make a merit of the fact that when in his cups he is the sort of person who loses his temper quickly. I need hardly stress that it is now trite that legal authority discounts a man's peculiarity of character or idiosyncracy of attitude as a factor worth taking into consideration when determining the existence or otherwise of extenuating circumstances. Moreover the accused in his second bite at a cherry told the Court that he stabbed the deceased with a knife because the deceased had asked him what his

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name was.

Having said this I do find that there are extenuating circumstances in this case. My assessors agree.

MITIGATION : You would be obliged, I am told, to raise the deceased's head but I will tell you that custom operates within an orderly scheme of the law; and that the law can never operate unless the police are there to ensure that it does. The type of sentence you are going to have will be exemplary such that whoever thinks of ever taking away a policeman's life will know what he is bargaining for. You will go to jail for 25 years.

J U D G E
14th December, 1990

For Crown : Mr. Qhomane

For Defence: Mr. Lebusa