

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

TSITSO MATSABA

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla  
on the 1st day of June, 1990.

The accused pleaded not guilty to five counts constituting summary charges preferred against him for the murders of :-

- (a) Thabang Shale
- (b) 'Mathabang Shale
- (c) Keketso Nkholise
- (d) Tokoloho Beneshe, and
- (e) Makoa Mabitle

all of whom are alleged to have died from gun shot wounds around 6th July 1988 at Mount Moorosi in the Quthing district.

The medical reports borne in post mortem reports A B C D & E in respect of the respective deceased were admitted on behalf of the accused by his counsel. It was further admitted that the injuries found on the deceased's bodies were caused by shots fired from a fire-arm issued to the accused.

/P.W.1

P.W.1 Mokoto Leanya testified on oath that on 5th July 1988 he was at the home of the first two deceased in the company of the first deceased Thabang Shale the husband of P.W.3 'Mabokang Shale who was also present and seated near a burning primus stove with P.W.2 'Mamahlomola Leanya a short distance away from the door while the first deceased and P.W.1 were dancing to the music played from a tape recorder.

The accused who is a policeman then came into the house and sat near the primus stove where the two wives were seated and started warming himself from the heat produced by that burning primus stove.

A short while thereafter the accused complained that the people in there were making a noise for him. P.W.1 said nobody paid any notice to the accused's remark at the time. However the accused repeated his utterance and this time even uttered an insult.

P.W.1 and the 1st deceased questioned the accused about his use of the swear word but the accused remained silent. Then the accused ordered P.W.3 to stop the music. Before P.W.3 could comply the deceased Thabang asked the accused if he was ordering his wife about. Reacting to this question the accused stated that he was a "royal" and therefore could kill those who were in there. P.W.3 switched off the music. P.W.1 and the deceased Thabang went and sat on a bed.

The accused rose from where he had been sitting between the two wives and made for the bed where the two husbands were sitting. He got hold of the deceased Thabang and the two started grappling at each other. The accused struck indiscriminately at both Thabang and P.W.1. A loose scuffle ensued and blundered towards the door which happened to have been shut thus forcing the combatants to stand at bay.

In this posture of events P.W.3 finding that everybody was trapped in that house made good her escape through the window and opened the door from outside. Thus P.W.2 was able to get out of the house and run away.

/P.W.1

P.W.1 said that P.W.3 pulled the accused outside followed by the deceased Thabang and P.W.1. When he got outside the accused ran away. The accused's blanket remained in doors having been slipped off from the head when the accused was readying himself for the fight.

P.W.1 and Thabang went back when the accused ran away.

However when P.W.1 was later leaving and was about turning a corner the accused surfaced holding a gun which he was pointing at P.W.1. There and then the accused said

"Mokoto your mother's rump-hole; you assault me. I am going to kill you".

Saying this the accused ordered P.W.1 to go back to his partner so that he could kill him.

P.W.1 said that at the time the accused ordered that the music should be stopped he had sworn at them by their mothers' private parts.

P.W.1 went on to say that when he approached the door he saw the deceased Thabang come outside and heard him address the accused as follows:-

"I have expelled you from my home.  
I don't want you here."

The accused then ordered P.W.1 and the deceased Thabang to stand abreast of each other and continued swearing at them. At that juncture the deceased Mathabang whose hut is nearby came to the scene and tried to assist the men who were placed in peril of their lives by pleading with the accused that he should rather arrest them than shoot them as he was threatening to do. The deceased Mathabang stood between the deceased Thabang and P.W.1 while the accused was pointing his gun at all of them.

Then there was a gun report as the accused fired his gun. In the result the deceased Thabang sustained an injury above the knee.

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In fact while P.W.1 and the two others were outside the gun was fired twice, but the only person who sustained a gun shot injury was Thabang. Apparently the other shot did not find a target.

P.W.1 and the other two ran away at the first shot. They sought cover in the house of the deceased Thabang; and in the process got crammed at the door in their effort to get inside. They managed to come in but the accused was close on their heels and he thus came in too. He stood at the door, ordered the trio to raise their hands and face the wall. The trio stumbled behind the door. The accused fired his gun three or four times and ordered the trio to bring forth their hands so that he could handcuff them. When the deceased Thabang complied with this order the accused shot him on the hand that was brought forth. The gun shot wound was later seen the following day by P.W.1 on the right hand of the deceased Thabang as he laid dead outside and along the path leading to the charge office which is some fifty to a hundred paces from the home of Thabang.

Then the accused ordered P.W.1 to stand in the middle of the house and make no movement while ordering Thabang to pick up the accused's blanket and take it to the accused's home. The deceased Thabang picked up the blanket and went out of the house followed by the accused. P.W.1 was ordered to remain seated in Thabang's house for he would in turn be finally dealt with.

When the deceased Thabang and the accused were outside P.W.1 heard one gun report. The time is estimated by P.W.1 to have been around 9.00 p.m.

P.W.1 then heard the deceased Thabang say

"sir why shoot me yet I admitted my guilt."

P.W.1 said he remained seated there and had no idea what the guilt admitted was about.

Some five minutes thereafter P.W.1 heard two more gun shots. P.W.1 then went outside and found the deceased 'Mathabang fallen

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to the ground along the forecourt and shook her urging that they should run away.

P.W.1 noticed that the accused was nearby thus he took refuge behind some shrubs and also noticed that the accused went into the house apparently looking for him. Failing P.W.1 in there the accused went outside and headed for P.W.1's house which is about 50 to 100 metres from 'Mathabang's. The accused poked at P.W.1's door with the butt of his gun. Afterwards the accused fell out of view whereupon P.W.1 made for his house inside which he remained till the following day.

At sunrise P.W.1 saw people gathered at respective places where the deceased were lying. The first deceased was lying below the police lines. The second deceased 'Mathabang lay where P.W.1 had last seen her the previous night at the forecourt of the deceased Thabang. P.W.1 observed that Thabang had three injuries. One was above the knee; two others were behind the head and on the right hand respectively. P.W.1 failed to see any wounds on 'Mathabang because she was wearing a blanket.

P.W.1 denied that he was drinking in Thabang's house. He denied that anybody was drinking in there. He denied that beer was being sold in that house. He testified that he knew the accused very well. He denied that the accused was also his friend. He conceded that the accused's actions surprised him but said he was not thereby implying that the surprise flowed from any existence of friendship between him and the accused.

Asked if he and the accused are so used to each other that they even crack jokes at each other P.W.1 said he just knows the accused as the two stay together. He denied that there was such familiarity of attitudes between them as to joke with each other.

P.W.1 denied that he was holding a stick when he and Thabang were dancing in the house. He denied that 'Mabokang was selling beer in there. He denied that the accused was drinking beer from a "long tom" and that being the accused's

/acquaintance

acquaintance he came and took away the "long tom" from the accused and drank it. He stressed that there wasn't any beer in that house.

P.W.1 denied that he said to the accused "this is at the stockfair you dog."

P.W.1 conceded that although he had estimated the time to have been at 9.00 p.m. it could possibly have been at 10.00 p.m. but rejected the suggestion that it could have been around 12.00 midnight.

P.W.1 was asked if the accused was drunk and his irrelevant reply was that he didn't know if the accused drinks. He was further asked if he could tell if a man is drunk and he said he could. Only after the question whether the accused was drunk was put for the third time did he say the accused was not drunk.

P.W.1 denied that he at times drinks in the company of the accused and buttressed his denial by stating that he is not used to him nor does he know if he drinks.

The reliable evidence of P.W.8 Major Ngatane who is the accused's senior and has worked with him for a long time and had occasion previously to remonstrate with him for his drinking habits shows that it is very difficult to tell whether the accused is drunk or sober because in appearance his face remains expressionless and in my view rather like a blank page.

P.W.1 estimated the distance between his home and the accused's house at between 40 and 50 metres. But again in response to an observation following from his estimation that his and the accused's houses are close to each other his irrelevant answer was that he did not go about with the accused.

When this observation was pressed home to him P.W.1 conceded that their houses are close "because it (accused's house) is within my view". It leaves me at a loss whether even if the houses are three kilometres apart but within view of each other P.W.1 would regard them as close for the reason

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that they fall within view of each other. It was accordingly put to him that the reason it took him so long to establish such a small fact was that he had decided to conceal the truth. In reply he said "nothing is more truthful than what I say".

It was put to P.W.1 that the cause of the quarrel was entirely different from what he wanted the court to believe. It was suggested that the quarrel broke out because the accused sat between the two wives of men who were in there and remarked to the wives that they had sandwiched him as though he was their brides maid. P.W.1 denied that the accused uttered those words. He further denied that the accused was sitting between the wives and in the process explained that the accused had sat next to the primus stove while the wives were sitting to one side faced by the accused.

P.W.1 denied that he angrily said the accused was too familiar with the wives who were in there or that he was disrespectful. He said neither he nor the deceased Thabang raised any query about the accused's alleged familiarity with the wives. He rejected the suggestion that because the accused was not aware that he had offended the husbands who were in the house in an effort to make amends the accused said "give these savages beer". He buttressed his denial by saying no beer was being sold in that house. He denied that he and the deceased Thabang started hitting the accused with fists. He further stated that when the accused started the fight he was wearing the blanket from which he slipped his head during the fight and thus removed it from his body.

To the question put that if a drunken man shows disrespect to another man's wife in a house that man is obliged to throw the drunk out P.W.1 said he and his company were surprised when the accused started fighting them.

To the question put that P.W.1 and his company tolerated this drunken man for a long time and when they got fed up with him decided to kick him out P.W.1 said the accused was sitting there and while thus seated he started insulting him and his company.

/When

When it was suggested to P.W.1 that in fact what the accused did to the wives could be interpreted as insulting he said

"the accused insulted us saying you mine savages you are making a noise for me"

I am quoting P.W.1's words because he was at pains to admit what he had said if that was repeated. He was inclined to avoid answering "yes" or "no" to questions put to him.

The apex of this attitude of his was reached and exposed when he denied that he and his companion fought the accused. He denied using the expression "we fought him". The machine was played back a mere two minutes afterwards and it was said to him "See the machine says you said you fought him?" whereupon he interposed "when he was fighting us."

"You don't have to hide anything you tend to seek to show yourselves as angels - ?

We are not angels.

We have already seen you were hiding something - ?

Nothing.\*

However P.W.1 was taxed about the fact that he testified to the existence of an injury in deceased 1's hand which is not borne out in the medical evidence. P.W.1 was adamant that he would be surprised if the medical report did not reveal such injury.

"I put it to you it seems your evidence is not true. The doctor's report shows that you say the deceased was injured even where he was not -?"

I am a truthful witness."

Indeed the evidence of P.W.7 detective trooper Hlaele at page 76 of my notes shows that the deceased Thabang had a gun shot wound at the base of the right hand thumb. This coincides with the demonstration (referred to at page 16 of my notes) that P.W.1 made to show where the wound was. P.W.7 was not taxed about this wound. It would seem therefore that the doctor must have omitted this wound from his post-mortem report.

/P.W.1



P.W.1 denied that before coming back with a gun the accused had been away long. He concedes that the wives had by then left. He explained that the period between the accused's departure and his return with a gun could have been two to three minutes.

P.W.1 was taxed about his use of the word "khale" meaning "long time ago" in reference to the time when the wives had left. Taken in the context of his evidence it seemed to me that P.W.1 in saying the wives had left long ago merely sought to emphasise that during the second encounter between the accused and the husbands the women were no longer at the scene because they left immediately after getting an opportunity to flee at the end of the first encounter. This is borne out by the fact that P.W.1 said when the accused left P.W.1 was making preparations to leave also but because of some three minutes delay incurred in his conversation with Thabang about what had happened he met with the accused away from Thabang's home and was forced by the accused to go back to Thabang's home.

P.W.1 denied the accused's alleged version that when the accused came back with a gun this witness said to him "Shoot Potieane". He denied that at the time P.W.1's wife was hurling abuse at the accused and blaming the husbands for their failure to give the accused enough disciplining.

P.W.1 said he didn't know if police go about armed these days. He said he has not seen a drunken policeman. He conceded that he has seen a drunken man but in the same breath said he has never seen the behaviour of a drunken person. It puzzles me to understand how P.W.1 can tell that a person is drunk if he denies ever observing the behaviour of a drunken one at all. In my view it is only if one has observed the behaviour of a drunken man that one would be able to tell that another behaving similarly is drunk. He denied that in his experience drunken people speak loudly and make a nuisance of themselves. He was insistent that the accused was not drunk that evening. He admitted the correctness of the question put to him that the accused admits shooting people who he (the accused) now says were innocent.

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He admitted that he had never seen a man assaulting or even killing innocent people in his previous experience. He also admitted that a man who acted as the accused did manifested abnormal behaviour.

While on the one hand P.W.1 said the accused got out of the house when P.W.3 opened the door on the other hand he admitted that he had said the accused got out when P.W.1 and the deceased were fighting back against the accused's attack whereupon they pushed him out. However in his evidence-in-chief P.W.1 never said that he and Thabang pushed the accused out. He merely said they came following when the accused ran away after P.W.1 had opened the door through which the accused moved out. P.W.1 nonetheless denied that previously he had said differently.

The text went as follows:-

"Earlier before lunch you said 'Mabokang went out through the window and opened the door from outside -?"

Yes.

And your wife ran away -?"

Yes.

'You said' we followed the accused - ?

Yes.

Is that so -?"

Yes.

This is different from what you said -?"

I said just that much.

If you see no difference I won't press the point.

'Mabokang had to pull out the accused for you were fighting him -?"

He was fighting us.

If the accused was fighting you and the deceased then 'Mabokang would not have had to pull the accused from your attack -?"

I have been explaining this as I did.

Thabang's wife would not have had to pull the accused out -?"

She pulled him from where we were.

/So

So after that you followed him -?

We didn't follow.

You may have not been chasing but you came out following -?

Yes.

The sequence of events doesn't show a man who was being thrown out but one who was being rescued -?

'Mabokang rescued us also by opening the door."

P.W.2 who is P.W.1's wife gave evidence which sought to support that of P.W.1 as to the events which occurred in the house till the occasion when P.W.3 went out through the window and managed to open the door from outside.

P.W.2's story differs from that of P.W.1 in the sense that even while the combatants moved out of the house they were still fighting. She testified that she and P.W.3 were trying to intervene but she was hit by the deceased Thabang. She said while she and P.W.3 were trying to intervene she discovered that they too were being assaulted by their husbands. They even inquired why they too were being assaulted.

She said she and P.W.3 went to report the incident to the deceased 'Mathabang. It was when they were at 'Mathabang's that the husbands came to collect them. The husbands however remained there while P.W.2 headed for her house only to observe while she was near 'Malebeile's house that the accused was striking at P.W.2's door with a gun, swearing and asking P.W.1 and 2 to come out so that he could shoot them.

Then P.W.2 headed back for the deceased 'Mathabang's house. She found that the deceased Thabang and P.W.1 had already left.

P.W.2 who had been in the witness box for seven minutes when asked how long she had been in 'Mathabang's house before she left said she had spent less than the time she had been in the witness box. She estimated that the distance between Thabang's house and 'Mathabang's is 100 metres. Both the estimation of time and distance were matters achieved with mind-boggling difficulty. However it is this Court's experience that estimation of time and distance usually occasions untold hardships to both ordinary

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and semi-sophisticated Basotho witnesses who give evidence in this Court from time to time. Even among the sophisticated lucid estimations are birds of rare occurrence.

P.W.2 reported to 'Mathabang that the accused had gone to P.W.1's house. After making this report P.W.2 left. But she observed that Thabang and 'Mathabang got into Thabang's house. She was between 40 and 50 metres away when she observed this.

P.W.2 saw P.W.1 and 'Mathabang leave Thabang's house. Then when P.W.1 was about turning the corner of Thabang's house P.W.2 saw the accused confront P.W.1 and heard the accused swear at him by his mother's private parts. The accused said he was going to kill P.W.1. There and then the accused grabbed hold of P.W.1 and dragged him to Thabang's forecourt. Then 'Mathabang came running to the scene. P.W.2 then heard a gun report. She didn't see who got shot. She didn't know how many times the firing went on. She only heard 'Mathabang pleading that if the husbands had committed a wrong the accused should arrest them instead of shooting them. However the shooting continued.

P.W.2 went to 'Mataelo to ask her accompany her to the police to report the incident. But 'Mataelo was apparently afraid to go out of her house amidst gun reports. When P.W.2 tried to take a plunge into the night to go and report to the police she was restrained by 'Mataelo.

Eventually and after the shooting had ceased she went to the scene and found 'Mathabang mortally wounded and lying sprawled at Thabang's forecourt.

P.W.2 denied that P.W.1 takes liquor. She said she would know that a person is drunk if she knows that person to take liquor. She said that if she happens not to know that person then perhaps she would know he has taken liquor if he staggers. She denied that she drinks.

It took P.W.2 a long time and a sizeable amount of fencing with the question to acknowledge that her narration of the events in the house of Thabang was so different from P.W.1's as to

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suggest that the two were not simultaneously present when the events took place.

P.W.1 denied that any husband said the accused was full of disrespect. But P.W.2 said in fact P.W.1 is the one whom she heard saying the accused had no respect. P.W.1 never suggested that he and the deceased went to 'Mathabang's house where they found their wives. He denied that he and the deceased assaulted their wives outside Thabang's house. He denied that he and Thabang assaulted P.W.2 and drove her to 'Mathabang's house taxing her about the whereabouts of Thabang's wife P.W.3.

If P.W.2's story about the departure from the scene of all those who were present before the second encounter is to be accepted it would seem that the accused's story that he took a long time before returning to Thabang's house with a gun has merit. Acceptance of the accused's version in this regard should likewise betoken acceptance of the fact that P.W.1 had something to hide. Obviously he hid the fact that he and the deceased assaulted P.W.2.

P.W.3 testified that when she opened Thabang's door from outside the rush of people from inside the house felled her below the stoep where P.W.2 jumped over her and disappeared into the night. Then P.W.1 and the deceased Thabang hit her saying she should produce P.W.2 or say where she was. P.W.3 said after she opened the door she didn't know where P.W.2 went. She next saw P.W.2 at the funeral of Thabang some days afterwards. But P.W.2 said she and P.W.3 were trying to intervene when they were assaulted by their husbands outside Thabang's house. In fact P.W.3 said the assault on her and P.W.2 by their husbands started inside the house.

P.W.2 denied that she knows when a person is drunk. When reminded that she had earlier said she would tell that a person is drunk if she sees him stagger she was in an obvious cleft stick.

P.W.2 said the husbands were holding sticks in the house when dancing. (See pages 34 and 42 of my notes). P.W.3 denied

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that they were. (See page 48 of my notes) .

P.W.1, P.W.2 and P.W.3 made a pretence of not knowing when a person is drunk. Even when told that the accused when he came into Thabang's house was drunk they denied this. So strange was their attitude towards beer that they pretended that they would not recognise the strained off husks which are common sight in the villages where such husks are usually sunned in places where feasts are held. Even P.W.5 Taole Hlabisi a self-confessed taker of beer and a World War II veteran who used to drink in the army and does so today pretended that he did not know the effect of alcohol on a man's behaviour. P.W.4 too acknowledged with great difficulty the effect that liquor has on a man's behaviour yet he like the above witnesses would not acknowledge the fact that the accused's conduct bore close similarities to that of either a drunken man or a mad man.

The observation was legitimate therefore that these witnesses were so cagey about admitting the obvious as to suggest that they had something to hide, namely that the accused was behaving strangely that night. The accused does not deny that he killed the various deceased.

With respect to the first two deceased it seems to me that he killed them while in an advanced stage of intoxication. The crown testimony as rightly pointed out by Mr Maqutu and conceded by Mr Mokhobo is full of inconsistencies as to the circumstances that led to the first fight.

In fact P.W.3 said P.W.2 was next seen at P.W.3's husband's funeral yet P.W.3 said when she came to her mother-in-law 'Mathabang the latter told her she should run away as the husbands would kill her. P.W.3 proceeded in evidence "I ran away and went to my maiden home". P.W.3 said she was dragged by the husbands to 'Mathabang's and that for a short distance before they reached 'Mathabang's they were assaulting her. (See page 45 of my notes).

At page 44 of my notes P.W.3 said the husbands were asking her to say where P.W.2 was. P.W.3 and the husbands went to

/'Mamahlomola

'Mamahlomola looking for P.W.2.

P.W.3 denied that she and P.W.2 went to 'Mathabang's and reported the incident relating to the first fight. She said she was surprised to hear that P.W.2 said they went together to 'Mathabang's.

Strangely though, P.W.3 said she was not surprised that the husbands should molest her asking her to produce P.W.2 whom she had left in the company of the husbands in the house at the time P.W.3 went out through the window.

P.W.4 Phomolo Jeremiah told the court that he and the deceased Keketso Nkholise, Tokoloho Beneshe and Makoa Mabitle had been locked up in a cell at Mt. Moorosi on 3-7-1988.

On 5.7.1988 while he was with these deceased the accused came at night and called them out of the cell. He told them he was going to show them their mothers.

He ordered them to take up positions in the corridor near the cell and face the wall. He taught them a song which he asked them to sing for him. He left them there but said they should continue singing, and told them he would come back to shoot them. While he was outside he fired a shot once.

He later came back. While P.W.4 and his cell-mates were singing P.W.4 suddenly found himself down. He had been shot in the chest. Thereafter P.W.4 heard several shots being fired. He discovered that all his cell mates had been shot dead. Before dying Keketso had asked why he and others were being shot but the accused vouchsafed him no answer.

Asked if the accused appeared drunk P.W.4 said he appeared as he usually was. He conceded though that accused was doing strange things.

P.W.4 said the accused was neither blood-shot in his eyes nor staggering.

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When the accused left P.W.4 escaped to his grandmother's place some 150 metres away from the cell.

P.W.5 Hlabisi the night-watchman at Mt. Moorosi Post Office said on 5.7.1988 at around 8 or 9.00 p.m. he heard a gun report. He paid proper attention and heard another gun report from the direction of the village next to the police lines.

After a while a person whom he later recognised as the accused went past P.W.5's duty-station. The accused went to the police quarters. The accused was murmuring as he went past the Post office. He went into a house and got outside and shot into the air. He came back and called P.W.5 to him. P.W.5 obliged.

The accused then said

"I tell you that you should go and report tomorrow that if there is heaven we shall meet there."

He conceded that the way the accused spoke seemed to suggest he didn't care what had happened.

P.W.5 said he didn't know drunkenness when asked if the accused appeared drunk. In point of fact he said he had never seen a man drunk.

It is strange that a man born, as he said he was, in 1925 and who was in the second World War would say this.

P.W.6 Detective Trooper Kolobe's evidence is mainly important as to the time when he heard the firing of the gun shots. His house is the same house where the accused stays except that it is divided by a wall that separates their respective rooms.

P.W.6 is able to deduce that the first flurry of gun shots that he heard when he was aroused from his sleep could have been at 12.30 a.m. because when he heard the second flurry he checked his watch and it read 12.45 a.m.

/Some



Some fifteen minutes after the second burst of gun shots he heard accused's footfalls and voice. The accused was saying

"I give you my beer and then you fight me."

Then the accused's door squeaked open and shut. The following morning P.W.6 woke up to see dead bodies of persons who had sustained gun shot wounds.

P.W.6 said he knew accused took liquor but did not know the limit of his intake. He was unable to say if on occasions he saw the accused drink he took a lot of drink.

When he spoke referring to people whom he had given beer but who afterwards he said were fighting him the accused sounded angry according to P.W.6. But in the morning when he came to see him the accused appeared frightened though nobody had given him cause to be shaky in his speech.

As stated earlier the accused does not deny killing all the deceased he is charged in connection with.

His defence is based on the fact that he had taken two 340 ml cans of castle lager. Then before Mitchel's cafe closed he took three tablets of phenergan.

Out of a six pack of the beer and nip of whisky which he had stored he thinks he took one can of castle lager and went to 'Mathesele Sekhonyana's shebeen where he had been promised some drinks.

The accused met his friend Mr Khabo a teacher at 'Maseribane High School and the two sat down to a hard core drinking. Though he cannot recall how much he drank the accused thinks he might have knocked back six castle beer measures.

The accused and his friend went to Ntsoeu's restaurant. There the accused bought 3 "long toms"; and drank two giving the third to a boy they found there.

When the accused went out to ease his bladder he heard

/beautiful

beautiful strains of music from nearby and naturally gravitated to its source and in the process got into Thabang Shale's home where he found him dancing with P.W.1.

The dancers' wives were seated next to the door and the accused sat near them.

The accused asked for beer from Thabang's wife. This beer was for sale. The accused says the crown witnesses who testified that there was no beer in that house are not telling the truth. The accused expressed surprise that these witnesses should say they don't know beer yet beer is sold in a big way at Mt. Moorosi. I agree with him.

The accused said P.W.1 is his friend and on previous occasions they even drank together. However the accused said he didn't know the deceased Thabang Shale.

After the music had stopped for a while the accused testified that P.W.1 came to him and took a swig from his can and told the accused that "This is at a stockfair you dog". Then music was resumed and the two men he had found in there danced. The accused kept on drinking and placing orders for some more drinks. The accused remembers several occasions when P.W.1 took beer from him and shared it with Thabang. Their wives too drank the beer bought by the accused.

He also recalls that P.W. 1 sent his wife to their home to bring some device that could be helpful in repairing the music player. When P.W.1's wife returned she sat next to the accused and thus the sitting position made it appear that the accused had been sandwiched between the two wives. The accused denies that he said the music was too loud and that it should be stopped. The accused contrary to the questions put to the crown witnesses on his behalf testified in his evidence-in-chief that he did not believe that he said to the men that they were mine savages. He buttressed his belief by referring to the fact that he even shook the men's hands in appreciation of the good thing he felt they were doing.

/He

He testified that while he was sitting thus between the two women he jokingly said to these women

"You have hammed me in like I was your bridesmaid."

P.W.1 heard these words and seriously remonstrated with the accused. P.W.1 took offence at the accused's utterances and pointed out that he had no respect. In an effort to pacify the men who seemed aggrieved by these remarks the accused asked P.W.3 to "give these savages beer."

Then P.W.1 rose from where he had been seated and hit the accused with fists reproving him for "even calling us savages." This took the accused by surprise for he and P.W.1 were on such good terms that P.W.1 had even referred jokingly to the accused as a dog. Understandably the accused took no umbrage at this.

The deceased Thabang closed ranks with P.W.1 in a fierce fight against the accused who was trying to pull himself away from them. When approaching the accused and P.W.1, Thabang had initially made as if to separate the two by holding P.W.1 only to use a stratagem that put the accused off his guard for much to his bewilderment the accused was dealt a resounding blow to the face by the deceased Thabang. The accused tried to free himself from their joint grip and managed to slip out of his blanket head last. The accused opened the door and ran away.

The accused said he did not remember P.W.3 dragging him outside. The accused said that these people had been drinking his beer when he left. He also observed that they had had a lot to drink. The accused ran to his house. While there he took some more beer. Meantime he was searching his wits for the reason why the people at Thabang's place fought him.

Then when he went out to pass water gun in hand he saw two people standing next to his gate. He recognised P.W.1's voice when the latter said "shoot Potiane."

These people left that place and headed for Thabang's  
/place.

place. The accused went back into his house. The accused said he took the gun when going to pass water because he had heard a loud voice of a woman who was scolding <sup>about</sup> something thus he thought since he had just escaped from a fight the men might still be coming for him.

While back there in his house the accused kept on drinking. In the process he identified the scolding voice as P.W.2's and heard that she was referring her abusive language to him.

Thereafter the accused does not remember what happened nor indeed does he remember going to P.W.1's or even the deceased Thabang's home. He does not remember going to the deceased 'Mathabang's or to the police cells. He does not remember asking anybody to go and report to all and sundry that if there is heaven that is where he hoped to see them. He does not know how he got into his house after venturing out as P.W.4 and others testified.

The accused brought to the court's notice that P.W.6 testified that the accused said "I gave them my beer and they assault me." In regard to this testimony by P.W.6 the accused said he did not remember saying that. He does not deny shooting all the deceased but does not remember doing all that. The accused said that although his counsel had encouraged him to apply for bail he declined because he is sorry for what he has done and is hurt by it and would rather justice was done first.

Under cross examination the accused pointed out that although he did not know the deceased Thabang he went to his house because he was enticed by the sweet music emanating therefrom..

Asked whether he usually goes to other people's place when the restaurant where he usually gets music is closed he said that a police-man can do so in the interests of surveillance.

Asked to reconcile his statement about surveillance that he suggested drove him there with his initial statement that he was lured to that place by sweet music he said that surveillance

/is

is one of police duties. Furthermore sounds and music provide a basis for finding persons wanted by police.

Asked if he didn't hear this music before reaching his home on his way from the restaurant he said he did not remember.

It was pointed out to him that in the light of evidence that Thabang's home is only 100 metres away from the accused's therefore he must have heard that music the accused insisted that he did not hear it.

When told that it was strange that when he was in his house he suddenly heard this music he said he was sitting and drinking when he heard it. When pressed on in this line of cross-examination the accused suggested that the music might have stopped at the stage when he travelled from the restaurant and came into his house.

He testified under CROSS examination that the disease in respect of which he took phenazone started in 1976 when he was working in the mines. However he said he didn't know what was prescribed to him then for he hadn't the Book of Life then.

He stated that notwithstanding that he did not know Thabang he nonetheless made himself at home by sitting down next to the women in there because there was P.W.1 whom he knew and was used to including the two women whom he knew.

Asked if he felt he had a right to come into a stranger's house and sit down when finding the stranger enjoying himself with his wife and friends, the accused said he thought he had. Asked if he maintained he had a right to be an intruder he said he did not regard himself as an intruder when he came and sat in there.

Having said that he didn't find any lawbreaker in the house he was asked why he didn't leave them he said he was attracted by what was happening in that house and therefore decided to drink. The accused said he had never been in Thabang's house

/before.

before.

Asked to whom he was referring when he said give these savages beer he said he meant the men who were in there including the deceased whom he neither knew nor was used to. He conceded that this was not normal. Asked why he behaved thus to Thabang, then he said he took him on the same level as the one he was used to by mistake. He said P.W.1 was not truthful in saying he was not used to the accused. He suggested that P.W.1 denounced their friendship perhaps because P.W.1 had started the fight at Thabang's house.

D.W.2 Mrs Getrude Mochibe a pharmacist by profession qualified in polytechnic in Sunderland England in 1979 showed that she has acquired sufficient experience and qualifications to be certified as fit to testify about the effects of phenergan in a human body and mind.

She testified that phenergan is a drug given to patients for allergic reactions. She said allergy manifests itself through itchiness and vomiting.

She said this drug does not cure allergy but only reduces symptoms of allergy. She said if used for treatment of the skin low dose for a long time is advisable. For other forms of allergy the drug can be used for only a week.

The drug can be habit-forming. Its bad effects manifest themselves in drowsiness, dry mouth, difficulty in swallowing, difficulty in passing water and sometimes makes the user excited. A high dose of this drug may make the heart beat slowly. One of the effects it has on the brain is that it makes the mind lazy to think-hence drowsiness. This is the effect much favoured by patients who maintain it "blocks problems."

When taken with other drugs such as alcohol the interplay of the two or more creates difficulties. The other drugs make it stronger. It also in turn makes them stronger. Thus a single dose is so potentiated as to make it appear to be double. The

/potency

potency of the other drug too is potentiated to a number of times more than its actual strength.

D.W.2 accordingly stated that it is advisable for people not to take phenergan along with alcohol because of this. She stated that it is impossible to obtain phenergan without prescription; but feared that there are outlets through which people obtain it without prescription. Because of the difficulty experienced in the policing of movement of drugs D.W.2 said she was not surprised that even though the accused is in jail he nonetheless managed to get phenergan without prescription. She had had a look at the accused's "Book of life" and noticed that the supply he was given should have been exhausted way back before 1984 or 1985 because the 1st book of life shows no prescribed supply between 1984 and 5-7-1988.

D.W.2 testified that as a pharmacist one advises patients not to use drinks along with phenergan. But she wouldn't say if the accused was so advised.

She said that taken along with drinks phenergan produces excitement and hallucinations.

Asked what would happen if a man takes 3 phenergans and goes to drink D.W.2 said he might go to sleep immediately or move about picking up fights with other people. If taken before drinking 3 tablets would take about 15 minutes before making the user pass out.

Though D.W.2 said to that effect phenergan would depend on a number of factors or variables such as the level of tolerance and the bulkiness of the user she was of the opinion that a man the size of the accused would be knocked out 15 minutes after taking 3 tablets of phenergan. But if he takes a bottle of whisky at the back of that then he would not be able to walk.

She was of the opinion that if he took 3 cans of beer afterwards then he would be drowsy and fall asleep unless his tolerance has been enhanced by long use. Thus long time

/drinkers

drinkers take long to pass out.

The accused said that he is still using phenangan and had taken 3 tablets the previous day when this trial was going on.

The accused said that at the time he is alleged to have killed all the deceased he didn't remember what he did. He further said if he was appreciative at the time that what he did was wrong he would not have done it.

Mr Mokhobo submitted that the defence raised in respect of the killings is one of extreme intoxication. He submitted further that the last three killings at the cells were effected when the accused was labouring under a condition known as delirium tremens. This was based on the fact that the accused said he did not remember going to the charge office.

However my perusal of the record shows that the accused also said he did not remember going back to Thabang's house after the first encounter. The only occasion he remembered precedent to the second encounter at Thabang's house was when he heard P.W.1 say "shoot Potiane" at the time the accused had gone out to pass water and observed two men standing outside his yard. That is the occasion when he went out carrying his gun. The reason for carrying it being that he had heard P.W.2 hurling abuse at him and thus he feared the men from Thabang's might still be after him. Otherwise he remembered that these men went away and he went back into his house. Thereafter he did not remember anything till the morning when he was arrested.

Mr Mokhobo urged that the accused should be dealt with in terms of sections 2 and 3 of the Criminal Liability of Intoxicated persons Proclamation 60 of 1938 read with section 172 (3) of the C.P. & E 1981 Act in respect of the last three counts. The effect of this should be that the accused be found to have been insane and committed into custody pending the signification of the King's pleasure.

In answer Mr Maqutu submitted that courts have acknowledged that drunkenness can be such that intention cannot be formed.

/In



In S vs. Christien 1981(1) SA 1097 it was stated that 11

"Whenever a person who commits an act is so drunk that he does not realise what he has done was unlawful or that his inhibitions have substantially disintegrated, he can be regarded as not being criminally responsible. If there is a doubt accused ought to be given the benefit thereof."

Mr Maqutu submitted that it should be observed from the above that the old reasoning that because a drunken person voluntarily brought upon himself such a condition, he is criminally liable has been abandoned.

Citing Voet 41:10:1 as representative of the old thinking abandoned in Christien above Mr Maqutu indicated that Voet 47:10:1 has this to say:-

"As regards the drunken you would not say the same as those who are mad. Although they cannot be very far different from those who are mad, or have lost their sense, nay even from those who are sleeping, at the very time that their reasoning has been confused for them by wine, that crafty wrestler; nevertheless they are not free from blame, since they have allowed themselves to become intoxicated."

Pointing out that before Christien the law regarded intoxication as a partial defence Mr Maqutu relied on Rex vs Ngobese 1936 AD 296 at 301 where in reference to R vs Bourke 1916 T.P.D. 307 Curlewis consequently remarked:-

"... where a special intention is necessary to constitute the particular crime, as for instance express malice to make homicide murder, then drunkenness reduces the act from a more serious crime to a less serious one. And it was pointed out by Judges in that case that the practice was not to regard the crime as murder but as culpable homicide where the accused was not in a state to realise the consequences of his act or to have the intention to kill."

A further passage in Ngobese was referred to where the learned Judge said at 300 :-

"Personally I think that our law does not take a sufficiently human view of the effect of liquor on the mind

of a person where it is laid down that when one in a state of drunkenness kills another, the offence will not be reduced from murder to culpable homicide unless the drunkenness was of such a nature as to deprive him of the power of appreciating what he was doing and of realising the probable consequences of his act, so that he could not be said to have the intention to kill".

In A.G. For N. Ireland vs Gallagher (1961)3 ALL E.R. 299 at 304 Lord Goddard after taking the view that evidence of self-imposed drunkenness existed said

"But to admit that as a defence would be to allow self-imposed intoxication to be set up as a defence of insanity, a proposition which was emphatically negatived by this House in Director of Public Prosecutions vs Beard (1920) ALL E.R. 21."

Agreeing with Lord Goddard, Lord Denning at 312 said:

"This seems to me to be far worse - and far more deserving of condemnation - than the case of a man who, before getting drunk, has no intention to kill, but afterwards in his cups, whilst drunk, kills another by an act which he would not dream of doing when sober. Yet, by the law of England, in the latter case his drunkenness is no defence even though it has distorted his reason and his will power."

Repeating the principle stated by Sir Matthew Hale in his Pleas of the Crown Vol 1 p. 32 Lord Denning said

"This vice (drunkenness) doth deprive men of the use of reason, and puts many into a perfect, but temporary phrenzy ...by the laws of England such a person shall have no privilege by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses."

In Beard above at 28 where the evidence established that the prisoner had over-indulged in drink as a result of which he committed a crime whilst in a drunken stupor Stephen J was quoted with approval by Lord Birkenhead L.C. as follows:

"But drunkenness is one thing and the disease to which drunkenness leads are different things, and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time,

as would relieve him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case the man is a mad man, and is to be treated as such, although his madness is only temporary ... If you think there was a distinct disease caused by drinking, but differing from drunkenness and that by reason thereof he did not know that the act was wrong you will find a verdict of Not Guilty on the ground of Insanity."

To the same effect the words appearing at 29 bear repeating. There it is stated that:

".... the learned judge ruled that if a man were in such a state of intoxication that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity.

- (ii) That the evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with other facts proved in order to determine whether or not he had this intent.
- (iii) That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts."

Our law governing criminal liability of intoxicated persons is to be found in Proclamation 60 of 1938, section 2(2) of which is in keeping with the English authorities cited above says:

"Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act ... complained of did not know that such act ... was wrong or did not know what he was doing and -

- (a) the state of intoxication was caused without his consent by the malicious ... act of another person;  
or
- (b) the person charged was by reason of intoxication insane temporarily or otherwise, at the time of such act .."

The defence if established under (a) above entitles the accused to his discharge while if established under (b) then

/the

the provisions of S. 172 of our C.P. & E apply.

Subsection (3) of S. 172 provides that if it appears to the court before which a person is tried that he did the act but was insane at the time the court shall return a verdict to the effect that the accused was insane at the time he committed the act and order that the accused be kept in custody pending the signification of the King's pleasure.

Furthermore subsection 4 of section 2 of the Proclamation provides that :-

"Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention ... in the absence of which he would not be guilty of the particular offence charged."

Finally subsection 5 says that intoxication shall be deemed to include a state produced by narcotics or drugs. Needless to state the accused's state of extremely advanced intoxication was not caused by the malicious or negligent act of another person. From the evidence led it appears to have been wholly voluntary. The intoxication induced by his intake of alcohol was compounded by his use of phenergan which he needed for treatment of his allergy. The use of this drug was not at the time that he was taking it prescribed by medically qualified person though it did bring relief when he took it.

Although it seems doubtful that while smarting under the grievance that the accused must have harboured when he left Thabang's house for his own he could just sit down and enjoy drink after drink and only remember to take his gun because he heard scolding words outside when he decided to go out and pass water, it seems to me that in the absence of credible evidence to show that the accused's mind never blacked out before he went to Thabang's house the second time his story should be accepted.

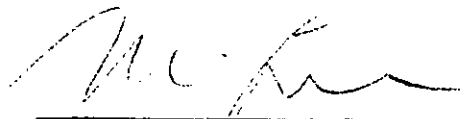
I have heard satisfactory evidence on the effect of combining liquor with the drug phenergan and have come to the

/conclusion

conclusion that because the accused's state of mind was self-induced by the intake of alcohol he was temporarily insane at the time when he committed the act charged in terms of Proclamation 60 of 1938 section 2(2) (b).

Acting in terms of S. 172(3) (a) and (b) the court makes a special finding that the accused is guilty of each of the acts charged but was insane and therefore orders that he be kept in custody in the appropriate prison pending the signification of the King's pleasure.

My assessors agree.



J U D G E.

1st June, 1990.

For Crown : Mr Mokhobo

For Defence : Mr Maqutu.