CRI/T/46/96

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

VS.

MOLIBELI TŠOSANE

JUDGMENT

To be delivered by the Honourable Mr. Justice G.N. Mofolo
on the 3rd day of February, 1998.

The accused Molibeli Tšosane was charged of murder in that:-

Count 1

'__ Upon or about the 14th day of December, 1994 and at or near Thabong in the District of Maseru, the said accused unlawfully and intentionally killed 'Maselloane

Tšosane.'

Count II

'___ Upon or about the 14th day of December, 1994 and at near Thabong in the District of Maseru, the said accused unlawfully and intentionally killed Lejoetsamang Nkiane.'

The charge being read to the accused he had pleaded not guilty.

P.W.1 Lethusang Molefe (P.W.1 at the P.E.) sworn had stated that he was 23 years old. He was not employed then. He had attended school though he had not gone beyond standard V1 which he had passed. He was literate in Sesotho but knew very little English. He knew the two deceased persons but especially 'Maselloane Tšosane who was his mother. He had seen Lejoetsamang before though he did not quite know him. He bore his present surname because he was born of a different man but he had later joined the late 'Maselloane Tšosane. He knew the accused who was Molibeli Tšosane and was also called Jeremiah. Accused's surname was the same as his mother's for his mother was married to accused's younger brother. His late father and his mother stayed at Thabong near Masithela's. He had stayed with them. His mother had died on 13 November, 1994. On 13 November he was going to work and called at his mother's place to say he was going to work. He had found the door ajar and he had seen blood everywhere - on the floor and some spluttered on the walls and he had found two people dead. He had rushed to the police. He had not known the other person who

died with his mother but got to know that it was Nkiane. He had not looked at the dead persons closely. He had however observed wounds on them and spent cartridges on the floor. On his mother were three wounds on her chin, neck and breast where a bullet was lodged. She was naked. She was on the bed with her feet hanging and lying on her back.

As for Nkiane he was lying on the bed and had a wound on the arm penetrating into the armpit. He was also naked. He had touched the cartridges on the bed on which they were lying. He had closed the door and went to the police. The police from Thamae had come and opened the door. Three policemen had come on the scene - 2 policemen and a policewoman.

The witness further testified before his mother died she had no quarrel with anybody save accused who accused his mother of all sorts of things like spilling water at the gate. He also complained about the flats. His mother and accused were next door neighbours. His mother had won her case against the accused concerning the flats though he had not been in court when the matter was disposed of. Accused and his mother were saying they did not know his mother; they were saying his mother should vacate the flats because she was a prostitute. He would not say how long his mother had lived with her husband Lefa though they had a child attending school. He was present when her mother was buried and she had been buried in her yard. Accused had refused to have his mother buried in accused's yard where the Tšosane's are buried. Accused, his mother and other relatives wanted the body exhumed. The Tšosane family had neither attended the scene or burial. Since the burial there were tenants in the flats and the late Lefa's child was staying in the flats.

All the tenants had since been expelled by the accused who threatened to shoot them for, afterall, they had learned the owner of the flats was shot. A case was pending between him and accused.

Cross-examined by Mr. Ntlhoki for the defence the witness testified he had lost the case at the Magistrate's court and he had appealed to the High Court. Nobody had attacked him so far. It was the same site hotly disputed between his mother, accused and accused's mother. He agrees an Indian had sued his late mother alleging the latter wanted to eject the Indian. He could not say whether his late mother was sued jointly with the late Lefa. Lefa had, however, won the case against the Indian. He says he does not know that there were several people disputing the site. He had stayed in the same yard and flat with his late mother and they were separated by rooms. The night his mother was killed he had heard no gun report and he had come home about 3 a.m. as he was on night shift. He had not raised an alarm although the police post is nearby. He could not raise an alarm because he suspected the accused to be the culprit. Police had asked him who he suspected and he had said accused on account of having a dispute with his mother. His suspicion was based on the fact that his mother had won the case. The police had not asked him about the man killed with his mother. As far as he was concerned accused killed Nkiane to avoid identification or for fear that Nkiane would assault him. He says he knows that accused is a soldier.

He says when the alarm was raised they could see the accused for he was present. The police had raised the alarm on coming to the scene. He does not think any other person would have killed his mother because whenever accused quarrelled

with his mother he threatened her with death. Put to him accused made no such threats he says he did and had gone further to say his mother had sold stones though cases were decided in her favour.

The witness agrees he is a brave person. He says he is not prone to make quick decisions or to arrive at such conclusions. He had not taken kindly to accused and his mother not attending the funeral. Beer at the flats was sold only during the day. He agrees there were many people during the day but not at nighttime.

In answer to questions by an Assessor he says the two deceased were found on the same bed and their heads were facing the same direction. His mother was not lying with the deceased man. Accused had a firearm and he had seen it; they were a big and a small gun. A big gun was taken away by the soldiers. He says between 9th - 13th November, 1994 there was a quarrel between his mother and accused. In measuring the site accused and his sister had come on the scene and insulted his mother. As he came into the room deceaseds' clothing was nicely put on a chair. In seemed like they were sleeping together.

P.W.2 Tpr. Paneng (P.W.7 at the P.E.) sworn stated:

He was a member of the L.M.P. and in 1994 he had worked at Thamae's police post. He knew the accused before court. He had met him in course of his duties in 1994. He had meet him at Thamae's. It was in December, 1994. He says what happened is that accused came to him while he was on duty. He reported he had a dispute with some person though he could not remember the name. The nature of the dispute was with a lady who wanted to sell a site and he (accused)

disputed this and wanted police advise lest he should go wrong as the matter was in court. He had not told him the nature of mistakes he (the accused) might commit. Accused was otherwise normal. He says he was seeking advice from him and he told accused the best course was to go to court. The case, according to the witness, was lying at Matala Local Court. He had not reduced the explanation to writing. He had heard nothing thereafter and had not met accused to date. Accused had said the site was at Thabong, Maseru. He had heard of fatalities at Thabong three- four days accused had been to him. The deaths had occurred on the same site accused had described to him.

Cross-examined by Mr. Ntlhoki the witness testified the advise accused sought and the advise he had given were of no concern to him.

No re-examination by Crown.

P.W.3 Tpr. Moloi (P.W.4 at the P.E.) sworn stated at present she was stationed in Mokhotlong and in 1994 she had been stationed at Thamae's Police Station and so was the case in December, 1994. She knew the accused before court. She had attended the scene of crime on 15 November, 1994. She came to know of the matter for P.W.1 had come to the police to make a report - she points at P.W.1. The report was that his mother and a male friend had been killed and they had gone to the scene. She had been with 2nd Lt. Seutloali, Sgt. Raboqa who are senior police officers. Five policemen had gone to the scene. They went to deceased's home at a place near Masithela's. P.W.1 had accompanied them to the

place. The place faces East and there is a room facing the main road being where the deceased was; on arrival a shell was found near the door; it looked like the door had been forced open - the reason being that the lock was damaged. There was a bed next to the door and on the bed were two dead people - a male and a female. The female had been left naked and she was lying on the bed; she was lying on her back facing the wall and her feet were on the floor. She was bleeding through the nose. She had a gunshot wound on her right cheek; there was another wound on the chest and on the right breast; there were no other wounds. Near the pots was another shell.

As for the male person, he was lying on the bed naked lying on his stomach with one leg stretched on the bed and another leg on deceased's tummy; he was facing the wall. He had one wound on the chest. All wounds were gun shots according to her observation as a policewoman.

She says there was a shell where the pots were - it was a dead shell, a 9 mm shell; there was another one near the bed and was also a shell. She says the one she found on entering was also a 9 mm calibre shell. When removing the corpses from the bed they had also found a bullet - a 9 mm one found on the bed. There was also home brewed beer in a drum and there was also blood on the bed. They had removed the corpses and taken them to the mortuary for postmortem examination. This had not been the end of her investigation for after their investigation they had gone to the accused who had surrendered himself to Tpr. Putsoa. Though she had met accused before, she had not met him again. She had met the accused before the fatalities at Thamae Police Station. 'Maselloane (deceased) was complaining saying

accused says she (accused) should leave a site left her by her late husband. Accused had then been confronted with deceased. Accused was saying deceased had no right to occupy the site for the deceased was not married and they had been advised to go to court. 'Maselloane (deceased) had said she had a marriage certificate and I had advised her to take it to court but accused was not satisfied with our ruling thinking we were taking sides with the deceased. They had, however, insisted the matter had nothing to do with the police and being a civil case had to go to Matala Local Court.

They had kept the shells as exhibits and when she left Thamae Police Station on 15 September, 1997 the shells were still at Thamae Police Station. The dead bullet had also been sent to ballistic experts and returned to the station. Sgt. Lechesa had died in 1996 and before then had been in charge of the C.I.D. department. Sgt. Lechesa had participated in the investigations having gone to Makoanyane in connection with the accused. She says after deceased's death i.e. 'Maselloane she had noticed that the matter had gone to court having learned this from P.W.1. Though she had seen no papers she had learned that there had been a dispute.

Cross-examined by Mr. Ntlhoki for the defence the witness testified that she was aware there had been a P.E. in this matter and she had not known what the result of the civil dispute was. She says even if she was a member of an investigating team one may not know everything because duties assigned are not the same. She says she was not asked at the P.E. whether she was part of the investigating team it is only now and hence her answer.

Put to her her story that accused came to her was not part of her testimony at the P.E., she says she has come by the story as a result of the question she was asked. She says she is an experienced policewoman though she has not given much evidence in courts of law. She had disclosed everything and left nothing. She had not said deceased bled though her nostrils at the P.E. because she had not been asked this; this might have escaped her mind to mention at the P.E. Put to her at the P.E. she had not mentioned blood on the bed or anywhere she agrees saying she was mentioning the fact following questions put to her. The witness goes on to say she had no means of telling what evidence was required of her at the P.E. Put to her accused's attitude as portrayed by her cannot be true she says she can't say what's not true. It could well be true accused was not at Thamae's in 1994 for there had been a long passage of time for hers was only an estimation though, when she came to the flats people were already there. No policeman had raised an alarm. She says she is concerned more with her evidence than other people's evidence. Asked whether P.W.1 had told her he had touched some of the exhibits she says P.W.1 had said nothing about this. She says when they came on the scene the door was ajar. P.W.1 had told them he had found his mother and a companion dead. She could not say whether any other person had come on the scene. P.W.1 had not said to the police who he suspected and the reasons thereof. She denies police had simply followed P.W.1's report. She could not tell whether P.W.1 suspected accused because of the civil dispute with P.W.1's mother. She does not know whether the same day P.W.1 made a report to Thamae police the police contacted accused at Makoanyane barracks. She denies this was the only investigation the police made relating to accused. She says other than ballistic tests nothing more was done. She says when she confronted accused with the Indian it had not been said that there

was a pending case between deceased 'Maselloane and the Indian nor had the Indian said he was ejecting 'Maselloane from the site. Put to her there was no case between accused and 'Maselloane the case having been between 'Maselloane and the Indian she says according to papers filed in the docket there was such a case. Put to her accused had not surrendered himself but had responded to a call to report himself at the police station she says as she wasn't there herself she has no argument with whether or not accused surrendered himself. She further says it can be no surprise for accused to have been called to the police post at Thamae's especially in view of the fact that if he had been called there could be nothing surprising as he had been called there by police before.

In answer to an assessor the witness said they conferred in course of an investigation and she had not hinted she had confronted 'Maselloane with accused. P.W.4 D/Trp. Putsoa (P.W.6 at the P.E.) sworn had testified he was stationed at Thamae police station. He had worked there from 1993 and knew P.W.3 herein with whom he worked at Thamae Police station. He also knew D/Sgt. Lechesa who was late. When D/Sgt. Lechesa passed away he (D/Sgt. Lechesa) was stationed at Makoanyane. In 1994 D/Sgt. Lechesa was at Thamae's. He had left Thamae's police station in 1996. He knew accused before court. He had seen him at Thamae's Police Post. He had wanted him for interrogation relating to the death of two people - 'Maselloane Tšosane and Lejoetsamang Nkiane. He thinks it was 5 January, 1995. On arrival he had told accused he was suspected of killings and an explanation had been requested from him. He had been told he was free to make an explanation but that if he did it might be used in his favour or against him. Accused had also been asked as to the type of gun he was using being entitled to the

entitled to the use of an official gun. He had said he had a 9 mm calibre - an auto pistol. He had then given him a charge. He had been asked to leave the gun to enable investigations and he had left it. He says he sees the tab which was written by him. He had put the tab immediately accused had left. He had put the tab immediately accused had left. He had written on it 'R.L.M.P. 39' Exhibit label and Exh. No. 12/97 - Station Thamae; charge: Murder - Rex v. O. Tšosane; also P.B. No. 3/1/95 with serial No.34708. He says this is a Parabella pistol calibre 9 mm. He had then given the gun to Sgt. Lechesa for custody and carrying out investigations. When the gun was returned to them he had seen it. He had also seen the gun at the P.E. He had taken the gun at a time Sgt. Lechesa had already passed away. The gun had been taken to Makoanyane for tests. When accused appeared before him he had seemed agitated. On parting accused had said nothing to him. Several messages had been made to him to report to them. When a member of the military force is wanted is he contacted through a delegation working with the police. The delegation is asked to bring the suspect or to have him report. He hands in the gun which is marked Exh. 1.

Cross-examined by Mr. Ntlhoki for the defence the witness agrees the delay in reporting by accused was caused by faulty communication between the police and the special liaison military unit. It was true certain procedures were to be followed before confronting a soldier for they are given special treatment. He could not say where accused was on 14 December, 1994 nor can he say where the previous day being 13 December 1994 he was. Exh. 1 had at all material times been safely kept at Thamae police station. He had known the gun was going to be used as an exhibit. He had been authorised to keep the gun though he had handed it over to Sgt.

Lechesa for safe keeping. He had said after seizing the gun he handed same to Sgt. Lechesa. He says it is correct to say at all material times the gun was in custody of Sgt. Lechesa. He says he had not spelled out the serial numbers. He says owing to a misunderstanding he had not reflected the serial number. Put to him the serial number is inaccurate he says that may appear so as he gave the serial no as 34708 whereas the bottom one is B34708. He says the serial no. he gave court does have a "B". Put to him the gun he took from accused did not have a "B" he agrees. He nevertheless denies he is talking about two guns. He says the serial no. on the tag has no "B". He had made a statement at the P.E. He agrees he had not told the court at the P.E. he had taken a gun with an empty magazine. Put to him the police at Thamae's had taken accused's gun he agrees. As to the number of magazines the witness says accused had said he had two. He says he had not asked accused about magazines. That accused had a magazine with life bullets the witness says he did not see two loaded magazines. The witness denies accused gave him two loaded magazines @ 15 rounds. The witness agrees he said he was not interested in life bullets hence why the witness gave accused life bullets. Put to the witness the magazine before court is not accused's for accused has two life loaded magazines he doesn't quite deny though he says the magazine before court is one of the magazines. The witness denies there is anything strange in giving back life rounds to the accused. He could not remember how many rounds he gave to accused - could have been five but certainly not fifteen. He says it cannot appear and there is nothing to show when shells are fired from a gun.

The witness went on to say he saw only one magazine. He says he doesn't know whether accused has two magazines for accused showed him only one

magazine. He says he is trained in the use of firearms. He could not deny he had not demanded a licence. He says if he had may be the licence would show the number of rounds he was entitled to per year for a licence reflects the number of rounds he is entitled to though not necessarily the number he has. He says he cannot deny that the two magazines had 30 bullets plus an extra 20. That he should have taken stock of accused's ammunition to determine the number spent he says these were not important issues so far as the case was concerned. He says the investigations suggested were worthless for all he wanted was whether accused's gun had ammunition. Put to the witness accused had been renewing his licence because the gun was at all times with accused, the witness says he cannot deny for in order to renew a licence one must produce the licence along with the gun. The witness goes on to say one may renew ones licence without a gun so long as the authorities know the whereabouts of the gun. The witness says he would deny that accused's licence authorised him to have 50 rounds of ammunition. He could not deny accused was licensed for the year 1995 - 1997. That the Commissioner of Police was satisfied accused had not breached conditions of the licence the witness says he could well have though the gun in any event is a common one. The witness agrees ammunition for the gun can be used in any other gun. He says accused did seem worried though it could have been for other reasons.

Re-examined. The witness testified a licence is issued automatically so long as one is able to hand in the gun and licence. He says it is never checked whether previous ammunition is exhausted. He agrees the licence is conditional in that one cannot shoot without good cause. He thinks a person is to account for used ammunition. He had not come across firearms with similar serial numbers. He says

there are two serial numbers on one side. One serial number was preceded by the latter "B" and the other serial number had no number and the numbers were on the same side of the firearm. He says the charge he gave accused and the licence were not related. When an exhibit is seized by police it is given to a senior officer for custody. He says he seized the gun for the sake of sending same for ballistic tests.

In answer to an assessor's questions he says when he saw accused on the day he reported to him he was seeing him for the first time. They had met subsequently but nothing had transpired. His pocket diary was lost. He could not tell any physical differences in accused between the day he met him for the first time and now because then accused was talking and he is silent now. He says according to what he was taught the number nearer the gun's bolt is the one to quote.

By Court: The witness testified he took the gun before court from accused. He says the accused acknowledged the gun as his. He had not satisfied himself that it was accused's gun. He says a licence is given two magazines. He had not asked accused how many bullets he had used. He says a licence can be re-issued without a gun so long as one has no criminal conviction. He says while a matter is under investigation a licensing authority is not stopped from issuing a licence. He says he had not reported to the licensing authority that a case involving accused's gun was being investigated. He had not alerted the licensing authority not to re-issue accused's licence for this was for his senior officer to take up. He says it does happen to report to the Commissioner that such a matter is under investigation.

Crown Counsel applies that the late D/Sgt. Lechesa's deposition be admitted

in evidence. Although he does not admit the truth of the deposition Mr. Ntlhoki for the defence has no objection the deposition being admitted. The deposition being admitted as evidence it is read into the record.

Mr. Sakoane applies to have P.W.3 recalled.

P.W.3 recalled sworn states she found 3 shells in deceased's home. She had handed the shells to D/Sgt. Lechesa for ballistic examination. They had been returned to him from the late Sgt. Lechesa. She had kept them in the exhibit room. They were still in the exhibit room in a white envelope. At the P.E. they had been exhibited. She had them with her and were contained in a white envelope. The envelope had a description on it. The handwriting thereon was Warrant Seutloali's who was in charge at the time at Thamae's police station. The other handwriting was hers, she had written Exh. No 132/94 on the envelope. 132 was serial no. and 94 was the year. She had also written R. v. Tšosane. After the exhibits returned from ballistic tests she had put them in the envelope. She says when she put them in the envelop she at the same time wrote on the envelope. The witness says the original envelope was brown. She says she identifies the shells by their numbers. Exh. 132/94 was also reflected in the exhibit register as well as the name of the suspect. She shows the 3 shells and one dead bullet being the ones she found on the scene. They are handed in as exhibits and collectively marked Exh. 2.

Cross-examined by Mr. Ntlhoki the witness says she had not forgotten to bring the exhibits the other day she gave evidence. She says the exhibits were still with her and she had not produced them because she had not been led to the effect.

She says when she was asked whether she had left anything she had agreed because she did not know what was in the counsel's mind. In connection with the envelope all she wanted to say was it was an airmail envelope. She did not think there was any other thing. She says she had not disclosed the OB because she was not asked about it. The last line on the envelope was 'Exhibits' but it was Warrant Officer Seutloali's handwriting. That Warrant Officer Seutloali had written 3 dead shells only and not a dead shell was an error. She had fetched the bullets. Shells and bullets were wrapped in a toilet paper and the toilet paper does not form part of the exhibits. She disagrees that the evidence is patched up. She says there is no significance for time on the exhibit which could have been written for the fun of it. The brown envelope was not important and she had wanted to keep the exhibits in the aerial envelope. Part of the evidence was the shells and a dead bullet. She disagrees she has thrown away the evidence. She says the brown envelope was torn and she wanted to replace it. She says she wasn't aware the criminal record would be wanted in court though if necessary she could have it produced. She says the writing thereon is hers. She denies the writing is not hers or that it could have been anybody's writing or that there is anything suspicious about the exhibits. She says it is up to counsel to require a re-examination of the exhibits. She says the envelope is not a semblance of officialdom in that it is police property. She says police stationary does not have to bear police label or stamp.

In re-examination the witness says Warrant Officer Seutloali had died in 1995.

By an Assessor the witness said she had joined the force in 1982. She had

been attached to the C.I.D. since 1993. She had no experience of ballistic tests though she had passed some exhibits for tests. There were identifying marks though these were knows to officer Telukhunoana. She says exhibits labels were the only marks by which she could identify the exhibits.

P.W.5 'Mamotlatsi Tšosane (P.W.2 at the P.E.) sworn had stated that she lived at Upper Thamae. She knew a place called Thabong next to Lekhaloaneng. She was married in 1960. She knew the accused as Molibeli Tšosane. They were related. He was related to her husband. His father and her husband's mother were born of the same parents. Upper Thamae was not far from Thabong. Could be ½ kilo metre from the courtroom. She knew 'Maselloane Tšosane in her lifetime. They were related by marriage. 'Maselloane was married to Lefa Tšosane who is accused's younger brother. She could not remember when they were married though she was married after herself. Marriage between Lefa and 'Maselloane was solemnized in church though she was not present when it took place. Marriage had been solemnized when they were already staying together.

When 'Maselloane died in November, 1994 she had a case with accused disputing over rented flats. 'Maselloane leased some flats and stayed in one. Before Lefa died these flats were leased by Lefa while staying with 'Maselloane. Before Lefa died there was no quarrel between Lefa and accused. The case between accused and 'Maselloane went to court. The family hadn't dealt with the matter. She had attended the magistrate's court here. It could have been in 1994. She knew a case at Matala Local Court which concerned the flats. Accused was suing 'Maselloane but she had not attended. She knew of such a case before

'Maselloane died. After suing 'Maselloane accused was not speaking to her. She had done Standard V1 at school and can count. Cases would have started in 1994. Accused's mother was not talking to her either. She had given no evidence in any of the cases.

As far as she was concerned between accused and his mother on the one hand and 'Maselloane on the other, 'Maselloane is entitled to the flats as the flats were the property of her husband. Accused lived in his own house. Before 'Maselloane's death accused and 'Maselloane had a case but on the death of 'Maselloane accused and his mother had not attended the funeral. When Lefa died accused and his mother had attended the funeral and performed all necessary rituals. When 'Maselloane died she had seen accused at his home peering through a window.

Cross-examined by Mr. Ntlhoki for the defence the witness denies there was no case between accused and 'Maselloane when the latter died in 1994. She denies a pending case was between 'Maselloane and an Indian. She denies C.C.942/88 in the Subordinate Court was 'Maselloane's case. She could not tell whether the Indian wanted to eject 'Maselloane and accused's mother. She says the Indian had a case against 'Maselloane. She says the Indian case had ended during Lefa's lifetime. The dispute between the Indian and Lefa affected the flats. She says the case at Matala Local Court was a criminal case. She denies she does not like accused's mother who is the oldest member of the family and regarded as one of several in-laws. She agrees she had marital problems and agrees they are now living apart with her husband. She disagrees accused's mother tried to reconcile them.

She denies she was the guilty party in her quarrel with her husband. She says she has never shared her marital problems with accused and his mother. She denies accused has had anything to do with her children or family problems. She says it is untrue she has accused Motšoari Tšosane for meddling in her family affairs. She agrees not all members of the Tšosane family had attended 'Maselloane's funeral. She disagrees 'Maselloane had a grave prepared for her at the communal graveyards and denies all such arrangements were made by accused. She says the chief of Qoaling would be surprised to hear that 'Maselloane's grave at the communal cemetery had been filled because P.W.1 objected to her being buried there. Put to her because the family was split concerning 'Maselloane's burial and others had watched from the sidelines she says that was accused's choice. She denies accused was in any way responsible for placing 'Maselloane at the mortuary for this was done by the police and all she knew was that accused took the responsibility of expelling people who were digging the grave next to 'Maselloane's husband. The witness insists on 14 December, 1994 accused was not at Makoanyane barracks but peeping through his window. She denies accused was fetched from the barracks by Thabelang Tšosane. She denies her evidence revolves on hatred and ill-feeling.

Re-examined the witness says the day deceased went to the mortuary is the day accused had peeped through the window. There had been many people around and deceased's house was open.

In answer to an assessor's question the witness says accused is a soldier. He had not seen him driving and accused is not entitled to deceased's childrens' rights. She had found police on the scene and did not know whether cattle had been paid

for 'Maselloane. When Lefa died 'Maselloane had worn a mourning cloth.

By Court the witness testified in his lifetime Lefa had leased the flats and rent was paid to him. 'Maselloane had lived with Lefa for a very long time. They had a girl Selloane. There were more than five rooms. Lefa's brothers were accused and Tumisang. Accused was older than Lefa. Accused lived on his own site.

P.W.6 Lt. Col. John Telukhunoana (P.W.3 at the P.E.) sworn stated that his job was that of arms and ammunition examination in suspected of crime. He had been doing this job for almost 11 years now. He had been giving evidence relating to arms and ammunition in Subordinate Courts and the High Court. He remembered the year 1994. He had received items fromThamae Police Station. He applies to refresh his memory and the request being granted he says when items come from the stations each item is accompanied by a submission form and the presenter signs for the items and the recipient also signs. The duty station is also indicated on the report. When examining each item he looked at the condition and the label and in the case of a firearm if it is in good condition, he did the test firing. In case of cartridges and bullets he gave identity marks. Most bullets and cartridges that came to him were those that had been fired and there was therefore no need to examine them for potency. The test cases were then compared with exhibit cases and notes were taken. Comparisons were noted. At the end of the examination a report was then made and he had prepared such a report. Generally, the report covered activities and findings of any examination. The report was then sent to the police station concerned and police stations concerned collected the exhibits. Those who collected the reports and exhibits signed the file and register for the purpose. In

conducting tests sometime he took pictures in order to buttress his findings. He had his report with him. He had received a 9 mm pistol serial no. B 34708; 3 x 9 mm cartridges for 9 mm and 9 mm fired bullet from D/Sgt. Lechesa. When he received them he could not recall in what they were contained. He had then subjected the exhibits to the procedure he had described. He had also taken pictures. His findings were the following: the 3 cartridge pieces were fired from the pistol brought with the cartridges i.e. one bearing serial no. B34708 a 9 mm pistol. Due to damaged marks on the dead bullet the result was negative. This, however, did not mean the bullet was not fired from the pistol - it is that it was damaged. When making the comparison one examined the marks left in the cartridge and the marks are so small one can see them with a naked eye though a microscope is used to pick them up. The comparison and identification is made because each gun has its own characteristics. The marks were because of the manufacturing process and wear and tear. This may be compared to fingerprints. In demonstration he says he looks at the base and circumference of the cylinder of the cartridge case. Where position marks being breech face marks are found on the base it was there that he took the photograph which shows the marks he had identified. He shows the court base of the cartridge base. Microscopically the picture shows the exhibit case and in the centre is a black line dividing the test case and exhibit case. Looking at the cartridge case there were striations made by the breech of the firearm going though the dividing line into the other case. According to the witness, this is an illustration of a positive match. The defence counsel was also shown the movements explained.

According to the witness, if the marks did not match the marks on each case they would be different from those of the chart/test case. The bullets could be used

on any 9 mm calibre pistol. Inside the glass, though, there were individual characteristics peculiar to the firearm even if cartridges may be fired from the same gun or may fit any 9 mm pistol. Any other ammunition would not bear the same characteristics. Even were the ammunition mixed, he would still be able to say such-and-such ammunition is fired from this or that firearm. Life bullets would not be necessary to be tested whether they were fired from the gun for he buys ammunition for test cases. A damaged bullet was a difficult test case and it could not be said it was fired from a particular gun. The result, concerning a dead bullet, is that it cannot be said it is either positive or negative.

Exhibits had been fetched from him by Sgt. Lechesa. Exhibits had come to him on 05 May, 1995 and were collected on 17 September, 1996 by D/Sgt. Lechesa.

Cross-examined by Mr. Ntlhoki for the defence the witness testified the process was not so complicated especially to those who deal with it on daily basis. A postulate that the police could have fired the weapon (Exh.1) at Thamae Police Station the witness says he could not exclude the possibility. As to why the weapon having been seized in January, 1995 it was submitted for tests on 5 May, 1995, the witness says some police officers are not aware exhibits should be submitted promptly; they investigate first and submit exhibits later. He, however, could only determine that a weapon was fired, for the period was irrelevant. Irrespective of when a weapon was fired, his conclusion would be the same irrespective of whether a weapon was submitted for tests expeditiously or belatedly. His information emanated from submissions by the police and other than this he knew nothing. He

had fired two cartridges. Put to him although he fired the cartridges they were not part of the evidence he says test cases are never part of the evidence. The defence, if it doubted his evidence, was entitled to sent exhibits to an expert of its choice. He says test cartridges are always available if needed. Put to the witness he did not receive Exh. 1 he says evidence does not disclose whether when he received Exh. 1 it was with magazine. He says the items he received do not show whether the gun had a magazine. He disagrees his evidence has no back up material.

That his evidence is only one long narrative the witness says there is one major tool - a comparison microscope - world acclaimed, fail-safe and with no margin of error except human error. He says his expertise can be measured by taking a look at cases in which he gave evidence and accompanying credibility. Put to him the evidence he has tendered is unreliable the witness disagrees saying it has necessary support. He also disagrees that the conclusions he has arrived at are unreliable for they are based on scientific proof besides, as he says, they are based on sound logic.

Put to him the only identifying marks were paper labels he agrees though he says the firearm had its own serial no. Also put to him such paper labels were transferrable, while the witness agrees, he nevertheless says these were distinctive marks. Put to him he did not indicate the class and individual characteristics of the firearm he says he showed the individual characteristics of the firearm. He says the examination starts with the class characteristics and if the characteristics are similar one proceess to individual characteristics. He had examined class characteristics and when he found they were the same he proceeded to examine the individual

characteristics. Put to him there is no evidence of class characteristics, he says the procedure is that only individual characteristics are examined. These were photographed when there was positive identification from the exhibits. He says he said type firearm bore same class characteristics. He says he has already said that class characteristics are not photographed but only individual characteristics the reason being that it is impossible for two firearms to have matching individual characteristics. He says class, shape and size also reveal the position of the firing pin. As for individual characteristics, marks found inside the firing strata impression pin will leave own individual marks though the firing pin, size, shape will be the same for the model firearm. Inside the impression will bear same individual characteristics peculiar to the firing pin being the result of manufacturing process and wear and tear. In manufacturing hard steel was used to cut the hard metal; during the cutting process the metal used wore off and the next cut would consequently leave different marks from the ones it left previously. Because of this and the wear and tear the marks left by the cutting metal, individual characteristics will be left. Put to him if an instrument is used and leaves certain characteristics and the same instrument is used on another setting or object it would leave same class and individual characteristics size and specifications being the same he says the answer is no because at any stage whenever two metals come into contact with each other there will be friction which changes individual characteristics afterall, individual characteristics on the surface of a gun were different.

He says the three shells bear the same characteristics with the test case (Exh "A"). The photograph represented one shell (though he could not say which). He agrees one shell represents characteristics of other shells. He says as the result

would in any event have been the same it was not necessary to subject all the shells to a test. He says that is why he used only one test shell. That a pair of scissors was used to bring the test case to size he agrees saying its because the model was uneven notwithstanding that the shell is itself round. He says the two cutting cases are mounted on two different microscopes brought together by a bridge. The Exh. Case was only ⅔ of the vision and the entire figure appeared on the photograph. A photograph was normally cut to fit the area. Scissors if used was merely to cut the photograph and not the Exh. Case. He says the purpose was not to produce the case but to bring to the fore individual characteristics. He says a test shell is the longest part of the photograph. The test case had a face impression. According to him, the photograph did not show the firing pin impression. Suggested the converse ought to be the case the witness disagrees saying it depends on individual characteristics.

Put to him he found it difficult if not rather impossible to match the test shell to the exhibit shell to an extend where the only way to get closer has been to adjust or alter, adjust, cutting and trimming and re-aligning the test shell to the exhibit and hence the cuttings and adjustments, the witness says he has not done anything as suggested for he had already demonstrated that the cutting was done to the photograph and not to the test case - the only adjustment having been to bring the two to match. He says he has already explained that the test case does not appear in its entirety for the test case is larger than the exhibit case. He says the lens took only what he was interested in i.e. the individual characteristics being edges of the prima that black marks do not match. He says the black lines do not synchronise. The matching of the primus was according to the witness not important for marks

are not made by the cartridge case. He says the white rings do not synchronise but diverge. What the examiner looks at was marks made by the firearm not marks on the cartridge before it is fired. He says all he did was to match the positive characteristics. Marks had to be brought out so as to be made familiar to a layman. In reacting to a demonstration by counsel holding Exh. "A", the witness says scientifically this is positively in the matching of positive identifications. He says the significance of the figures on the Exhibit case is to identify the calibre or manufacture. He says he never signs on the photograph but on the report.

Re-examined: He says whenever a firearm is fired there are noticeable marks. Although the manufacturer may be one characteristics are different much the same as twins have different fingerprints.

In answer to an assessor he says exhibits came to him late as a result of the delay by the investigating officer. Cartridges used were of the same make but different calibres.

Mr. Sakoane applies that medical evidence and the postmortem report be admitted as the doctor is untraceable. There being no objection to the reports being handed in they are read into the record and marked Exhibits "B" and "C" respectively.

The Crown had closed its case.

Mr. Ntlhoki for the defence also closes the defence case.

In addresses Mr. Sakoane for the Crown has submitted that the Crown's case hinged on circumstantial evidence. The court had heard evidence that accused had approached P.W.2 a police officer from whom he sought guidance lest he should go wrong and no sooner had P.W.2 proffered advise for accused to go to court than the deceased along with her companion were murdered. Evidence had been to the effect that accused feared 'Maselloane (deceased in Count 1) would sell the site and flats thereon. Counsel says according to crown evidence accused had sought advise from two independent police officers namely, P.W.2 and P.W.3. Noticeably, the two policemen were not related to either P.W.1 or P.W.5 and could have no motive for implicating the accused falsely. Another factor to be taken into account was that accused though closely related to deceased in count 1 had not attended the funeral and had been seen by P.W.5 to be peeping though his window. Counsel has also drawn the courts attention to the fact that though accused had an official issue, he had handed in his gun which was never claimed to have been lost. He says at all material times the gun was in custody and possession of accused.

If forensic evidence was accepted the only person to answer for the shooting was the accused person. According to him, crown evidence had not been tarnished or challenged nor can it be said it was unreliable. Several cases were quoted in support.

Mr. Ntlhoki for the defence has said that it was wrong for Crown Counsel to have submitted that cross-examination was no defence for in several cases the

appeal court has held cross-examination was evidence. He says even were the court to arrive at its conclusion by reason of cumulative facts or all the circumstances taken together cumulative facts were no more than proved facts and there were none in this case. He says there was no evidence that the fatal shots were fired by the accused. The crown should also have proved that at the material time accused was in possession of the firearm and it was up to the crown to prove possession or loss of the firearm.

He says the police did not investigate the case at all having contented themselves with spurious claims of there having been a case between 'Maselloane (deceased in Count 1) and accused and because of the so called hostility between the two having jumped to the only conclusion that it is nobody but accused who murdered the deceased. The area being a built up area and liquor being sold in the premises people other than the accused could have committed the crime. None of the tenants had been called in evidence to testify whether they heard the sound of a gun. Nobody has testified to seeing accused in the neighbourhood of where the crime was committed. He also says accused's movements had not been accounted for on 13 November, 1994. If the accused's gun had a silencer this should have been investigated. He says police did nothing following P.W.1's suspicions for finger-prints could have been taken of spent shells and rounds returned to accused. He says even the gun was not fingerprinted to determine whether the accused had touched it. He says that accused peeped through the window could have been for several reasons. It was up to P.W.5 to have alerted accused of what was happening and to have noted accused's reaction. He says a motive should have been proved in respect of the deceased in Count II. Counsel was up in arms regarding

identification of exhibits as a better and more lasting means such as paint could have been used and it could not be ruled out that the poor method of identification left the door wide open for fiddling with the exhibits. He says neither the police nor the expert P.W.6 can be said to have been in a position to identify the shells positively. What P.W.3 read from the envelope was not what was on the envelope. He says the exhibit register was deliberately left behind and there were all sorts of possibilities why it was left behind e.g. could belong to another firearm. The police did not say why they hung on to the exhibits for four months nor was an empty magazine mentioned by D/Sgt. Lechesa and P.W.6. Exhibits should have been submitted timeously for ballistic tests.

He says the ballistic evidence is no evidence at all being a mere narration of events; he says he does not doubt the colonel's qualifications save that there was not enough data to back up his findings. He says the photographs were poor quality and were interferred with by trimming and cutting - a grotesque exercise according to him. He says the result was to synchronise the otherwise divergent photographs to produce a harmonious effect. He says the flaw in the exercise was the so-called class and individual characteristics. He says P.W.6 could not say what individual characteristics of the weapon were that made it different from any other weapon. He should have displayed the different characteristics in the form of a chart spelling out the individual characteristics. So far as the picture was concerned, it could be the primer of any gun not particularly Exh. 1. He says there was no corroboration. He says the expert's evidence has led the count to a dead end. He says the evidence would have had a sting only if there were comparable projections. He says the Colonel had not gone far enough for he should have tested the common reaction of

guns of the same calibre and produced two instead of one specimen. Several cases were also quoted in support.

As for Mr. Sakoane's submissions, the danger is that this court would have to draw inferences from the set of circumstances outlined. It could well be accused sought advise from the police because he was concerned lest he should commit a crime because of his unhappy relationship with the deceased in Count I or because he wanted to avoid such an ugly situation developing.

As for accused not attending a funeral of a close relative, here again it is a matter of inference for it could well be that accused hated 'Maselloane to an extend where he could not identify with her problems or did not go to avoid the embarrassing situation he would find himself.

There are too many possibilities; nor do I think the fact that the accused merely pipped at a window takes the case any stage further. This line of reasoning worries this court for it was not shown that accused is a notorious troublemaker and has a tendency to fight his relatives.

That accused when asked to hand in his gun surrendered his personal weapon is hardly surprising for he could have understood his personal weapon as the wanted one. In any event in handing in Exh. 1 it cannot be said that accused had anything to hide; on the contrary, it shows he had nothing to hide. Were problems encountered in handing in the gun, an adverse inference would rightly be drawn unfavourable to the accused.

As for Mr. Ntlhoki's submissions, it is an accused's common law and constitutional right to remain silent for it is up to the Crown to prove its case beyond reasonable doubt. Most evidence against accused as the Crown Counsel correctly conceded was circumstantial the question being whether accused was obliged, in the circumstances, to defend himself. The question indeed as Mr. Ntlhoki submitted was whether there were any proved facts requiring accused to answer. Mr. Ntlhoki says the case was not investigated at all the police having jumped to the conclusion that because there was hostility between 'Maselloane and the accused the latter must have killed the deceased. It is true there were tenants and they were not called and the reason for their non-calling was not explained nor, indeed, were accused's movements of 13 November, 1994 accounted for. Also, nobody appears to have heard a gun shot sound and moreover the court was not told whether accused's gun had a silencer. Fingerprints were not taken either. It is also true the exhibits were submitted to the ballistic expert rather late and no cogent reason was given for the delay. Identification of exhibits left much to be desired so far as Mr. Ntlhoki is concerned. He has also criticised P.W.6 the expert's findings. Nicholas in some *'Aspects of Opinion Evidence'* in *Kahns Ed. Fiat Justicia: Essays in Memory of Oliver Deneys Schreiner (1983) 225* says:

> *'___ Legal proceedings are concerned with facts not with beliefs of witnesses as to the existence of facts ___'*

Evidence of P.W.1, P.W.2 to some extend P.W.3 and P.W.5 was largely based on the witnesses beliefs and accused's purported motivations. These beliefs were not, in the view of this court, based on solid existence of facts justifying unfavourable inferences to be drawn against accused - the more so because taking

into account what was said in *R. v. Blom, 1939 AD 188, 202 - 3 that:-*

> *'The first rule is that the inference sought to be drawn must be consistent with all the proved facts; if it is not, the inference cannot be drawn;'*
>
> *'The second - that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn: if these proved facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'*

So far as this court is concerned, the only proved acts were that 'Maselloane and her companion were found shot dead with spent cartridges lying around plus bloodstains spluttered all over. There are therefore no proved facts from which the court can draw inferences unfavourable to the accused.

Regarding the second requirement, I repeat there are no proved facts and consequently there is no question of proved facts excluding any reasonable inference and here again no inferences can be drawn. Accused person at the end of Crown case elected not to go into the box and as I have said he was only exercising his common law and constitutional right. The question is whether the expert evidence of P.W.6. the police ballistic expert, has proved a case against the accused.

Schwikkard - Principles of Evidence, 1997 Ed. P.87 says there are requisites for the acceptance of such evidence, namely:-

'(a) _____

(b) The opinion of an expert is received whenever his skill is greater that of the court

© the true criterion is whether the court can receive appreciable help from the opinion of the witness

(d) when the issue is one of science or skill the expert can be asked the very question which the court has to decide.

For the expert witness's evidence to be acceptable he must:-

(a) _____

(b) _____

© Not or will not express an opinion on hypothetical facts, that is, facts which have no bearing on the case or which cannot be reconciled with all other evidence in the case.

Schwikkard in his *Principles of Evidence (1997 Ed.)* has given an exhaustive case history of the development of principles appertaining to identification of firearms. The subject is said to have appeared in print in America in about June, 1960 although its progenitors consulted widely and particularly in Europe. In the beginning it seemed as if there was a breakthrough but as always the early experiments had floundered. The publicity generated by the St. Valentine Day Massacre had, however, drawn the attention of identification laboratories regarding the comparison technique utilised by Dr. Goddard.

It is particularly to be noted that, like the instant case, these techniques were resorted to where people were shot dead and there were no clues as to who the culprits were.

In South Africa during March, 1931 an article titled *'Cartridges and bullets in murder cases'* appeared in the South African Police Magazine Nongqai written by Captain and later Major M.S. Barradough. Major Barradough was an inspector of small arms and machine guns in the Defence Force and is generally credited with being the founder of arms identification in South Africa.

While in the beginning Col. Goddard titled his first article *'Forensic Ballistics'*, finding the title inappropriate in that ballistics dealt with motion of projected and dead fired shells in a state of rest, he changed the term to the simpler *'firearm identification'*. It is said the term *'forensic ballistic'* was intended to indicate that the expert's ballistic evidence was concerned with matters involved in legal procedures and court trials.

It is also said it is common cause that firearms experts are trained to examine and give testimony on the whole spectrum of the science ballistics.

Van der Westhuizen in his *Forensic Criminalistics (2nd Ed.) at p.290* says:-

> *'It is the barrel of a gun that leaves significant markings on a projectile.'*

On p.292 *van der Westhuizen* says microscopic examination of the cutting

edge would reveal the part that the edge is not truly smooth and would have nicks in it. The serrated cutting edges resulted in serrations and ridges being formed in the surface made by the cutter. Also, tiny chips of metal from the cutting operation may produce inequalities in the action of the cutter, giving individuality to the surface being cut. Apparently, too, the steel used in barrels is not absolutely homogenous and there will be some areas of the surface which will be harder than others. The cutter is said not to act in the same way on these areas resulting in inequalities in the surface. Moreover, at it is said, in spite of a 'lapping' operation, after the grooves have been cut, individuality will exist because all the scars and imperfections on the inside of the barrel are not removed.

The above was the general, if globular account of what P.W.6 Lt. Col. Telukhunoana gave of the surface of the barrel of a gun. *Van der Westhuizen* gives several methods used that make the surface of a gun e.g. Hook - cutter method, scape-cutter method, Broaching method, swagging method, Hammering Method and Polygonal Boring Method. As I have said, Lt. Col. Telukhunoana (P.W.6) has merely referred to these methods in a globular fashion and this court does not think that because he has not singled out or identified the methods this makes his evidence fall short on this aspect by reason of the fact that like van der Westhuizen, the witness P.W.6 has spoken of the inequalities and imperfections on the surface of the barrel of a gun thus giving it individuality.

I have already referred to methods that give guns their individual characteristics though I seem to have been attracted by Polygonal boring method, German in origin and rather unconventional. It is noted in this method that the

characteristics are on bullets fired through firearms which leave identifying marking on fired cartridge cases. Attention is also drawn to the fact that since a cartridge case is forced to the rear with the same pressure as that exerted on the bullet when a gun is fired, the primer and often the brasshead had acquires an impression of the imperfections on the weapon's breech head. It is also to be noted that the breech block of a weapon is usually surface finished by a milling tool or file, which leaves tiny skretches that are distinctive to that weapon on the surface of the block.

In addition, it is also said that to breech face markings, extractors, ejectors and firing pins often bear characteric scars accidentally produced in machining or hand finishing methods. The surface imperfections varied from gun to gun and it could be said that no two guns will leave the same marking on fired cases. Comparison of these markings is the means of determining whether or not a particular cartridge was fired in a particular gun. (My underlining).

According to *van der Westhuizen (p.294)*, when a bullet is fired down a rifled barrel, the rifling imparts a number of markings on the bullet that are called *'class characteristics.'* These markings may indicate the model and make of the gun from which the bullet has been fired. *Van der Westhuizen* says this results from the specifications of the rifling as laid down by the manufacturer. Several characteristics are given. It is said in addition to these class characteristics, imperfections on the surfaces of the lands and grooves score the bullets, producing individual characteristics. The individual characteristics are peculiar to the particular firearm that fired the bullet and to no others. According to the author, no two barrels, even those made consecutively by the same tools will produce the same

markings on the bullet. They are as individual and unique as fingerprints. Thus, while the class characteristics may be identical on bullets fired by two different weapons of the same make, the individual characteristics will be different.

It is said when a bullet and firearm are submitted for examination the question to be answered is whether the bullet was fired by the suspected gun. The answer is said to be obtained by detailed comparison of markings on the evidence bullet with corresponding marks on the test bullets fired through the suspect gun. Apparently test bullets are obtained by firing the suspected weapon into a special water tank to avoid bullets being damaged or loss of fine marks. It is said this facilitates the task of identification.

A comparison microscope is then used for examination of striated marking. The microscope is so constructed that it allows a critical comparison between two separate specimens. A true identification is said to be achieved when the two specimen appear as if they are one. There has to be rotation of the two bullets in the same direction allowing individual strae and strated areas to be compared throughout the periphery to ensure that all the strae match.

On p.295 *van der Westhuizen* has given a configuration of markings on the evidence bullet. It has, among other things, a reference number, shows impressions caused by the grooved barrel of a firearm and markings used for identification purposes. On p.296 he also gives a graphic representation of contour height of ridges and depth of valleys formed by striations.

Regarding damaged bullets, it is said the entire conclusion must be based on a fraction of the total lines which could appear on the bullet for, with sufficient similarity a perfectly valid conclusion can result, similar to fingerprints, where a fraction of a fingerprint found on the scene of crime can lead to a perfect and valid identification.

Mr. Ntlhoki for the defence has said there were no two separate, distinct specimen. P.W.6 has said his microscopic representation reflects markings on the evidence bullet with corresponding marks on the test bullets and that the strae match although he did not mention that there was rotation and comparison throughout the periphery. The markings on the evidence bullet are not as pronounced as those represented by *van der Westhuizen;* Exh. "A" has no reference number and the marking are indistiguishable from other figures on Exh. "A". The court was not able to say what impressions were on the evidence bullet and test bullet. P.W.6 instead of making do with a fraction of lines on the damaged bullet chose to gloss over the inquiry thus rendering his test incomplete. The Colonel's assertion that it is difficult to test case a damaged bullet is hardly acceptable in the light of *van der Westhuizen's* convictions. As he said cross-examined by the defence it could well be that the damaged bullet was not fired from the suspect's gun. If so, it can be seen how wide open the prosecution case has been made. Nor is this court in the least impressed by the Colonel's testimony that the result of the dead bullet cannot be said to be positive or negative. Shaving marks on the forward shoulder of the bullet where lead has been scraped off by the breech of the barrel depending on the type of the gun were not investigated nor were firing pin impressions often identified with the weapon in which firing took place. I am not aware that extractors and ejectors -

an important component of automatic weapons, were examined.

Although the field of firearm identification is at times compared to that of fingerprints, unlike the field of fingerprints comparison, it is said there is no number of characteristics required for positive identification of a tool mark. It is also said most impression marks represent a combination of class characteristics and individual characteristics like say, a footprint.

As I have indicated, in identifying the impression two basic methods are generally followed being comparison between the impression and the tool itself; a comparison can also be made between the impression in evidence and a test impression made by the suspected tool. Test marks are made with the suspected weapon on a substance resembling the evidence material as closely as possible. There has to be simulation of original evidence marks and a number of tests are made to match the angle of application.

Representation of evidence is also said to be similar to the technique employed in fingerprints cases where lines are drawn on the photograph of test and evidence marks pointing out characteristics and configurations. As most of the tools used in criminal cases are hand-made, it is said a number of tests have to be applied to an object over a wide range of angular applications with varying pressures resulting in a tremendous variety of marks by the tool. Fired bullets, striated tool marks, evidence and test specimen are compared through a microscope as to regards height, width and depth of certain features as well as the contour of striations.

On *pp. 298 - 9 van der Westhuizen* says the interpretation of these marks must be considered together with marks made by the firing pin and breech face to determine if a cartridge case was fired in a suspected gun and so are breech-block markings on a cartridge case - said to be the largest on a casing and forming most valuable identification characteristics and these to be compared with tests from the same weapon. To be included are magazines markings and chamber marks - all these necessary exercises not gone into by P.W.6. For these omissions the witness was subjected to relentless and withering attack by the defence counsel. There were no lines drawn on the photograph of test evidence nor were there evidence marks pointing out characteristics and configurations. Although a comparison microscope was used, it did not reflect all necessary characteristics.

On judgments in court cases *van der Westhuizen* says courts generally accept the evidence of an expert. He also says that because of the pioneering spirit of Major Barraglough, in South Africa firearm evidence is accepted on the same basis as that of fingerprints. According to *van der Westhuizen (p.306)*, whether an individual has fired a firearm is determined by 'paraffin' 'Deremal Nitrate' or 'diphenylamine' test. The process consists of subjecting the individual suspected of firing the gun to these tests which will disclose debris or gunpowder on hands that have fired the suspected weapon. The tests are highly sophisticated although it is said the paraffin test is in fact non-specific and of no use scientifically.

Concerning footprints or shoe prints, as the aggressor has to walk to and away from the scene of crime, it is said foot and shoe prints are among important varieties of physical evidence to be gathered by an investigator; and so is the

evidence of fingerprints on fired bullets and shells as Mr. Ntlhoki for the defence has represented.

The three tests referred above to determine who fired the gun are strictly based on time factor whose observance was so painfully lacking in this case. The suspect in this case was belatedly confronted and the confrontation was done on routine and more than friendly basis as if a crime had not been committed. One of the weakest features of this case reflecting the tardiness and flat footedness of the police was the unreasonable delay to set in motion investigative procedures. This can be summed up as lack of will on the part of the police and their reluctance to close nets and apprehend suspects timeously. Although P.W.6 testified the several inordinate delays in investigation and submission of tools for ballistic test had not affected the result of his tests, the fact that materials for test were not submitted expeditiously certainly adversely affected the result of his tests. How could P.W.6 test either the gun or the suspect for gunpowder several months after the firing? The delay in submitting the suspected weapon for tests is probably the reason P.W.6 did not conduct all necessary tests. Tests conducted by P.W.6 cannot be said to be far-reaching and placing the evidence beyond reproach or suspicion. As Mr. Ntlhoki has properly submitted, P.W.6's evidence lacking, as did, back up material in the form of physical evidence which was available but not utilised, it cannot be said the Colonel's evidence has disclosed sufficient material to justify a conviction.

The defence has not challenged P.W.6's qualifications nor has this court doubted the qualifications especially in the light of P.W.6's long-continued experience in the trade. Suffice it to say that as has been said with regard to a

fingerprint expert, the attitude that a question concerning the history of fingerprints or a technical aspect has no bearing on the case need not be applied for, if the witness fails to answer the question this tends to encourage the defence to further discredit the witness. As I have said, P.W.6 was caught by the defence on several occasions in this regard and particularly regarding flaws and omissions concerning Exh "A" which, amongst other things, bore no reference number and could easily be mixed up with other exhibits.

This court aligns itself with what was said by *van der Westhuizen at p.280* that:

> *'_____ It is imperative that experts extend their knowledge though research and keep abreast with new methods.'*

In *S. v. Harris, 1965 (4) S.A. 340 (A) 365 B - C Ogilvie Thompson, J.A.* is quoted as saying:

> *'_____ In the ultimate analysis, the crucial issue of appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by the psychiatrist, but by the court itself. In determining that issue the court - initially the trial court, and, on appeal, this court ____ Must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including ____ And the nature of his proven actions throughout the relevant period.'*

This court endorses the above finding and would substitute 'psychiatrist' for 'firearm' and 'ballistic' expert and 'medical' for 'ballistic.'

In this case ballistic evidence is the one and only court's anchor; to lean on it unreservedly it must give sufficient leverage and be able to withstand all pressures. The evidence given does not withstand such pressures; actually, it has lacked sufficiency and wilted for lack of necessary support. The evidence as presented is so precarious this court would be doing itself an injustice to rely on it. As was said in *R. v. Nat Bell Liquor Ltd. (1922) 2 AC 128 at 159*, the evidence as it stands is no more than 'the inscrutable face of the sphinx.' This court will treat ballistic evidence on the same footing as fingerprint evidence if all necessary tests have been performed and markings on evidence and test tools are clearly discernible and have been so represented by an expert and the testimony has the support of other physical evidence so ably advocated for and propounded by *van der Westhuizen* and other eminent forensic and ballistic authors.

The court wishes to extend its heart-felt thanks to Mr. Sakoane for the Crown who, because of his undying search for justice has made the two works referred to above available to this court. The two works are so invaluable they are a must for all those involved in ballistic and forensic criminalistics.

As it cannot be said that the Crown has proved its case beyond reasonable doubt, the court finds accused not guilty of the offence of which he is charged and accordingly he is acquitted and discharged of the crime of murder.

My assessors agree.

G.N. MOFOLO
JUDGE
15th January, 1998.

For the Applicant: Mr. Ntlhoki
For the Crown: Mr. Sakoane