CRI/T/90/1994

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

vs.

TŠELISO HAMILTON MAKOTOKO

J U D G M E N T

Delivered by the Hon. Mr. Justice G.N. Mofolo
on the 6th day of January, 1998.

The accused Tšeliso Hamilton Makotoko was charged before this court with the crime of murder it being alleged that the said accused did upon or about the 29th November, 1991 and at or near Hoohlo's in the district of Maseru the said accused did wrongfully and unlawfully and intentionally kill and murder Martin Setebele in his lifetime a Mosotho male adult of about 27 years residing at Police Training College in Maseru.

The charge having been read to the accused the accused had pleaded not guilty.

The crown had then made the following admissions admitted by the defence:

P.W.1 Tšeliso Setebele's evidence at the P.E. P.W.5 Sgt. Molapo's evidence at the P.E. P.W.6 D/Tpr. Mathaha's evidence at the P.E. and the 4 shells had been marked collectively Exh 2; Exh "A" at the P.E. had been marked Exh "A" and Exh "B" at the P.E. had been marked Exh "B". The doctor's post-mortem report also being admitted had been marked Exh "C". The depositions had then been read into the record.

The trial which proceeded on 5 December, 1995 had then been postponed to 7 December, 1995 to enable the Crown to find witnesses. There had been several postponements for various reasons until the 20 August, 1996 when the trial resumed in earnest.

This court is to say at this juncture that the admitted evidence was purely formal in nature and content.

The Crown had then called P.W.1 (P.W.2 at the P.E.) Moteloa Makate who sworn had stated:-

He was literate and 29 years old and that at present he lived at 1904 Matwabeng, Senekal, Free State in the Republic of South Africa. He was a

policeman stationed at Matwabeng Police Station. In November, 1991 he was at Fouriesburg Police Post and had come to Hoohlo's in the evening of 28 November, 1991 at Matšumunyane's place to an acquaintance of his and there beer was being drunk and free flowing as it seemed there was a little farewell party.

Present were 'Mamoelase Matšumunyane, Lucky a visitor, Miemie and Mrs. Ntsukunyane and others he could not recall. He says he sees accused in the box who was then also present. Accused had found him there at night hours. He had not known the deceased. It was at night and they had wanted to go to bed but people who were supposed to leave had not done so. Deceased had then demanded that accused leave the premises because accused was in uniform and had to go to work. It was a brown police uniform. Accused had just been silent and had not left. He had not seen accused and deceased drinking together despite the fact that they were in the same room. He could not remember whether there had been a quarrel between accused and deceased before accused was asked to leave. He could not remember what had transpired before there was a tussle about deceased's 7.65 gun. The gun was from deceased's waist. When the gun went off it had been in deceased's hand pointing upwards and there were many hands holding deceased's hands. Deceased had not pointed the gun at anybody. Accused had been holding his rifle and deceased holding a 7.65 calibre pistol. Nobody had wrested the gun from deceased's hands. The quarrel according to him had been between accused and deceased. He had asked accused to leave and leave deceased alone and he had offered to take accused halfway. Accused had readily acceded to the request and both of them had left. As they left, it seemed accused was in control and had been conversing with the witness normally. He had said that he lived at Florida and if

deceased followed him he would shoot deceased. He had accompanied accused for 50 metres and had made his way back. He had left deceased where he had been. According to him, he thought he had seen accused off and on returning he had also requested to see deceased off. A man he cannot recall had gone out first and on returning accused and deceased were engaged in conversation. The man who had gone out first had said he was not to go out because he had heard the cocking or clicking of a gun. Returning from accompanying accused he could not see the gun in deceased's hands. He had wanted people to leave the premises because he was tired and wanted to retire for the night. Deceased had pipped at the door and he had not gone out when the sound of a gun was heard in their direction and the bullets were kicking dust. He says he is used to gun reports. He says it was the sound of a big gun or automatic. He says deceased stood at the door shooting outside erratically. He did not know who was shooting. Deceased had then gone into 'Matšumunyane's bedroom and taken a seat. A short while after deceased had entered therein accused got into the house with his service rifle, directed it at deceased and said: 'Where's that one - I mean take out that shit of yours; deceased had raised his hands and said: 'my friend, let there be peace the fighting is over.' Accused had passed next to him and while the deceased had taken out the gun, held it in his left hand and said: 'Here it is, let there be peace;' accused had then shot deceased who fell on his left hand side still holding the gun.

Accused had raised the deceased, lifted him up and taken away the gun. When deceased had pleaded for peace accused had said nothing. When accused said the words I have referred to deceased had said nothing. Even when deceased was shot deceased had said nothing save pleading for peace. He could not say

whether anything had angered accused to have acted as he did for nobody had said anything to accused. When accused shot deceased he was about 5 paces away from deceased - it was at point blank range. After deceased was removed there were bloodstains on the floor. He had then made a report to 'Mamatšumunyane and when they went to report to the police accused was left behind. After shooting deceased and taking the gun away from deceased accused had said nothing nor had they said anything themselves.

He says after deceased was shot he was frightened for it seemed as he was between accused and deceased he might have been shot. He was in a state of confusion because he had persuaded accused to leave, had accompanied him and did not believe he would return. Empty shells had been collected outside and the deceased had been taken to the mortuary while policemen took statements from them. Accused had then handed the gun he had taken from the deceased to the police.

Cross-examined by Mr. Mafisa: The witness testified he had joined the police force in 1989. He had done basic criminal investigation though he had no experience. Among some of police duties are investigation and prosecution of the crime. Crime prevention came first. When the shooting took place he could not say how much beer he had taken though he had taken it moderately. They had been drinking beer from quarts emptied into drinking glasses. He could not tell the number of bottles he had taken and at the time of shooting he was normal and in control of his senses. He was not drunk. What he had told the court was the truth. His memory was good though he could not remember what time he made a report

to 'Mamatšumunyane's the reason being that he had not consulted a watch. He would remember if there had been a quarrel before deceased asked accused to go to work. The incident had happened a long time ago and facts were not fresh in his mind though what he had told the court was what had happened. It had not occurred to him to say the reason for the tussle over the pistol was because accused had been asked to go to work. He was not hiding the fact that there was a reason for the tussle over the gun. It had not come to his mind to tell the court this. Put to him he is an unreliable witness he denies. He had appeared in another court and there gave evidence. No beer was being sold that night. He says the reason he did not mention accused's name - until he was reminded by counsel was because this was not necessary because accused is here in court. He had not mentioned accused as present for the same reason he had given. He had not known the relationship between the deceased and accused though it had been reported to him they were policemen.

Deceased had pushed accused a little and said: 'go to work - you are still on duty go to work.' This did not seem to anger or belittle accused. According to him, it was not necessary to remind accused his duties. He was certain the gun was a 7.65 calibre pistol. The reason they wanted to take away the gun from deceased was because drinking people do funny things and report their deeds when it's too late. He says it was for security reasons the gun needed to be seized from deceased. He says he had not thought it necessary to take away the gun from accused because he had accompanied him home. He had not seen deceased threaten anybody with the gun. Nobody had tried to grab or take away the gun from accused. He had not seen deceased try to take the gun from the accused. As he was present, he would

have seen this. There were times when he was absent from the scene as when he was going from the kitchen into the sitting room. They were drinking in the kitchen. He says they had not succeeded to take away the gun from the deceased who did nothing with the gun. It had not been necessary to ask deceased to leave. He had asked accused to leave in order to separate the two though accused had then not caused any trouble. Deceased was not causing trouble for all he did was to tell accused to go to work. Accused was not a troublemaker, either. Accused asked to leave had complied for he did not protest. He says he wanted to separate the two to avoid conflict and he had felt at ease after seeing accused off. He made sure accused had left. He says deceased was next to be accompanied so he could get some sleep. He says the request to go to work was misunderstood. Put to him he is hiding something from the court he says what he said is what he knows and he was not hiding anything. He says when accused said if deceased followed him he would kill the deceased it was the result of conversation relating to events that took place at 'Mamatšumunyane's. He says he was urging accused to dissociate himself from irrelevancies - to leave deceased alone and go to work. He says he had not found out from accused why he wanted to kill deceased. He say she was seeing accused for the first time and did not want to poke his nose into accused's affairs so long as he left deceased alone. According to him there was no reason for accused to entertain the intention to kill deceased. He says he was concerned with seeing accused off and it did not occur to him to talk to accused about his threats.

He says on his return from accompanying accused home he had spoken to the deceased offering to accompany him home - he had been satisfied having seen accused away nothing would happen. He says he had testified as the P.E. that

accused had said if deceased followed him he would kill deceased and he does not know why the Magistrate did not record this. He denies that this is an invention as it is what happened. He says the shooting was sporadic the rifle shot having come first and the deceased having responded with his small gun. When the deceased shot he had entered through the right side of the house. He says deceased was not firing at a specific target and shot in response to the sound of the big gun. He had not heard deceased shout at accused inviting the latter back into the house for the quarrel was over. He says the time lapse between the accused leaving the house and returning thereto could have been 20 - 25 minutes. He says after seeing accused off he could have returned to the house in fifteen minutes time. Deceased had not been cooperative to have him accompanied home nor was the accused cooperative in efforts to have the firearm taken away from him. He says when shooting took place he was so frightened he did nothing. He says there were three of them in the sitting room namely himself, accused and deceased. He says he thinks there were four people but accused included. He says accused was looking at deceased who was pleading for forgiveness. He says the way deceased handled the gun with his left hand it did not seem he was handling it in a shooting position not withstanding that it was facing accused's direction. He could not deny deceased was left-handed. He could not deny accused's aim was to disarm deceased.

Re-examined the witness said the gun was not pointed at accused as it was lying in deceased's palm though pointed in the direction of the accused. After he accompanied accused he did not hear deceased shout at accused. When he accompanied accused deceased had not rushed at accused and grabbed accused. Apart from the scuffle to disarm deceased no such thing had happened again.

Accused had expressed no desire to go back to the house. There was no girl friend in the house which caught accused's attention. There were only 'Mamatšumunyane and her two daughters who were seated with them. On accompanying accused he had not noticed whether the accused was agitated or nervous. According to him accused's life was not in danger at any time.

In answer to questions by an assessor the witness said he was moderately drunk though he didn't know whether deceased was moderately drunk or drunk. According to him accused was less drunk than the deceased..

P.W.2 Lehlohonolo Monyako (who, effectively, should have been P.W.3 at the P.E.) sworn had stated he was literate and 33 years old. He lived at Khubetsoana and remembered November, 1991 when he stayed at Hoohlo's. He knew the accused in the dock who was Tšeliso Makotoko. He also knew the deceased Martin Setebele. In the evening of the fateful day they had been to Matšumunyane's at Hoohlo's. He was with deceased and P.W.1 plus the others he had forgotten. He had come there with the deceased. Whilst there deceased had bought beer and accused had come in. They had been there a long time when accused came in and the accused bought him a quart of beer and got into the sitting room. Beer was for sale for this was a regular spot and they had gone on drinking beer. Accused had left the room he had been to and joined them. Deceased had then told accused to go to work. Accused had stood on the doorway leading outside. He could not remember accused's response but heard a gunshot. When accused came he was in a brown uniform carrying a rifle. When accused cocked the gun he was not pointing at anybody nor could he say in what mood accused was.

Accused had after shooting pointed the gun at the table on which they were sitting. He was pointing at them and they tried to stop him as the gun was facing in their direction. He says he was scarred and in a state of panic and did not observe accused's mood. He says P.W.1 tried to stop accused by telling him to go to work. He had disarmed accused. He could not remember if accused was saying anything. He had tried to carry the gun into the bedroom with him but as he was holding it horizontally the gun could not go into the bedroom and he had dropped the gun and hid himself under the bed. After the first gunshot he had heard another. The sounds he heard were from a big and a small gun. The sounds were in the house. He could not say who was shooting who. There was continuous shooting while he was under the bed. He was not hearing the sounds for the first time. The shooting had gone on indefinitely until the deceased said he had run out of ammunition. Deceased was speaking normally saying: 'hey man, I am running short of ammunition.' He had not noticed whether accused was carrying anything. There was a respite after deceased said he was out of ammunition but a gun report had followed.

He had then heard a voice say: 'You have finished him.' He thinks it was P.W.1. He had crouched out of his hiding place under the bed into where he found deceased having fallen down. Accused was seated on a chair with a gun next to him - a rifle. Accused then said he had not meant to shoot deceased but merely to scare him. This had been announced to the people present. When he touched deceased's heart region there was no heartbeat and his knees were cold and he had announced to those present that the man was dead. There was no blood on deceased and he saw no wound. The police had found a wound on the neck which he saw. There was nothing unusual in the sitting room. Other than a gun next to accused he had

seen no other gun. When he went into the bedroom he had noticed another gun in deceased's hand - he was holding it. The gun in deceased's hand was small and shining. He had seen a similar gun before. He was seeing the gun for the first time that day. Accused and deceased had not exchanged any heated words that day except deceased saying accused was to go to work because he was wearing a uniform. While he was in hiding he could only hear not see. He had heard P.W.1 reprimand accused to the effect that accused was to stop his troublemaking. Can't say whether accused was drunk or not for he was not staggering. As for deceased, he had just arrived from work and was not drunk. As far as he was concerned the shooting was unprovoked. He could not remember what happened to the big and small gun.

Cross-examined by Mr. Matooane for the defence the witness said he had testified before a magistrate at the P.E. and then events were more vivid in his mind. He says at the P.E. he had not said he had hidden under the bed because accused was shooting outside. He says he was in possession of accused's gun and the sound he heard was from a big gun. He says before he ran into the bedroom he had heard a gun report. He says when the gun fell accused took it while he was on the bedroom door step; asked why he had not said this in his evidence-in-chief he says the question is difficult to answer. Put to him he is deviating from the story he told the magistrate he says owing to passage of time this could well be. He however denies that deceased was shooting at accused and the latter had replied 'He says after the request to leave a short time (about 3 minutes) lapsed before the shooting; he denies it could have been about 20 minutes. He says he saw nobody leaving before the shooting. Accused had not gone anywhere. He could not remember the

words 'where is that shit of yours,' ever being uttered not did he hear deceased say 'I am no longer fighting let us make peace.' He can't tell whether deceased was left-handed. He says the accused demanded the gun from deceased. He says he had forgotten to tell the court this. He denies deceased started the trouble and people disarmed him. He says accused cocked the gun and shot. He is unable to answer the question whether accused and deceased were friends nor can he remember whether deceased grabbed accused's gun. He says the hostess was in her bedroom much as he cannot remember whether deceased shot at the hostess making the latter run away.

No Re-examination.

In answer to the courts questions the witness says he had taken some beers before coming to 'Mamutšumunyane's but he was not drunk. When the events subject matter of the trial took place he had along with deceased and some three others, taken twenty beers.

The matter having been postponed to 18 November, 1997 on this date Mr. Qhomane had had the matter further postponed to 19 November, 1997. On 19 November Mr. Qhomane had said he was dispensing with the evidence of P.W.4 and P.W.5 at the P.E. and he had closed the crown case.

Mr. Matooane had then applied for the discharge of the accused and when the courts reservations manifested themselves as to the course he was taking the defence case had been closed.

In addresses Mr. Qhomane has said the fact that accused did not go into the box entitles the court to draw inferences adverse to accused's case. He has also commended the demeanour of the crown witnesses saying things speak for themselves.

Mr. Matooane for the defence has said the two crown witnesses don't agree on who between the accused and deceased was the aggressor. He says the fact that crown witnesses have not agreed on this essential the onus being on the crown it cannot be said that the crown has proved that the accused was the aggressor. The time lapse before the shooting took place was twenty minutes by one witness and three minutes by another nor can the witnesses agree as to when the shooting took place. The crown witnesses are one, though, in that when deceased was shot he had a gun in his hand. The two witnesses could not even agree on alleged words uttered by the accused.

He says although it was claimed deceased had sued for peace the deceased was at the same time holding a gun which posed a threat to accused's life - accused was therefore justified in shooting to avert imminent danger facing him.

Crown evidence had put accused in a dilemma and it was not for accused to go into the box to provide crown with evidence which it lacked.

On 19 November, 1997 judgment had been reserved to 10 December, 1997 and because of the vacation holidays had been further reserved to 6 January but read on 16 February, 1998.

This court takes exception to the conduct of this case by the crown. There was evidence which the crown should have called but the crown had, for unexplained reasons, failed to call such evidence. In order to reach its decision, the court must depend on the two witnesses who testified. Unfortunately, these witnesses did not seem to be saying same things. The question, though, is whether the two crown witnesses differed materially in essential respects.

As to who was aggressor, Mr. Matoone has said the two crown witnesses are not agreed on this score. P.W.1's evidence in this regard was that there was a tussle regarding deceased's gun with people attempting to disarm him. The gun had not been pointed at anybody; this was the time when P.W.1 had offered to accompany accused home so accused could leave the deceased alone. In cross-examination the witness had repeated the tussle incident and further added that deceased had pushed accused a little and said: 'go to work.' According to the witness this had not angered the accused though he admitted it had not been necessary to remind accused his duties. In this regard P.W.2 puts the entire blame on accused who shot after being told to go to work, had cocked the rifle though not pointing at anybody, had pointed the rifle at the table on which they were sitting and as the gun was facing in their direction they had tried to stop the accused. The question is whether by pushing accused a little and reminding him to go to work this can be construed as aggression on deceased's part. P.W.2 has for all intends and purposes branded accused as an aggressor though the inquiry is whether in this regard P.W.2 was convincing as a witness. Undoubtedly though, the two witnesses are not saying the same thing.

Whether accused was seen off as P.W.1 claimed, is not supported by P.W.2.

The evidence taken together, can it be said deceased was the aggressor or effectively, the aggressor was accused? According to P.W.1 accused had returned to the scene after he (the witness) had seen accused off and entering accused had said: 'where's that one, I mean take out that shit of yours.' To which deceased had raised his hands and said: 'my friend, let there be peace, the fighting is over.' Deceased had then taken out the gun, held it in his left hand and said: 'Here it is, let there be peace.' Accused had then shot deceased. P.W.2's evidence is one of intermittent shooting the result of which was deceased declaring himself to have run out of ammunition and shortly thereafter he had heard a gun report and crouching out of his hiding place had found deceased having fallen down, dead. He had, however, found deceased holding the gun. Although as to the progress of events the two witnesses differ, they seem to agree that when deceased was shot he was not in a fighting mood nor did he pose any threat to accused's life.

Undoubtedly P.W.2 seemed drunk and P.W.1 can be said to have been moderately drunk. In the result P.W.1's recollection and marshalling of facts was a lot better than that of P.W.2. This court does not understand how a normal, reasonable man could have disarmed accused and fail to go into a room carrying a gun. The reason for abandoning the gun is hardly convincing and less so the witnesse's state of petrification to hide under the bed having abandoned the gun or as a result of the fear of a man he had disarmed. And while the court was at pains to accept P.W.2's evidence, the court has found P.W.1's evidence even flowing, reliable in material respects and coming from a person well versed with the situation

and its developments.

Where there is a drinking party or festivity, it would be asking too much of witnesses to observe in minute detail what transpires or whether such-and-such a person went to the toiled or went outside for breath of fresh air. People involved are in the event the best to give an account of their activities. Even were the court to reject P.W.2's account of events, (and there could well be reason to do so) on account of P.W.2 having been under the influence of liquor quite apart from the fact that P.W.2 claimed to have been in a room other than that in which deceased was shot, it is doubtful whether P.W.2 considering the state of his insobriety was, coupled with being in a different room, in a position to have heard what accused and deceased said.

But although this court was not satisfied with P.W.2's evidence for being improbable, a shade biased and in some respects exaggerated, it was nevertheless said in *S. Miller, 1972 (1) S.A. 427 (S.R.) at p. 420 that:-*

> *'It is a well accepted rule of evidence that the mere fact that a witness is a liar does not mean that all his evidence must be disbelieved ___'*

And in *Buta Phalatsi and Other v. Rex - 1971 - 73 LLR. 92* it was said the fact that the evidence of a witness may be unsatisfactory in some respects yet this does not mean that the court is obliged to reject his evidence in its entirety. So also in *R. v. Abdoorlam, 1954 (3) S.A. 163 (N) at 165* where Broome, J.P. said:-

> *'The Court may be satisfied that a witness is speaking*

the truth notwithstanding that he is in some respects an unsatisfactory witness.'

The difficulty with P.W.2's evidence is that he does not seem to agree with P.W.1 in some respects. For example while P.W.1 told the court deceased had sued for or prayed for peace P.W.2's story was diagrammatically different from that of P.W.1 in that accordom to him P.W.2, the deceased had said: 'hey man, I have run out of ammunition' or words to that effect. Indeed it was as if P.W.1 and P.W.2 were not together when the shooting took place although, as I have said earlier, they were not together and P.W.2 may not have heard the precise words uttered. Significantly though, both P.W.1 and P.W.2 are in agreement that the deceased told accused to go to work. P.W.2 also repeated to this court what he had said at the P.E. regarding accused's gun and the fact that he crawled under the bed after dropping the gun. He also says that when he ran away with the gun the deceased had fired his gun. He also says before he ran away he saw deceased holding a gun and that deceased was outside where he could see him.

It was, indeed, P.W.2's evidence at the P.E. and in this court that accused had asked or demanded deceased to give him his gun and deceased had replied that 'he had no more rounds in his gun.' On this very material and decisive aspect of the evidence, it will be seen that P.W.2 differs from P.W.1's evidence which was to the effect that deceased had just entered 'Mamatšumunyane's bedroom and taken a seat when accused got in whith his service rifle and directed it at the deceased saying. 'Where's that one ____;' and said further: 'take out that shit of yours___' and deceased raised his hands and said: 'my friend, let there be peace, the fighting is over.' Further, the witness has testified that the deceased had taken out the gun,

held it in his left hand and said: 'here it is __ let there be peace.'

The accused, according to P.W.1, had nevertheless shot deceased. Either way, whether one goes by P.W.1's or P.W.2's evidence, deceased when he was shot was not belligerent or offensive but defeatist and prostrate so that even if P.W.1 and P.W.2 differ in some respects e.g. whether P.W.1 did accompany accused or not this is not material for the conflict in the evidence does not go into the root cause of why accused shot deceased for, in the view of this court, the only reasonable inference to be drawn from these set of circumstances is that while accused was offended by being told to go to work by deceased, accused also resented empty threats by the deceased with his inferior gun. Moreover, accused took advantage of deceased's weakness in pleading for peace. Also, from the evidence as a whole, it does not seem that deceased either verbally or physically threatened accused's life prompting the latter to defend himself.

I have said that although P.W.2's evidence was unsatisfactory in some respects, this is not the reason to throw out the entire evidence. Assuming that I am mistaken P.W.2's evidence is worthless and ought to be thrown out, the view of this court is that P.W.1's evidence standing alone is enough for this court to return a verdict of guilty as charged.

Regarding evidence of a single witness, *section 238 sub-section (1) of the Criminal Procedure and* Evidence *Act, 1981 is to the effect that:-*

> *subject to sub-section (2), any court may convict any person of any offence alleged against him in the charge*

on the single evidence of any competent and credible witness.'

The case of *Moshabesha v. Rex. - 1976 LLR 47* is relevant. It concerned question of a single witness's evidence and conflicting stories. Mofokeng, J. as he then was had held where the court is confronted with the evidence of a single witness, before convicting the court was to warn itself of dangers inherent in relying on such evidence and especially where the motive to mislead exists on the part of such a witness; the court, according to the learned judge was to be vigilant in that absence of corroborative evidence could well be unsatisfactory resulting in reasonable doubt as to accused's guilt.

The above case was followed by *Rex v. Molomo, 1976 LLR 64* where, while Cotran, C.J. adopted the same reasoning as in R. v. Moshabesha above and took the matter a stage further by holding that where the court is faced with the evidence of a single witness and the accused had given evidence which the court rejected, the court having warned itself of the attendant dangers in accepting such evidence of a single witness and the court having found there was no bias in the single witnesse's evidence, and there having been both direct evidence corroborating that of the single witness the court was entitled to convict. (I have underlined.). Of interest to this court in *Rex v. Molomo's* case is the question of bias. There was no motive on the part of P.W.1 to mislead the court. However, at the trial P.W.1 had said when he accompanied accused the latter had said if deceased followed him he would kill deceased. The defence has made capital out of this saying the witness was hiding something from the court. Admittedly, P.W.1's evidence in this regard was fresh for this is what he had not testified to at the P.E. and P.W.1's explanation was that the

Magistrate had not recorded it.

Well, although courts go by the record, it would be asking too much to expect a court to record everything freehand. This is why there are recording machines to ensure accurate and reliable recording. In any event, evidence at the P.E. is no evidence unless it is admitted or repeated at the trial. P.W.1 also testified that he was seeing accused for the first time and in my view had no reason to implicate accused falsely. P.W.1 seemed to me to be a well-trained, competent and conscientious policeman who would not take sides. In the witness box he was convincing, impressive and not shaken.

It is to be remembered that in the instant case the accused did not testify on his behalf. It has been said this is a factor that may be taken against accused. Maybe although this court can only remark that it is accused's common law right or his constitutional right to remain silent. And as was said in *R. v. Segoale, 1947 (2) S.A. 641 (T) at 645:*

> *'There are two conflicting stories and before the onus placed on the Crown is discharged, the court must be satisfied that the story of the party on whom the onus rests is true and the other false.'*

As I have said, there are no mutually destructive stories here and accordingly the court is concerned with whether the Crown has, beyond reasonable doubt, discharged the onus placed on it though, it would be expected that, where the Crown has inculpated the accused, the latter would exculpate himself.

It is not denied that accused shot and killed the deceased. The defence counsel has argued that the accused was entitled to defend himself.

In *R. v. Masiya, 1961 (1) S.A. 218 (W.)* although the accused and deceased were engaged in an illegal activity by proffeing the weapon for use in an unlawful assault, before the perpetration of the unlawful act as accused was handing the weapon to deceased, deceased's finger was on the trigger and this made the gun to off killing the deceased. Held accused and deceased were engaged in perpetration of an unlawful act and it was the performance of the unlawful act which caused deceased's death. The killing being unlawful the accused was found guilty of culpable homicide. That accused and deceased engaged in an ulawful act of shooting aimlessly and erratically as they did was no excuse in the view of this court for accused to shoot deceased.

In *S. v. Jackson, 1963 (2) S.A. 626 (A.D.)* appellant and the deceased the latter appellant's father-in-law, the deceased had repeatedly assaulted the appellant culminating in a serious assault which made appellant discharge the contents of his stomach. The appellant being pinned to the ground, tired and fearing for his life had drawn a pistol and shot the deceased. The appellant had been convicted. On appeal the question asked was whether the appellant reasonably feared for his life and whether a reasonable man in the position of the accused would fear that his life was in danger. It was then said if he was justified in having the fear and defended himself as he did, then he was not guilty; but that if he overstepped the boundaries of self-defence he would in the event have gone beyond reasonable limits and would be guilty of culpable homicide.

In R. v. K., 1956 (3) S.A. 353 (A.D.) Centlivres, C.J. had said at p.359:-

> *'The law accepted by this court may be compared to what Holmes, J. said in Brown v. United Stated, 256 U.S.R. 335 at p.343':*
>
> > *'Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills he has not exceeded the bounds of lawful self-defence ___. Detached reflection cannot be demanded in the presence of an up-lifted knife.'*

Undoubtedly, it might be mentioned that a cocked gun is worse. According to the evidence which this court believed, accused and appellant were acting in a most disquieting and irresponsible manner shooting wildly in and outside the house in which they were as if it was Guy Fawkes day. At no time in their errant shooting were there any particular targets nor were any 4 - letter words exchanged. The evidence has not disclosed that at any time the deceased aimed at the accused. And yet it was when deceased pleaded for peace that accused shot him. I have already expressed the reason why deceased was shot and that, at the time of the shooting deceased was overcome with remorse and pleading for peace. At the time there was nothing which deceased did which could remotely be construed as imperilling accused's safety nor was the situation in any way tense or imminently foreboding. The deceased had not chased accused around and even if earlier the deceased had 'pushed accused a little' and told him to go to work, the provocation if any should have subsided. Besides, I do not think deceased was wrong to remind accused of

his duties.

Watermeyer, J.A. in *Rex v. Molife, 1940 A.D. 202 at 204 said that*

> *'___ Homicide in self-defence is only excusable under certain strictly limited conditions, that the means of defence must be commensurate with the danger; that dangerous means of defence must not be adopted when the threatened injury can be avoided in some other reasonable way - that homicide in self-defence, which is not entirely excusable in law, may yet be committed in such circumstances that the crime is reduced to culpable homicide.'*

I have believed P.W.1's version of events and fail to understand why accused returned to the scene unless his motive was to execute the deceased. I have said there was no evidence that deceased was hunting accused down and this court fails to appreciate why, on accused returning from being seen off went to confront deceased. He confronted deceased because he had noted the hopeless and hapless condition in which the deceased was. If accused feared for his life the question is when such fear arose for, had accused either on his own or on being told by deceased to go to work or when he was accompanied by P.W.1 had he not returned to the scene, all would have been well; of importance is that at the material time accused was expected to be at work but defied everybody. That accused should have been at work at the material time was not denied by the defence. Besides, the admitted evidence of Sgt. Molapo at the P.E. showed that accused was dressed in a brown police uniform; there was also evidence that the rifle which accused had was a police firearm.

R. v. Patel, 1959 (3) S.A. 121 (A.D.) justifies use of firearms under certain circumstances. In this case appellant's brother had been struck by deceased on the back with a hammer. As he was in a crouching position the next hammer blow might have landed on his head. In this critical situation the appellant used the only weapon to hand - a revolver. I would emphasise the words 'critical situation' and to add that accused was never in a critical situation.

In *R. v. Attwood, 1946 A.D. 331 at 340* Watermeyer, C.J., laid down the foundation of self-defence by saying:-

> *"(a) that the accused was to show that he had been unlawfully attacked and had reasonable ground for thinking that he was in danger of death and serious injury (though there may be cases of lawful self-defence where the accused was originally the aggressor) - see R. v. Ndara, 1955 (4) S.A. 182 (A.D.) at 184E.*
>
> *(b) that the means of self-defence were not excessive in relation to the danger;*
>
> *© that the means he used were the only or least dangerous means whereby he could have avoided the danger;*

I may mention that it was not contended by the Crown that the means used to repel the so-called danger were disproportionate nor can it be said that accused went beyond limits of self-defence. Accused has not said that he was unlawfully attacked and had resonable ground for thinking that he was in danger of death and serious injury.

A famous case, regarded as the mainstay of our criminal law where self-defence is raised is the case of Union Government (*the Minister of Railways and Harbours v. Bunn, 1914 A.D. 273 at 386*), where Innes, J.A. as he then was said:

> *'Men faced in moment of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstances of their position.'*

It would be an over-exageration to say there was a moment of crisis for the accused or that he had no choice of alternatives. He had an opportunity to go and leave the deceased alone but he bungled it. There was time and opportunity offered him but because he was not satisfied he was done with deceased, he returned to the scene to finish him off. *In R. v. Zikalala, 1953 (2) S.A. 568 (A.D.) at 572* Van der Heever, J.A. approved the following passage from Gardiner and Lansdown's - Criminal Law and Procedure:-

> *'Where a man can save himself by flight, he should flee rather than kill his assailant. So think Matthaenas (48.5.3.7) and Moorman (2.2.12); and see also van den Linden (2.5.9); R. v. Olgers (1843) 2 Mood and R. 479; R. v. Smith (1837), 8C and P.160.'*

For the accused it was not a question of fleeing, it was a question of discretion being the better part of valour - of there being 'a tide in the affairs of men which, taken at the flood, leads on to fortune ___; omitted, all their voyages are bound in shallows and in miseries.' He should have left when the was offered the chance to leave by taking at the flood the opportunity to leave deceased alone.

Sentiments and reservations expressed by Damhonder (C.72) with his ideas of defence against dishonour that no one can be expected to take flight to avoid an attack if flight does not afford him a safe way of escape, or that a man is not bound to expose himself to the risk of a stab in the back when by kicking his assailant he can secure his own safety (Moorman 2.2.12); oon Quistoep para.244 are not relevant or applicable to the case under consideration for, in the view of this court, even if accused was not the original aggressor, he became one by returning from an otherwise no return lift offered by P.W.1 to the accused.

Consider, too, this passage from *Gardiner and Lansdown p.154 Vol.2 of Edition 6 quoted with approval by Holmes, A.J.A. in R. v. Patel above:-*

> *'The danger may in truth not have been great, but the jury must consider whether a reasonable man, in the circumstances in which the accused was placed, would have thought that he was in great danger. A weapon less dangerous than the one used may have been at hand which would have sufficed to ward off the threatened assault but the jury must not expect too nice a discrimination or too careful a choice of weapons from a man called upon in a sudden emergency to act promptly and without opportunity for reflection.'*

For the accused it was not a question of using a less dangerous weapon or one at hand. He casually and deliberately used a weapon he had been carrying all along. There was no question of warding off an attack for no attack had been made on him. There was no sudden emergency nor was accused called upon to act promptly and without opportunity for reflection. There was no danger to accused's life and if

accused imagined there was, it was of his own creation expected of him to take it or lump it.

I do not see the present case as one where it can be said that the accused exceeded bounds of reasonable self-defence. I am saying that circumstances were such that accused did not have to defend himself at all. In this I am fortified by Hiemstra, J's reasoning in *R. v. Mathlau, 1958 (1) S.A. 350 at p.355 where* he said:-

> *'I am of the opinion that the only true application of the law to these facts is that where there is an intentional killing which is not justified by considerations of self-defence the only true verdict in law is murder. A finding of culpable homicide postulates a negligent killing or an unintentional killing.'*

According to *Schreiner, J.A. in R. v. Mathlau's* case above, it might well be thought that when reasonable self-defence has been disproved the only logical approach to the question of guilt should be along lines of provocation. In this count's view, when accused was seen off by P.W.1 any inflamed tempers can be expected to have cooled down notwithstanding the fact, in any case, that provocation in our law is no defence.

As I have said earlier, if any credible evidence to be gone by is that of P.W.1, this court has warned itself of dangers inherent in accepting the evidence of a single witness although the considered view of the court is that evidence as a whole has disclosed the offence of which the accused is charged.

murder as charged.

G.N. MOFOLO
JUDGE
23rd December, 1997.

For the Crown: Mr. Qhomane
For the Defence: Mr. Matooane

EXTENUATING CIRCUMSTANCES

These are said to be factors which, taken cumulatively, lessen the moral blameworthiness of an accused person.

According to the reasoning by Holmes J.A. in S. v. de Bruyn, 1968 (4) S.A. 498 (A) at 507, what is needed in these sort of cases is down-to-earth reasoning with a view to ascertaining what was going on in the minds of the appellants. The process, according to the learned Judge involves looking at all facts on the ground, and allowing for human factors such as robust truism, when intoxicating liquor has been imbibed too freely and sensitivity is apt to become blunted, so that a man may do things while sober he would not do. Courts are also urged to refrain from the rubber-stamp maxim that 'a person is presumed to intend the natural and probable consequence of his act' for the brocard contains a deceptive blending of the subjective and the objective. The Court is therefore urged to look at all the facts and from that totality to ascertain whether the inference can be drawn.

Visser and Maré in their General Principles of Criminal Law through the cases - 3rd Ed. say that dolus directus consists in the accused directing his will to compassing the death of a person ___; in other words, he means to kill and the sole characteristic is actual intent to kill. It is said methods are legion though poisoning is also an example.

The authors say that dolus eventualis is where an accused sees the possibility, however remote, of this act resulting in death to another, yet he persists in it,

reckless whether death results or not.

It is also said the multiple characteristics of the form of dolus are:

1. Subjective foresight of the possibility, however remote, of his unlawful act causing death of another;

2. Persistence in the conduct despite the foresight;

3. An insensitive recklessness having nothing in common with culpa;

4. The conscious taking of the risk of resultant death, not caring whether it ensures or not;

5. The absence of actual intention to kill.

Accused's conduct is nowhere closer to the conduct of A who, intending to kill X, puts poisoned meat into X's food knowing that the result will be instant death nor can it be compared to a murderous legion intent on liquidating its enemies. Accused's conduct is closer and akin to a man who, though appreciating that by pulling the trigger death may result persists in the conduct and is insensitive and reckless as to the result.

In R. v. Huebsch, 1953 (2) S.A. 561 Schreiner, J.A. has said that this form of dolus involves a technical and artificial connotation of the word 'intention'. It is also said these descriptions are helpful, provided they do not blind one to the fact that the law regards either form as dolus and sufficient for the crime of murder; that each is dolus in its own right, with its own characteristics; that in general the law

requires the death penalty for murder, unless extenuating circumstances are present; and that it cannot be said, in vacua, that either form of dolus, per se, connotes a lesser or a greater of blameworthiness than either (see Visser & Maré above p.477).

Intoxication has been described by Hall in his General Principles of Criminal Law at p.524 in this way:

> 'In cases relevant to the present problem, the defendant is in a state of intoxication between these extremes. What we have to deal with is not incapacity to perform simple acts on such obliteration of cognitive functions as to exclude any degree of purposive conduct, but instead a severe blunting of the capacity to understand the moral quality of the act at issue, combined with a drastic lapse of inhibition. As has been suggested, this closely resembles, it is not identical with, insanity.'

Indeed unless the accused was intoxicated, for purposes of extenuation, it is not clear why accused returned to the scene when he had been seen off by P.W.1; nobody in his sound mind would have behaved as accused did. He behaved as he did because his mental capacity was deposed by his state of intoxication. He had lost the normal inhibition and there was a lapse of intention resembling or identical with insanity.

The law is now clear that in arriving at the conclusion whether there was provocation it is not the single but cumulative effect of factors that are taken into consideration to decide whether there was provocation, it has also been said that intoxication and provocation either singly or together, may affect a person's mind that the requisite intention to kill is absent; counsel for the accused has conceded and quite rightly in the view of this court that accused having been accompanied by

P.W.1, this allowed considerable cooling of emotions by accused and consequently whatever provocation accused may have encountered had no relevance to accused shooting deceased and that while considerations of provocation did not avail accused in his conviction such considerations availed accused for purposes of extenuation.

Therefore accused's insobriety taken together with provocation however extended coupled with the fact that the case is one of dolus eventualis these, factors cumulatively amount to extenuating circumstances and the court accordingly find that there were extenuating circumstances.

My Assessors agree.

Mr. Qhomane for the Crown has said his records do not show that accused has previous convictions.

In Mitigation

In mitigation Mr. Matooane for the prisoner has said accused is fairly young, because of the conviction he is likely to lose his job and any accompanying benefits. He has a wife and children to support plus an elderly mother. According to custom there may be a claim to raise deceased's head.

On Sentence

On Sentence

Both accused and deceased were members of the police force and it does not appear that there was any hostility between them. The court was not clear who between the two was senior though there was some indication that deceased was senior.

It is common cause that when deceased was shot by accused the latter was in police uniform carrying a police service rifle. It can therefore be taken safely that at the material time accused was on duty and that therefore deceased was right to have reminded accused of his duties.

This court takes extreme exception to accused's presence in a beer hall while being on duty and carrying a police service rifle. There is nothing wrong anybody visiting a beer hall but certainly not in course of duty and unless there is reason to go to the beerhall i.e: to investigate a crime or apprehend a criminal. The exchange of fire that followed and waste of government ammunition by accused shows how insensitive and inresponssible accused is, as a policeman. Government firearms and ammunition is not meant for settling personal differences but are used in more noble and auspicious circumstances in defending justice and certainly in course of duty and within the scope of employment of a police officer. In discharging government ammunition accused was not in any way assisting in the national effort but acting against it.

Perhaps the idea of government does not strike a note in some people because

of the tendency of some to hate and like particular governments. It appears government is better expressed if it is equated to the 'people' and the property is termed the 'people's property'. People who gave accused his job could never have allowed him to have wasted their ammunition as he did. This court finds accused to have acted so irresponsibly as to be necessary to impose a deterrent sentence to stop accused and the like-minded in their tracks.

In Gane's translation, vol. 2.72 Voet, vol. 1.57 in a note, it is said:

> 'It is true, as Cicero says in his work on duties Bl 1 ch.25, that anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little. It is also true that it would be desirable that they who hold the office of Judges should be like laws, which approach punishment not in a spirit of anger but in one of equity.'

In the same note it is stated that 'among the faults of Judges which are most harmful are hastiness, the striving after severity and misplaced pity.' The same author at ZLVIII 1.4 goes on to say of a Judge:

> 'He must be watchful that no step is taken either more harshly or more indulgently than is called for by the case.'

and

> 'in trivial cases indeed Judges ought to be more inclined to mildness, but in more serious cases to follow the severity of the laws with a certain moderation of

generosity (Gane's trans. Vol. 7.504).

Striking the middle course and not striving after severity or misplaced pity and having taken into account factors in mitigation of the sentence, the least sentence this court can impose on accused is Ten Years (10) years imprisonment and accordingly accused is sentenced to a term of Ten Years (10) Years imprisonment.

G.N. MOFOLO
JUDGE
16th February, 1998.

For the Crown: Mr. Qhomane
For the Defence: Mr. Matooane