

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

GABRIEL PUSELETSO NCHELA

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 29th day of September, 1995.

In this case, the accused is charged with the crime of murder.

"In that upon or about the 24th March, 1991 and at or near Khohlo-
ntšo in the district of Thaba-Tseka the said accused did wrongfully,
unlawfully and intentionally kill Kosaphe Phoka by shooting him with
a .38 special revolver and did commit the crime of murder aforesaid.

The accused pleaded not guilty to the charge.

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In terms of Section 273 of the *Criminal Procedure and Evidence Act* of 1981 accused admitted certain facts and deposition of the Preparatory Examination.

Section 273(1) provides:-

"An accused or his representative in his presence may, in any criminal proceedings, admit any fact relevant to the issue and the admission shall be sufficient proof of that fact."

For convenience, I decided to treat the admitted Preparatory Examination depositions as if they were evidence actually given before me. Both counsel for the accused and counsel for the Crown agreed with this mode of conducting proceedings.

The identity of the deceased Kosaphe Phoka and the fact that he was shot by the accused with a .38 revolver was admitted.

P.W.1 was Motjoka Geremane (His deposition is on pages 2 and 3 of the Preparatory Examination record). He states he was looking after cattle at Thabaneng near the road to Bokong. He saw Masake meet Matia. Masake was Kosaphe's girl-friend. Kosaphe (deceased) came and Matia left. P.W.1 saw Kosaphe's claps go up and down and the girl cried. Deceased stopped when he saw Fanyane and Koloti. A vehicle came and P.W.1 says he heard one of the men from

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the vehicle tell Kosaphe to get into the vehicle. The man caught Kosaphe (the deceased). P.W.1 says he saw Kosaphe (the deceased) run and when Kosaphe got below the road, he heard a gun report. P.W.1 says he then saw Kosaphe fall and roll downwards. The men were not in any uniform. P.W.1 was 150 yards away from the fighting.

P.W.2 was Matia Mooko, aged 17 (His deposition is on page 3 of the Preparatory Examination record). His evidence shows that he was met by the deceased while P.W.2 was in the company of 'Masake Takane (a girl) who was P.W.2's girl friend. Deceased (finding them together) confronted the girl by standing in front of her. P.W.1 left deceased and the girl together. When he was some distance away, he saw deceased slap the girl. P.W.2 reported the incident to Fanyane Rantau and Koloti.

P.W.3 Captain Moremi of the Police Thaba-Tseka, (His deposition appears on Page 4 of the Preparatory Examination record). P.W.3 says after receiving a report from the accused, he asked for the gun used. On the 25th March, 1991, accused gave him a .38 gun, two rounds and one empty shell. He sent them for fire-arm examination.

P.W.3 went to the scene of crime. From where the vehicle was standing to where the body had fallen was a distance of 50 paces. It was a sloppy place, hard

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to measure with precision.

P.W.4 Lekhonatha Moqiphi identified the body before the doctor before the post mortem was conducted. P.W.5 Teboho Mohlathi also identified the dead body of deceased before the doctor examined it.

P.W.6 was Fanyane Rantau, who gave a sworn testimony *viva voce* before this Court. P.W.6 says he got a report from P.W.2 that they should go and intervene as a boy was assaulting a girl. P.W.6 says when he and Koloti came to where they could see what was happening, nothing was happening. The girl was walking ahead of the boy whose name was Kosaphe (now deceased). Deceased would not reply to the question why he had been fighting with the girl. P.W.2 identified the girl as Masakhe. Masakhe and deceased were lovers.

Just then a motor vehicle stopped in front of the girl. P.W.6 and Koloti went to ask for a lift from the occupants of the motor vehicle. They were given a lift and consequently got on the bakkie of the vehicle. It was a van with no canopy.

One of the men from the vehicle got down asked the girl why she was crying. She said "that person hit me", pointing at the deceased. Kosaphe (the deceased) who had in the meantime got to the vehicle was asked why he had assaulted the girl. Deceased replied that it was a matter between him and the girl.

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He was told to get into the vehicle. Deceased said he would not do so as he was not going far.

One of the men from the vehicle hit deceased with a fist. Deceased hit back, although P.W.6 did not see where the blow landed. A second man alighted from the vehicle and tried to catch deceased. Deceased ran away. They chased deceased. Deceased ran below the road. As he ran one of the men produced a fire-arm and shot him. Deceased ran a few paces and fell. As he fell down, those gentlemen told them to go and pick him. When they picked him, he was groaning. They carried him about 100 paces to the road. Deceased belched and died. One of the men brought the vehicle and they loaded the deceased in it. When the man shot deceased, he was 10 paces from him. The man who fired was the accused. He never said a word before he fired.

P.W.6 says none of these two men introduced himself as a policeman. P.W.6 did not notice any injuries on the girl. When they got to the village of Nkokane the two men told Koloti to go and report to the chief of the village that Kosaphe was dead. Koloti came from the village of Nkokana. P.W.6 got down at his own village of Sekhohola. Masake was taken with these two to where they said was the mortuary.

Under cross examination P.W.6 said the following: Although P.W. 6 was

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not exactly deceased's friend, he conceded they had at one time herded animals together. P.W.6 says he was very angry that deceased had been shot. He felt accused ought not to have done so. Deceased had fallen 30 paces below them. They carried him 100 paces to the road. Kosaphe had fallen 120 paces from the motor vehicle. Kosaphe (deceased) was running in the road. When he saw the two men were chasing him, he turned and got out of the road and ran downwards.

When he got out of the road, the two men who were chasing him stopped and one of the shot him. Deceased swerved from the road when he was 20 paces from the vehicle. He ran about 120 paces downwards before he fell. These two men were standing when one of them fired. They never got out of the road. Before deceased fell, he was no more running normally. P.W.6 says he did not hear accused used the swearing words "nyoa meng ting", your mother's vagina.

P.W.6 insists he did not hear when accused said he was a policeman. P.W.6 says accused was 4 paces from the deceased when deceased got out of the road and ran downwards. P.W.6 denies any of the two men was ahead of the other as they chased deceased. P.W.6 denies deceased ran only 3 paces before he fell after being shot. P.W.6 agrees that had accused not fired, deceased would have outrun them. At the Preparatory Examination P.W.6 had said accused had said to the deceased:

"You are wrong to say it is your business, you should have told us

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why you assaulted her. Come into the vehicle.”

P.W.6 conceded that his memory was better at the Preparatory Examination than it was at the trial. At one stage he said what he said at the Preparatory Examination should be taken as correct and that he stood by it.

At that stage of proceedings, Counsel and Defence Counsel agreed that portions of Masake Takane's evidence at the Preparatory Examination be admitted by consent.

P.W.7 Masake Takane's evidence followed. (The portion of Masake Takane's evidence that come from pages 4 and 5 and page 8 of her deposition at the Preparatory Examination were read into the record).

P.W.7 says she was from a Church Service. She says after she had been assaulted by the deceased, a vehicle passed. Deceased was asked by one of the men from the vehicle why he had assaulted her. Deceased said it was none of his business. Accused said: "Look here by boy, I am a policeman, come into the vehicle." Deceased refused. Accused clapped him. Accused hit accused with a fist. Posholi, who was with accused, came to help but deceased fled.

P.W.7 then heard a gun report. She later saw deceased loaded on the

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vehicle, he was bleeding. He was taken to hospital. P.W.7 says she was not taken for medical examination because she had no visible injuries. She felt pain in some parts of her body.

The reason deceased assaulted her was that deceased had found her with another boy friend of hers, Matia P.W.2. Deceased was also her boyfriend. Deceased started hitting and kicking her. P.W.6 and Koloti came to the scene after they had separated with deceased. They found her crying and she told them she had been assaulted by deceased.

When accused came from the vehicle and asked deceased why he had assaulted P.W.7, and accused said it was none of his business, accused said:-

"Look my boy I am a policeman, enter the vehicle, you will explain why you assaulted the child."

Deceased refused to get into the vehicle. Accused clapped him, deceased fought back with his fist. Posholi alighted from the vehicle. Deceased fled and said "Nyoa meng ting" (you mothers' vagina). Posholi threw stones at him. P.W.7 heard a gun report. P.W.7 saw deceased fall.

After deceased was carried to the vehicle, she was told to get into the cabin

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front seat of the van. They took deceased to the hospital. She later heard her boyfriend, the deceased, had died. P.W.7 says she had no visible injuries except mud stains.

The post mortem report was admitted by consent and marked Exhibit "A".
The Crown then closed its case.

The accused gave evidence in his own defence.

The accused says they stopped in front of some four people who were following each other because a lady was screaming. As a result of enquiries, he came to know that the deceased was responsible. He asked for an explanation from the deceased. The deceased said it was none of his business. Accused says he retorted:

"Look here boy, I am a policeman, I have a right to ask because by hitting the girl you have committed a crime. I am arresting you.
Get into the vehicle."

Accused says two men and the girl were near the vehicle towards the front. He went towards the boy (meaning deceased), caught him by the arm and pulled him towards the vehicle. The Deceased pulled back. Accused slapped him. Deceased

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let loose a barrage of punches and hit accused. Accused lost consciousness. Later, accused changed this to a feeling of slight dizziness. He added only one blow landed. He warded off the rest. The blow that landed, landed on the forehead. Accused says when he looked up, he realised deceased was beginning to run away. He chased deceased with Warrant Officer Posholi. Deceased was running in the road, when he was some distance away, he turned and ran out of the road down a curving slope (letsoapo). The continued the chase.

Accused says he had resolved to arrest deceased because P.W.7 the girl was full of mud as if she had been rolled in the mud. Accused thought she was badly injured at the time. As deceased ran, it got into his mind that deceased was also committing a serious offence of escaping from lawful custody. Accused says he realised that he could not catch the deceased, he then pulled out his .38 special revolver. He called the boy and said stop or I shoot. The boy continued running. He then aimed at the boy's legs in order to break him by disabling the lower part of his body. This was being done in order to arrest him. Deceased ran three or four paces and fell. Deceased was 50 paces from him when he fired. Accused says he is supposed to fire a warning shot after telling an escapee to stop. Only then can he actually direct fire at the escaping suspect. Even so, everything depends on the particular surrounding circumstances.

Accused said he arrested deceased for assault with intention to do grievous

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bodily harm, indecent assault, and escaping from lawful custody. When he neared Thaba-Tseka, he realised deceased was dead. At Ha Nkokoana he had sent someone to report the death of the deceased. The body was taken to the mortuary and the girl sent to a doctor for medical examination.

Accused says he never intended to kill deceased and never doubted the legality of what he was doing.

Cross-examined accused said his fire-arm has a range of between 50 and 100 metres. It loads 6 bullets. Accused says he was very polite during all these proceedings and is a highly disciplined person because of his training as a policeman. He is never emotional. Accused says deceased was about 23 years old while the girl was 19 years old. P.W.7 asked to be taken to a doctor and he took action to see that P.W.7 was taken to a doctor. He saw the medical report of P.W.7, it disclosed bruises. P.W.7 must be telling a lie if she says she was never medically examined. During the chase deceased was 50 paces from him and 80 paces from Warrant Officer Posholi. Warrant Officer Posholi was 20 to 30 paces from deceased.

Warrant Officer Posholi was 35 years old at the time but was very fat because he had just returned from a promotion course. Accused says he was obliged to fire at deceased because Warrant Officer Posholi was tired. P.W.6 and

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other witnesses did not hear him warn deceased to stop because he was shouting only moderately. He has no doubt deceased heard him.

Accused says he had aimed low the bullet hit a stone which deflect it upwards. That is why it hit deceased in the chest region. Accused says he actually heard the bullet hit a stone and ricochet upwards. Accused was not able to say why he did not say this in his evidence in chief. Deceased claimed he was very accurate with his shooting, he could be classed a marksman of some sort.

Accused called Warrant Officer Posholi, who became D.W.2. He said they saw two people fighting in the road at distance. He drew accused's attention to this fact. He thought they were men because he had not at that stage discovered that one of them was a girl in jeans. He told the Court that when they reached deceased and P.W.7, they found P.W.7 crying and very muddy. It was as if P.W.7 had been rolled in mud. Warrant Officer Posholi stopped the vehicle in front of them intending to find out what was happening. The girl was crying aloud. He switched off the engine after parking the vehicle.

Accused (after being directed to deceased by the people nearby) asked deceased why he had assaulted P.W.7. Accused said that is none of his business. Accused then said:

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"Look here boy, I am a policeman, I am arresting you, get into the vehicle."

Deceased resisted. Accused hit him with a clap. Deceased hit accused with a number of blows with his fists. Warrant Officer Posholi got out of the vehicle to go and help accused. Deceased ran down the road in the opposite direction. Warrant Officer Posholi was ahead of accused during the chase. At 50 paces deceased changed direction and went down the rocky twisting slope.

Warrant Officer Posholi says he heard accused tell deceased to stop or he would shoot. Deceased was 30 paces in front of Warrant Officer Posholi. Accused was 35 paces behind Warrant Officer Posholi. Mr. Posholi says he was too fat to catch up with deceased, he was tired. He heard a gun report. There were two sounds. It was as if something had been hit and deceased fell. Deceased had fallen 130 paces from the vehicle.

Warrant Officer Posholi in cross-examination conceded that he had not said before this Court what he said at the Magistrate Court. That was an accidental omission. Similarly, Mr. Posholi never mentioned the second sound that followed the shooting. He says he realised a stone had deflected the bullet yet this may not have been in the report he made after the incident. He denied he and accused had talked over and agreed so that his evidence should corroborate that of accused. He agreed

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the girl P.W.7 had no visible injuries.

Assessing credibility is not always easy. It seems as if from the admitted deposition of the girl P.W.7 that accused did indeed say that he was a policeman although P.W.1 Motjoka Geremane and P.W.6 did not hear him. This admitted fact I have to accept. P.W.7 also says Warrant Officer Posholi threw stones at deceased during the chase. This fact I have also to accept. It is admitted by the accused himself that he assaulted deceased. Was that necessary? Deceased hit back. This behaviour of accused and Warrant Officer Posholi becomes only partially relevant in that they do not seem to have worked within the law at all times. Nevertheless to err is human. I do not think this behaviour should be pursued further. The only thing is that deceased's retaliation upsetted and angered accused.

If Warrant Posholi says he stopped in front of P.W.6, P.W.7 and deceased intending to find out what was happening, then it becomes far-fetched to accept that accused had formed the intention to arrest the deceased for any offence. Warrant Officer Posholi and the accused are experienced policeman. Policemen investigate before they decide to arrest any person. Even if investigation is not always called for, a policeman will attempt to get some explanation before the acts. I therefore accept that even when deceased was asked to go into the vehicle it was for interrogation purposes.

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I was a bit unsettled and unimpressed by the exaggerations which accused and Warrant Officer Posholi made before Court. They then proceeded to lie in concert. If only accused had let Warrant Officer Posholi to tell his own story unadulterated, the accused and the Court would have benefitted. As it happened, the evidence of Warrant Officer Posholi became worthless. I reject that deceased was under arrest or that he was being arrested for a specific crime. Even if he was, accused having regard to the surrounding circumstance could only have had in mind assault common. Indecent assault and escaping from lawful custody are being concocted to bring the offences within Schedule I Part II of the *Criminal Procedure and Evidence Act* of 1981. This is being done to escape the consequences of the accused's lack of self-control and the reckless ill-considered acts that followed.

The deceased in this case was shot by a policeman while he was running away. That policeman stands before me today charged with the crime of murder. The accused claims the accused was already arrested or was resisting arrest.

Accused justifies the shooting of the deceased by relying on Section 42(1) of the *Criminal Procedure and Evidence Act* of 1981 which provides that where a policeman or peace officer or even a private person required to make an arrest:

"attempts to make an arrest, and the person whose arrest is so attempted flees or resists and cannot be apprehended and prevented from escaping, by other means than by the peace-officer or private

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person killing the person so fleeing or resisting, such killing shall be justifiable homicide.”

The accused agrees that this Section applies to serious crimes. The offences to which Section 42(1) of the *Criminal Procedure and Evidence Act 1981* which might be relevant to this case which appear in Schedule I Part II of the *Criminal Procedure and Evidence Act 1981* are:

- (i) Indecent assault.
- (ii) Assault in which a dangerous wound is inflicted.
- (iii) Offences the punishment whereof may be imprisonment exceeding 6 months without an option of a fine.

The accused states he had arrested deceased on a suspicion of indecent assault, assault with an intention to do grievous bodily harm and escaping from lawful custody.

The facts as believed by me do not show that deceased was definitely under arrest, nor was he ever in any form of custody. The accused's story that deceased was under arrest is a recent concoction which was belatedly supported by Warrant

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Officer Posholi D.W.2.

Accused exaggerated everything to magnify the deceased's transgressions. P.W.7 had been assaulted with fists and kicked by deceased. There was some mud on her. Yet accused and Warrant Officer Posholi built a false story of her appearing to be so muddy that she appeared to have been rolling on mud.

The only fact that Warrant Officer Posholi seems to be consistent with his Preparatory Examination deposition, was that he saw and told accused that there were two people fighting in the road. These turned out to be P.W.7 and deceased. I believe this is true. That being the case there was no question of indecent assault. P.W.7 did not have any wound but was crying. Here too there was no question of assault with intent to do grievous bodily harm of any kind. The view I have was that accused was of the view that an ordinary assault had been committed.

Assuming accused had grounds to suspect that a serious crime had been committed, what would have made this killing justifiable?

The premise we have to begin with is that the life of every person is sacred. Yet, the maintenance of law and order and the elimination of serious crimes is just as important. Without a stable society in which criminals are apprehended, the very lives could be endangered.

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Wessels CJ in *R v Hartzler* 1933 AD 306 at page 309 dealing with resort to firearms in such circumstances said:

“In any case a policeman cannot shoot at a person arrested because he runs away. He must use other means to recapture him, and he can only resort to a firearm if he can use no other means whatever to recapture the arrested person.”

In that case, a policeman had shot an African who wrenched himself free and began to run. The policeman had demanded a pass from the African and produced handcuffs and told him that he would arrest him if he was without a pass. The African did not produce a pass and the policeman got hold of him. The African wrenched himself free and began to run. Thereupon the policeman produced his gun and fired twice. The first time he fired at the ground. The second time the policeman says he aimed at the ground but in fact struck the complainant at the back. It was held the African was never in lawful custody and even if he was, the shooting was not justified in the circumstances.

In *S v Swanepoel* 1985(1) SA 563 the Appellate Division of South Africa held that where the accused invokes the protection of section 49(2) of *Act 51* of 1977 (which is similar to Section 42(1) of the *Criminal Procedure and Evidence Act* of 1981 of Lesotho, the onus is on him to show those provisions apply to him. In the case before me, there were no grounds for the accused to believe that the

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deceased could never be apprehended if he had outrun the accused. In *Mazeka v Ministry of Justice* 1956(1) SA 517 AB Van den Heever JA said:

“The legislature could not possibly have intended that recourse to shooting should be taken lightheartedly...”

His Lordship also noted that there was “information which points out to the likelihood of the arrestee being identified, located and arrested”, later. The accused says it did not occur to him that he could easily come for deceased on another day and easily find him in his village. This consideration becomes all the more relevant where the crime committed is a relatively minor assault. While the harassment of young ladies by young men is deplorable, righteous indignation should not becloud judgment.

In the case of *R v Koning* 1953(3) SA 220 the situation was somewhat equated to private defence and killings that occur in such situations. The situation is not quite the same. In an emergency where a life is threatened, there is no room for armchair speculation. In cases such as this one, there is no such an emergency. Secondly, the crime committed or suspected has to be weighed against the need to take a life.

Courts strictly interpret this Section in favour of protecting lives. If

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conditions are fulfilled to the letter, then even where the accused has been unreasonable, he will be afforded protection under that Section. What I have said finds support in *R v Britz* 1949(3) SA 293 at page 303 and 304. After correctly showing in criminal cases the *onus* is always on the Crown, Schreiner JA said:

"But it should be observed in the first place that the section is obviously designed to provide protection for a person, who killed another in specified circumstances..., and that it is not available where their presence has only not been negated.... In relation more particularly to some of the offences mentioned in the First Schedule, makes it clear that the section may, on any view of onus protect persons who ought not to be protected.... Now the dangers... would be greatly increased if the onus lay on the Crown to exclude the reasonable possibility that the specified circumstances exist... And bearing in mind also the emphasis which our law and customs have in general placed on human life, I am satisfied that the legislature must have intended that a person who has killed another and seeks to use the very special protection afforded by Section 44 should have to prove, by a balance of probabilities, the circumstances specified in the section as a pre-requisite to immunity."

The underlining is mine and the Section 44 referred to is identical to section 42(1) of our *Criminal Procedure and Evidence Act* of 1981. It was an uphill struggle for the accused to fit the nature of the crime committed within the category of those in Schedule I Part II, he had to exaggerate and lie outright.

In this case accused being in possession of a firearm was expected to keep his head through out. He was assaulted and humiliated by a boy when he was doing his police duty in a moderate manner. Accused's untruthfulness in this matter,

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where the *onus* was on him, was pitiable. His mind was so affected by the sudden provocation, from the assault of the deceased, that he acted with criminal recklessness. Unfortunately once in trouble he decided to get himself out through lies.

Taking the case of *S v Sigwahla* 1967(4) SA 566 I find nothing that conclusively shows accused had the subjective intention to kill deceased.

I note that accused himself does say he aimed his gun at deceased's lower limbs. The act, according to the accused, was deliberate. I doubt if accused (in the mood he was in) in less than five seconds exercised the cool judgment he claims he did. I do not believe he particularly aimed at the limbs. Borrowing from Holmes JA at page 570 AE of *S v Sigwahla*:

"The expression intention to kill does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such a result."

I have already disbelieved Applicant when he says he directed his mind at shooting deceased and that he felt entitled to do so. Because of my factual finding, there can be no *dolus directus*. I am only left with determining whether there was such recklessness as I could find beyond reasonable doubt that he subjectively intended

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to kill deceased.

The view I take is that even if I applied the objective test (let alone the subjective one) accused cannot be deemed to have intended to kill deceased. What is clear is that he was suddenly angered and provoked by a lively young man, the deceased. Deceased was just as angry from his own quarrel with his own girl friend.

In South African law, Schreiner JA in *R v Krull* 1959(3) SA 392 at 399 E said provocation *per se* does not convert murder into culpable homicide. "Since a merely provoked killing is never justified, there seems to be no good reason for holding it to be less than murder when it is intended". After dealing with the problem of choice of words which I take to include both the "objective" and subjective tests, Schreiner JA in *R v Krull* page 399 B concluded:-

"Legal systems can only attempt by one approach or another to give effect to the basic idea, which is that the provoked person may have been so upset that the mental element requisite for murder may not have been present."

It is because Accused's mental balance was suddenly upset, that he could not in my view be said to have subjectively (let alone objectively) intended to kill deceased.

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What accused did (though not murder) borders on murder if we follow present South African cases. The position is changed by the sudden provocation accused encountered. Accused wanted to lay hands on deceased for personal reasons after being assaulted. He was no more acting as a policeman, therefore he was not going to let the deceased to escape into the ravine. Consequently he shot the deceased quite recklessly driven by anger. The position of the law is simply that the police should not shoot people who run away when they are suspected of minor offences. He was expected to have weighed the nature of the deceased's offence. This he was not in a position to do. For that reason, Accused was negligent.

Accused's case is not helped by the fact that he says he is a good shot. There may be a suspicion that he shot to kill. This does not entitle me to find he subjectively intended to kill the deceased. I am obliged to give him the benefit of the doubt. The *Criminal Law Homicide (Amendment) Proclamation* of 1959 also obliges me not to find the accused guilty of murder on account of the immediate and sudden provocation that preceded the shooting. Our law of provocation was belatedly changed in 1959 and is now (and remains) similar to Section 141 of *The Transkei Criminal Code* and English law. There is a slight difference between the Law of Lesotho and present South African law. This is often overlooked. Even if accused might have been found guilty of murder, according to present South African law, in Lesotho it would be culpable homicide because of the *Criminal Law Homicide (Amendment) Proclamation* of 1959.

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Taking all the evidence before me into account, I do not believe that when accused told deceased to get into the motor vehicle, he was formally arresting the deceased. I believe P.W.7 Masake when she says accused told deceased it was his business to know why P.W.7 was assaulted by the deceased because he was a policeman. It seems to me the accused was obliged to assert his authority as a policeman because of the attitude of the deceased. Had deceased co-operated, deceased might not even have arrested him. The view I take is that even when accused told deceased to get into the motor vehicle, it was in order to ascertain the facts.

Although accused struck me as a decent man, once he was in trouble he tried to get himself out of it by telling a string of lies.

In my view, whether deceased had been arrested and was escaping this does not make any difference. He should not have been shot in the manner he was shot.

I, therefore, find the accused not guilty of Murder. He is guilty of Culpable Homicide.

My two Assessors agree.



W.C.M. MAQUTU
JUDGE

For the Crown : Mr. N. *Qhomane*

For the Accused : Mr. Z. *Mda*