CRI/T/43/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

PETER MOHAU MARABE

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu
on the 22nd day of August, 2000

In this case accused, on the 1st August 2000, came before me summarily charged with the following crimes:-

COUNT I MURDER

In that upon or about the 20th August 1999 and at or near LIKILENG FOOTBALL GROUND in the district of Butha Buthe, the said accused did unlawfully and intentionally kill MOLEFI JACOB KHOLOKHOLO.

COUNT II CONTRAVENTION OF SECTION 3(2) (a) & (b) OF THE INTERNAL SECURITY (ARMS AND AMMUNITION) ACT 1966

In that upon or about the 20th day of August 1999 and at or near LIKILENG FOOTBALL GROUND in the district of Butha-Buthe the said accused did unlawfully and intentionally have in his possession a firearm to wit: a 9mm X 19mm TANFOLIO serial numbers, A B20052 without a valid firearm certificate at the time; and did thereby contravene the provisions of the aforesaid Act.

To both charges the accused pleaded not guilty.

The Crown called seven witnesses who gave sworn testimony while the accused (duly sworn) was the only witness for the Defence. Both the accused and the deceased (the late Colonel Kholokholo) were policemen. All the witnesses in this case except one were policemen. The deceased was the Officer Commanding Butha Buthe while the accused was a policeman of junior rank (trooper) who was serving in the Butha Buthe district together with many other policemen under the deceased.

Sergeant Maime who was the first Crown Witness (PW1) duly sworn told the court that he knows the accused and the deceased (the late Colonel Kholokholo). On the 20th August, 1999, PW1 had attended a public meeting (pitso) that was being addressed by the Prime Minister. At about 1 p.m. the deceased (Colonel Kholokholo) went behind the tent in which the Prime Minister and his entourage were sitting. He called PW1 and asked him why he did not report himself to him on arrival. Before PW1 could reply, he noticed accused walking towards deceased and

immediately heard two gun reports. PW1 felt something hitting him on the left side. PW1 says all this had taken him by surprise, he saw deceased fall to the ground. Then he saw accused pointing a firearm at the deceased and firing three times at deceased who had fallen to the ground. Accused had been very close to the deceased. Although PW1 was very frightened, he got behind accused and held both arms of the accused against accused's body and the gun fell to the ground.

The firearm that had fallen to the ground was picked up by Senior Superintendent Tsilo. The police conveyed deceased to hospital. There was a person who helped PW1 put the accused into the back of the van that conveyed him to the charge office.

PW1 then added that before the deceased fell, deceased had said what is happening to him. Accused had then said "Justice has not been done, he has expelled me from work", when he asked him why he is firing at the deceased. Accused then asked them to take him to the police to surrender. Under cross-examination PW1 said in his report he never said deceased had said what was happening to him nor did PW1 write in his report that accused had said Justice had not been done. PW1 admitted he had written his report on the day deceased was shot. PW1 said he was confused due to the trauma he had suffered when he saw deceased shot. PW1 said it is not easy to remember things immediately after their occurrence. PW1 said he only knew accused was a policeman in Butha Buthe and did not know of his traffic accident that affected his behaviour. When it was put to him that accused had a black-out and was acting as he did due to automatism, PW1 said he was not a medical doctor.

The second Witness (PW2) was Major Tšilo who was stationed in Butha Buthe at the time holding the rank of Superintendent. PW2 says he had seen deceased coming in his direction, he heard a gun report and saw deceased fall and realised someone was firing. PW2 ran away and hid behind the landrover to whose occupant he had been talking. When PW2 looked again to where the deceased had fallen, he realised that this person he had seen earlier was firing a number of times at deceased who was still lying prostrate on the ground. PW2 identified the man who shot the deceased as the accused because towards the end he was also told that person was Marabe. PW2 grabbed the accused's firearm from the accused and handed it to a policeman. Accused was rushed to the police station as the public wanted to assault the accused. PW2 and other policemen remained calming the crowd while deceased was rushed to hospital.

In cross-examination PW2 said deceased was seven paces from him, walking towards PW2 as if he was going to give PW2 instructions when he was shot. Accused was walking alone but there were people beside him. PW2 did not see PW1 until he got hold of the accused. He could not commit himself about the presence of PW1 because he did not see PW1 before then.

The third witness (PW3) was Senior Inspector Theko. He said he was at the pitso, sitting in a landrover. He felt drowsy, he was woken up by a sound of fire-works. When he looked up, he saw the deceased (Colonel Kholokholo) staggering and falling. Deceased was less than a meter from him. Accused (whom he knew) fired twice at deceased after deceased had fallen. PW3 saw PW1 holding accused from the back. PW1 asked accused why he was killing a person. Accused said he was killing deceased because deceased had brought about his expulsion from

work. Accused added that justice had not been done. Thereafter accused was taken away. PW3 and others took deceased to hospital where he doctor said he was dead a short time after their arrival.

Under cross-examination PW3 said he did not hear deceased say anything. PW3 only saw PW1 when he caught the accused.

PW4 was Moferefere Senokoane who had attended a pitso. He says he heard a gun report after the Prime Minister had risen. He heard three reports. People ran away from the scene and he went to help arrest the man responsible for firing. He could no more identify the accused because accused had lost weight. There was someone who had already caught the accused when PW4 came to help. The person who had been shot had fallen down. PW4 and the police took accused to the charge office. When he got there the police took a statement from him. They took another statement some days later. PW4 said he heard accused say that he should not be treated badly because he would tell his story where he was going. While they were going to the charge office with the accused, at the back of the van, he asked the accused why he had killed that person. Accused said that man had dismissed him from work.

Under cross-examination PW4was told that in his statement (which counsel had in his possession) PW4 had not said he asked accused why he had killed a person. PW4 said he had mentioned that fact in his statement, he does not know why that was not recorded. When counsel said accused will deny that PW4 asked him why he killed a person, PW4 replied that a person who is guilty never admits it. PW4 in reply to questions said he had earlier seen from a distance deceased talking

to a person who later got hold of the accused. He was at the side of the tent and they were 5 paces apart. PW4 said he could not hear what deceased was saying to that person because they were far from him.

Inspector Nkohli was the fifth Crown witness (PW5). She is a police woman. She told the court that she was on duty at the Prime Minister's pitso (public meeting) that day. She had been posted to control the crowd behind the tent with other members of the police force. There was a vehicle of the Commissioner of Police, she noticed deceased meeting PW1. She heard a gun report and looked around and saw nothing (although she was not far from deceased). She then saw deceased fall. PW5 then heard deceased say what is happening to him. A person fired shots at deceased who had fallen at the feet of PW1. PW1 caught that person. She was told to go and get a vehicle and she did so. As she was driving away, three empty cartridges and a stick belonging to the deceased were thrown to her by Mabitle's driver. They took deceased to hospital with detective Sergeant Ntlaloe and a nurse. They placed deceased before a doctor. Mrs Kou the Commanding Officer Butha Buthe later confirmed deceased had died. PW5 had later handed the shells in her possession to Mr Takalimane a policeman in Butha Buthe.

Under cross-examination PW5 said in her report she had said she had tried to help deceased who had fallen by making him sit straight. She had even said Sergeant Maime (PW1) had applied first aid, but stopped doing so and caught accused who was firing again. She had heard an unidentified voice that asked accused why he was shooting the deceased. Accused had replied that deceased had caused him to be expelled from work. She said she heard what she heard before people could be many. People were removed from behind the tent for security reasons. PW5 said

she knows the accused and that he was out of work, but she does not know of the accused's car accident and the effect it had on his mental or emotional state.

Sergeant Khotsoane (PW6) was the next witness. He had worked with the accused in Butha Buthe. That day (the 20th August 1999) he was on duty at the Prime Minister's pitso. He had been on the eastern side of the Prime Minister's tent when he heard a gun report. He immediately proceeded in the direction of the gun report. When he came to the back of the tent he found deceased had fallen and PW1 was holding accused. PW1 and accused were one pace from deceased. When he came nearer he saw blood-stains on deceased's jersey as a result of which he concluded that deceased had been shot. PW2 handed to him a pistol which had reportedly been used. It was a Damfolio 9mm pistol AB 20052. There were still 9 live bullets in its magazine. That type of pistol carries 15 rounds of ammunition. PW6 handed that pistol as an exhibit and it was marked Exhibit "1". The 9 rounds of ammunition were handed in and were marked Exhibit "2" collectively. PW2 went with the accused to the charge office. After he had heard deceased had died, he cautioned the accused and charged him with murder.

In terms of Section 273 of the *Criminal Procedure and Evidence Act* of 1981. Mr *Mosito* admitted the following documents as evidence with the concurrence of the Crown:-

(i) Evidence from ballistic firearm examiners that the empty cartridges had been fired from the pistol Exhibit "1". This was read into the record and marked Exhibit "A" by consent of the parties.

(ii) Five (5) Empty Shells and 2 spent bullets that had been collected by the

police from the scene of crime. They were collectively marked Exhibit "3" by consent of the parties.

(iii) The postmortem report was read into the record and was handed in by consent of the parties and marked Exhibit "B".

(iv) The accused's confession was read into the record by consent of the parties and marked Exhibit "C".

The Crown called (PW7) Major Mahao as the seventh and last witness. PW7 told the court that he was a Senior Superintendent in the Leribe district. On the 20th August, 1999, he found the accused already under arrest. He showed him the firearm Exhibit "1". Accused said it was his. PW7 asked for accused's fire-arm certificate. Accused took PW7 to accused's house where accused gave him a fire-arm certificate dated 31st December, 1996. After PW7 had made investigations and satisfied himself that the fire-arm certificate of the accused had in fact expired, he cautioned the accused and gave accused a charge of possessing a firearm without a valid certificate and contravening Section 32(1) of the *Internal Security Arms & Ammunition Act* of 1966. Under cross-examination, PW7 admitted that he himself had not found accused in possession of a firearm at Likileng Football Ground or anywhere.

The crown closed its case.

Accused gave evidence in his own defence duly sworn.

He told the court that he was a policeman between 1989 and 1998 when he was dismissed from employment as a policeman. He had been dismissed because he was suspected of having torn a picture of the Commissioner of Police. He was charged disciplinarily and found guilty. It was recommended that he be dismissed. In his disciplinary case, Lieutenant Colonel Ntlama (the Officer Commanding Berea district) had presided, assisted by Sergeant Manyeli. After the disciplinary hearing, the disciplinary panel recommended that he be dismissed from the police force.

After the recommendation of dismissal, accused appeared before the deceased (as the Officer Commanding Butha Buthe district) under whom the accused served. Accused asked for forgiveness and asked accused to make a recommendation to the Commissioner of Police that accused should not be dismissed from the police force. Accused told the court that the deceased said that he has no power in the matter, it was the presiding officer in the disciplinary matter who made the recommendation. The deceased said if accused asked for mercy he should go the presiding officer who made the decision, and ask for mercy, perhaps he might make the recommendation to the Commissioner of Police that the accused should not be dismissed. Accused says he met the Presiding Officer Colonel Ntlama and asked for pardon. Colonel Ntlama said the decision had been made by accused's seniors and his senior was the deceased. Some policemen charged with disciplinary offences are acquitted while some are convicted. Accused went back to deceased who told him that once a decision had been reached, he could not reverse it. It was the Commissioner of Police, acting on the recommendations of the district commander, who makes the final decision. The accused told the court that he informed the deceased that he would appeal, and in fact did so.

Accused had been before the disciplinary committee in May 1997. In June he was found guilty. He appealed between June and July 1997. The police appeals board which sat in September 1997 dismissed his appeal, and on the 31st December 1997, the Commissioner of Police terminated his employment. Accused had remained in the police force while his appeal which had been lodged within 7 days of his conviction by the disciplinary panel was pending.

The summary of the facts of the case which lead to his dismissal was made by the accused. He said he had relieved other policemen from duty at the Charge Office after lunch. Those policemen had said there was nothing important to report. A security man had asked for Sergeant Manyeli, and accused had gone into the Radio Room to phone Sergeant Manyeli. While accused was phoning, he observed that the picture of the Commissioner of Police had been torn. Accused went to police woman Thakheli and asked if she knew who had torn that paper (meaning the Commissioner's photo). Police woman Thakheli lamented the fact that she easily gets into trouble. That being the case, she is going away so that if this is discovered, she should not be there as she might get into trouble. Accused retorted that it is no use because he will say he reported to her if he is asked and this might get her into trouble. Whatever happens to him if he gets into trouble will have to happen to him while he is still on duty. From there, he went to report to Sergeant Matsumunyane what had happened. He in turn forwarded accused report to his seniors. It was on these facts that he was charged and found guilty.

Accused had (on the 31st December 1997) taken the disciplinary proceedings in his case on review to the High Court as soon as he received the letter of

Commissioner of Police dismissing him from the police force. His attorney Mr *Khasipe* who had come to Butha Buthe informed him that he had lost his case before the High Court. He had been on his way to Maseru when someone told him his attorney would be at the Magistrate's Court, Butha Buthe, he should wait for him there. This he did.

On learning that he had lost his case before the High Court, accused says he was hurt by this bad news. He went home to inform his wife. His wife said he should no more go to Maseru as he now knew the results. Accused says he went to the Prime Minister's public meeting (Pitso). Accused said he was not expecting to see anybody there. When he was asked if he did not expect to see the Prime Minister there, accused said he did - what he meant was that he did not intend to do anything. He got to the pitso and found many people. Immediately on arrival he saw deceased (Colonel Kholokholo). Accused's heart had a black-out (meaning his heart was so deeply hurt - as if something had hit him on the heart). Accused says he lost consciousness of his surroundings. He only remembers that he had felt like firing his pistol at the deceased. The last thing he remembers is getting hold of his gun.

Accused says he recovered his consciousness in police custody. He was being told he did this and that. He felt very sorry indeed. He does not recall ever speaking to anybody at the pitso. He had taken his gun going to Maseru. He did not expect anything to happen that might cause him to use that gun. He always goes about with a gun everyday. He does so in order that if his home is burgled, burglars should not find it and later misuse it.

Accused said when he got to the pitso and saw deceased, he thought about the

job he had lost. He thought about his children who would miss their education, insurances that would lapse, his furniture that would be repossessed because of non-payment of instalments and generally the future of his family. Accused told the court that he was the sole bread-winner for his family. He has a wife and two children, a girl aged 21 years and boy aged 16 years. All these consequences came to his mind when he saw the deceased because he knew clearly that deceased is the one who brought about his expulsion because deceased knew him. Deceased was the officer in charge of Butha Buthe district. Apart from the town of Butha Buthe deceased was in charge of 5 police posts spread over the district. Deceased was in charge of between 80 and 100 policemen of all ranks. Deceased knew accused as he knew any of the 90 to 100 policemen.

Accused then told the court that this was not his first black out. It was in fact the second one. These blackouts happened after a car accident in which he was seriously injured in the head and ribs. He was even hospitalised. He attributed these blackouts to the car accident. The blackouts happen when something had hurt him in the heart or when he is seriously disturbed. There were no other black-outs other than the two mentioned above.

The fire-arm on the Charge Sheet is not his and no one asked him about it at the pitso ground. He never possessed such a weapon. He would have known if he was asked about such a weapon although he was unconscious because, the police would have followed the matter up after he had regained consciousness. Accused had produced his firearm with a fire-arm certificate that had lapsed. He had not been aware of the fact that his fire arm certificate had lapsed through carelessness. He bought the firearm for R2500.00 and it is his valued possession.

The crown applied for an amendment of Count II in terms of Section 161(in)(b), (iii) of the *Criminal Procedure and Evidence Act* of 1981 by deleting 13 after A in the serial number of the firearm and substituting the letter B so that the serial number would be AB 20052. Mr *Mosito* (counsel for the accused) had no objection. It was agreed by both parties that the PW7 in fact had charged accused of contravening Section 3(2)(a) of the *Internal Security (Arms and Ammunition) Act* of 1966.

The Crown began its cross-examination as the defence had completed its examination-in-chief.

In cross-examination Mr *Rantsane* for the Crown asked the accused how the first black out happened after the accused had had a car accident. Accused said his children had come late from some school activity and his wife was siding with them. That made him so angry that he broke the table without knowing it. His temper cooled after an hour and thirty minutes. He only learned from his wife what had happened. That was the only black-out he had before the 20th August,1999.

Accused was hurt when he heard from his attorney Mr *Khasipe* that he had lost his case before the High Court, but he did not have a black-out because it just comes, he does not control it. He went home and then to the Pitso (public meeting). His feelings had subsided because he had talked the matter over with his wife. He took a short cut to the pitso. This short cut goes through the forest. Out of the forest he got to the back of the tent going to the front of the tent. The black-out happened immediately he saw the accused. Accused only remembers holding the gun. After that he does not remember thinking of anything. Accused admitted he had told the

court earlier that he thought of his loss of work, the loss of education his children would suffer, insurance policies lapsing and the general problem he and his family would suffer as a result of his expulsion from the police force. All these things had come to his mind suddenly and in a short time.

Accused said he knew it was the deceased who caused his expulsion. Colonel Ntlama who presided over his disciplinary case had come on the instructions of the Commissioner of Police. Accused said he had no doubt he had had a far hearing. Then when accused was asked to repeat what he had said, accused said he had not heard the question he was answering. He had not been the only one who entered that office nor was he the only one who had been on duty. He only reported what had happened. Yet he was the only one that was charged. He was found guilty only because he had decided to report what had happened when police woman Thakheli chose to run away. The words she had said to her when he said he was going to report the matter regardless of consequences were taken as an admission of guilt. Those words were "seo ebang seka nja, se nje ke ntse ke ea mosebetsing" translated they mean let what has to happen to me happen while I am still at work. Those words were said to discourage police woman Thakheli from running away and avoid making a report.

Accused was asked whether he expected the deceased as Officer Commanding to hide to the Commissioner of Police the fact that his picture has been torn. Accused answer to the question was that he expected deceased to report this matter to the Commissioner. Then accused was asked why he did not go for Colonel Ntlama who had presided at the disciplinary hearing. Accused replied that if he had planned the killing he would have gone for Colonel Ntlama. His real grievance is

that he was convicted wrongly. Accused denied he was fully conscious of what he was doing. Crown counsel said to the accused, he found it strange that accused could have known that he did not say to PW4 that he killed deceased for expelling him from work if indeed he was unconscious. Accused maintained he was unconscious. Crown Counsel then asked the accused if his counsel asked that particular question on accused's instructions, accused said yes. The accused insisted that he does not remember what he said or what was said to him during his period of unconsciousness.

Accused said he saw deceased about 12 to 15 paces and had a black-out. He probably walked that distance before shooting the deceased. Accused said as a policeman he has a wide knowledge of issues of security, he would not do a foolish thing of walking through a cordoned area. There was probably no yellow cordoning off tape. People were milling around even behind the tent. He admitted that even if the area was cordoned off, the police still regarded him as one of them although he was a former policeman. During the period between the 31st December 1997 and the 20th August 1999, he had been meeting the deceased without doing anything to him although he thought deceased was responsible for his expulsion. Deceased had nothing to do with the decision of the High Court that went against him, but the High Court confirmed what deceased had already done. A policeman in the Leribe district had been expelled for tearing a picture of the Commissioner of Police. That policeman was charged and expelled. That is why policewoman Thakheli ran away while he (the accused) decided that he would not.

Accused said he went about with the gun loaded to avoid it being stolen. A gun cannot be separated from its magazine. He had felt like shooting deceased

because his heart was hurt and held the gun before the blackout. He always goes with his gun cocked. Accused denied that he does not keep the gun at home to protect it from being stolen because he keeps it cocked. He got into the habit of going about with a cocked gun during the period he used to escort important people. Accused said he goes about with a cocked gun all the time despite the training he got from the police force to always keep his gun with its safety catch locked. He goes with a cocked gun even though he knows if he were to fall the gun would automatically fire and hurt the accused and those around him.

Accused told the court that this black-out took about 30 minutes while the previous one had lasted one hour thirty minutes. He has heard of people who bang tables and throw around dishes when they are angry.

Accused concluded by saying he was not looking for the deceased, he just met deceased by accident. In re-examination accused showed that all his family problems came to mind in a moment, as soon as he saw the deceased. Accused was under ex-Staff Sergeant Jonas on the day he discovered the picture of the Commissioner of police torn. He gave him a report which he forwarded to the high authorities through proper channels. Accused said he has no knowledge if Staff Sergeant Jonas had anything to do with his expulsion.

Accused said he had been going around with a fire-arm since he joined the police force. He had no fire-arm issued to him. Side Fire-arms (pistols and revolvers) are issued to troopers on request. He was only issued with such a fire-arm on request in 1994 after his car accident because he was leaving in a dangerous area. It was for self-defence. He returned it immediately in 1996 when he acquired his

own. Accused said he recalls holding his pistol while it was in its holster. He does not remember pulling it. He never decided to shoot deceased. He cannot recall doing so. Then the defence closed its case.

This case has no dispute on the facts. Nor is the unlawfulness of the killing of deceased disputed. What the accused is saying when he pleads automatism is that he did not kill deceased voluntarily because he had a blackout and does not remember anything. He was, so to speak unconscious, therefore he could not in law perform an act. He claims to have ben sleep walking, therefore even though he does not deny shooting the deceased he is not legally responsible. He was however not insane.

The crisp question for determination is whether a sane person can ever commit a crime while he is wide awake and pleads automatism. There is no dispute that automatism is a characteristic of insanity, therefore an insane person is not legally responsible for whatever he does. But a sane one is.

What we must first do is to review the law on the subject in order to be able to determine whether the accused is under our law of the category of that in law falls under automatism.

SANE AUTOMATISM

The accused's defence is that of automatism. The South African courts have described acts committed by a person relying on this defence as involuntary, consequently such a person cannot be held criminally liable for such acts. If this defence succeeds, the accused (according to South African law) has to be acquitted. Burchell *(General Principles of Criminal Law) South African Criminal Law and*

Procedure Volume I 3rd Edition at pages 41 and 42.

The reason South African Courts hold such a person not criminally liable is that such acts are mechanical, unconscious, automatic or are caused by an involuntary lapse of consciousness. To put what Burchell says in his own words:

> "This conduct covers conduct which occurs during sleep, black out, dissociation, hypnosis, or is a result of arterioschlerosis, concussion, epilepsy, hypoglycemia (low blood sugar), intoxication or provocation. Automatism brought about by mental illness is termed "insane" automatism and is distinguished from the other manifestation of automatism which is terms "sane automatism".

What we are involved with in this case is "sane automatism" because accused was healthy not suffering from insanity or any mental illness. He says seeing deceased acted as a form of provocation that caused him to have a complete mental blackout.

Automatism is nothing new in law. It was largely discussed theoretically in English law. Today automatism, which occurs because of what happened internally in the body of the accused (be it mental or physical), is treated as a disease and therefore a form of temporary insanity. Cases such as *R v Dhlamini* 1955(1) SA 120 and *R v Ahmed* 1959(3) SA 776 which purport to apply English law are based on a misunderstanding of English law.

English law develops from case law rather than broad principles. The English concept of disease (of which automatism is a part) is broad and it is any bodily condition that affected the mind at that particular time. It is treated as insanity or temporary insanity especially if it is likely to recur like epilepsy and sleep-walking.

See the case of *S v Sullivan* [1982] AC 156 at page 172 where Lord Diplock rejected the medical definition of insanity. He said any bodily condition that causes a defect of reason, memory and understanding is a disease of the mind whether "the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of the commission of the act".

Automatism is treated not as insanity in English law (according to Lord Lawton LJ) at page 922of *R v Quick* [1973] QB 910 where:-

> "A mulfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot be fairly be said to be due to disease."

It follows that in English law a black-out that is caused by internal operations of the body which is triggered by stress, anxiety, depression due to marital and personal problems are not regarded external. Therefore they constitute mental disease. In the Lesotho case of *Rex v M Chobokoane* CRI/T/90/99 two psychologists, which took opposite positions on the question of the accused's black-out, said that what is described as "sane automatism" today would have been described as temporary insanity over ten to fifty years ago. Legal definition do not change but in medicine and psychology definition change often. But legal definitions do not change often.

"Sane automatism" is a recent development in South African law. It is what we called judge made law through the doctrine of precedent. It is a logical development of what was said by Rumpff CJ in a case of *S v Chretien* 1981(1) SA

1007. This was a case of drunken driving. Rumpff CJ said a man who is blind drunk acted like a sleep walker. Whatever he did was involuntary therefore it was not his act. That being the case he had no capacity to commit any crime. Therefore such a drunkard who voluntarily imbibed intoxicating beverages to excess should be acquitted for any crime he might commit in that state of extreme intoxication.

Because of the case of *S v Chretien* South African law began to change drastically on the issue of capacity of the accused person to commit crime. A jurisprudence began to develop fast in which the accused might not be found criminally liable because of non-pathological loss of criminal capacity whether drug induced or brought by environment and personal problems that create a situation that the accused find himself in distress or as fear *S v Bailey* 1982(3) SA 796 C) and extreme emotional distress—See *S v Arnold* 1985(3) SA 256 at page 264 C).

Nevertheless on the issue of intoxication the South African legislature felt compelled to intervene. In 1988 it decided to do something about the issue of intoxication only which had caused an outrage. In *S v Chretien* it had become clear that Rumpff CJ "had miscalculated the community's attitude to intoxication".—Burchell *SA Criminal Law* Volume I *(General Principles of Criminal Law)* page 188. The *South African Criminal Law Amendment Act No.1* of 1988

> "1.(1) Any person who consumes or uses any substance which impairs his faculties to appreciate the wrongfulness of his act...and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his faculties are impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty...which may be imposed in respect of that act." ...

/....

This amendment even went so far as to make intoxication to give the courts the discretion to treat intoxication as an aggravating factor in a fitting case.

Despite the feelings of the South African community the South African Courts regarded what was said in *S v Chretien* to be logical and to be in conformity with general principles. In the past only insane people or people suffering from mental illness were deemed to have no capacity to commit crime. Therefore the onus of proving insanity was on the accused. What Rumpff CJ said in *S v Chretien* revolutionised capacity to commit crime within South African law. From then on, persons would "only be criminally liable if their actions are determined by their free will. This principle is expressed by the requirement that for purposes of criminal law, a human act must be voluntary in the sense that it is the subject of the accused's conscious will."—**Burchell** *South African Criminal Law and Procedure* Volume 1 *(General Principles of Criminal Law*, page 41. Within a few years what is called "sane automatism" got out of control and many accused began to claim that they had black-outs and therefore were not criminally liable for crimes committed.

People who are sane can now escape the consequence of the crime they commit provided they can create a doubt in the mind of the court on the question of automatism. "Sane automatism" has been extended to cases of provocation if it can be shown that such a provocation or painful event has led to a mental black out rendering the accused to act involuntarily like a person who walks in a dream. This is the defence of the accused in the case before me.

Rumpff CJ in *S v Chretien* in extending automatism to sane people said at page

1103D that up to 1981 South African law was "juridically impure" on the question of capacity to commit crime. The law in my view can never be pure in logical and moral terms. Therefore the saying "the law is an ass" is a recognition that the law is not logical and that very often it embarrasses those who believe in the rule of law and fairness.

A sane person who commits a crime in circumstances of "sane automatism" gets acquitted of his crime and goes Scot-free. An insane one who commits a crime because of a mental illness however temporary is found not guilty, but is then detained in a mental hospital or prison until it pleases the State President to release him even though at the time of trial he has become as sane as the next man. It is reasonable to say it is not safe to allow back into the community a person whose insanity might recur, therefore it is just as cogent to say a person who has been found to have had sane automatism may commit crimes because he has shown susceptibility to the weakness of acting involuntarily under stress or provocation, therefore he should be detained in the same way as one who is temporarily insane.

What is even more illogical, "juridically impure" and unfair is the following:

> "Since insanity is involved, in a case of the accused is burdened with proof of his insanity on a balance of probabilities.... On the other hand in a case of sane automatism, the onus of proving the elements of liability beyond reasonable doubt remains with the prosecution despite evidence of automatism...." Burchell *South African Criminal Law and Procedure* Volume I *(General Principles of Criminal Law* 3rd Edition page 43.

It seems odd to put an onus on a sick man rather than a healthy one. If the Crown

represents society then it seems South African law has made the life of healthy criminals easier than it is on the sick to the detriment of society.

What Rumpff CJ in *R v Chretien* and those who have made "sane automatism" fashionable is that in Lesotho and England the onus is on the accused because "sane automatism" largely falls under temporary insanity. Therefore the onus of proof is on the accused. Insanity carries such a stigma quite apart from the indefinite detention that follows proof of insanity. No one would take the trouble to be declared temporarily insane, unless there is no other way to escape an even worse calamity. Therefore Blackstone's *Criminal Practice* 1998 3·12 concludes:-

> "Until recently, even this possibility was a largely theoretical one since the consequences of an insanity verdict were so unattractive that seldom would an accused seek one."

Until *R v Chretien* where Rumpff CJ claimed to purify the law by coming up with an easily available and attractive defence of "sane automatism", there was logic in putting the onus of proving insanity on the accused because no accused would readily opt for temporary insanity, by proving it. Putting the onus of disproving "sane automatism" on the Crown with an assurance of a complete acquittal and a discharge has distorted the South African criminal justice system. It is more illogical than before, because the onus is put on a sick person while a healthy one has no onus.

Another feature of "sane automatism" that gives rise to problems is that too much reliance is placed on the evidence of psychiatrists when there are serious problems with determining *post facto* what happened at the time of the crime. The

poor very often cannot afford medical fees of such specialists. In poor countries where legal aid is not well-funded, and medical facilities are scarce, the poor and the disadvantaged often cannot have the services of psychologists and to assess them and make a case for "sane automatism".

Ground was prepared for "sane automatism" to get into the law of provocation by Diemont AJA in *S v Van Vuuren* 1983(1) SA 12 at page 17 when he carried the principles of *S v Chretien* closer to the provocation in an *obiter dictum* when he said:

> "I am prepared to accept that the accused person should not be held criminally responsible for an unlawful act where his failure to comprehend what he was doing is attributable not to drink alone, but to drink and other facts such as provocation and severe mental stress."

In the case of *S v Arnold* 1985(3) SA 256 the area of provocation as it was traditionally known was invaded by "sane automatism". Indeed even what was known traditionally as diminished responsibility in murder has never been quite the same since this extension of "sane automatism". In that case the accused disturbed past from childhood up to his commission of a murder were considered.

Accused (Arnold) had had an unstable family life as a child, failed in marriages, lost jobs and had married a wife 21 years younger than he was. It was this woman that he killed. He loved this woman in an obsessive manner. Their marriage had been happy until the mother-in-law came to live with them. From that time their marriage began to disintegrate and become turbulent. The accused was forced to expel his mother-in-law (the deceased's mother) from their home after he had been forced to put his son by his former marriage in a children's home because

of a deteriorating domestic situation. There was now violence in their domestic life and the deceased (who professed to love the accused) deserted him.

On the day Arnold killed his wife, the deceased, she had come to fetch her belongings. While they were trying to patch up their marriage, the deceased's mother telephoned Arnold (the accused) saying she had nowhere to live therefore she wanted to come to live with accused and the deceased again. This was something the accused was not prepared to have. A stormy emotional scene occurred during which the deceased among other things provoked the accused who was already a highly excitable emotional wreck. Accused who always went about with a fire-arm shot the deceased. Accused claimed he did not remember how he loaded his fire-arm, aimed it at the deceased and shot her. Arnold had soon thereafter called a neighbour, an ambulance and the police. The trial court summarised the psychiatrist's report which was favourable to the accused at page 261 of *S v Arnold* as follows:

> "His conscious mind was so "flooded" by emotions that it interfered with his capacity to appreciate what was right or wrong and, because of his emotional state he may have lost his capacity to exercise control of his actions."

The psychiatrist's evidence was unchallenged. The superintendent of the home (where accused's son was) had said the accused was at this time suffering severe emotional stress as his home broke down, he was a pathetic figure at the time he returned his son to the children's home, a little before accused shot his wife.

The trial court at page 262 B and C of *S v Arnold* said this of the accused:

> "It is clear that the accused was emotionally extremely upset by all prior events and that, at the time of his final conversation with the deceased he could have been at a breaking point.... The case is remarkable in that not a single statement made by the accused was found to be untrue. A large number of the statements made by him were corroborated from other sources and, except for the statement that he can't remember, all the rest of the evidence fits logically, and has the appearance of being highly probable. The State could however not point to any fact or reason why these statements should not be accepted except to say they were improbable."

The trial court found that the State had not proved that the accused had the criminal capacity because "extreme emotional distress" can lead of a state of criminal incapacity. The accused was found not guilty.

In *S v Campher* 1987(1) SA 940 the accused's defence of sane automatism was not believed on the facts but the principle that provocation and severe emotional distress might lead to an acquittal on the grounds of sane automatism if the accused is believed. In *S v Wiid* 1990 SACR 651 the court acquitted accused where temporary non-pathological incapacity was raised and the Crown failed to rebut it.

The defence of "sane automatism" has caused quite a few raised eye-brows. In the case of *S v Nursingh* 1995(2) SA 331 it was found unbearable tension can lead to a situation in which an emotional occurrence might trigger a situation in which actions may appear goal directed when in fact the intellect is like that of a dog biting in response to provocation. This happens where due to past history of abuse a person becomes capable of separation of intellect and emotion thereby suffering from a temporary destruction of intellect. In that case the accused was acquitted. In *S v Moses* 1996(1) SACR 701 accused was acquitted of murder for killing his

homosexual lover who had had unprotected sex with him and afterwards said he had aids. Accused became very angry. He hit deceased with a blunt object and when deceased was helpless, accused went to look for a knife and stabbed and carved deceased with it. Accused had a history of poor control and anger and came from a dysfunctional home. Accused was acquitted because the crown had not proved beyond reasonable doubt that accused had the requisite criminal capacity at the time of the killing.

The problem of "sane automatism" has been compounded the fact that courts in South Africa have accepted that an overwrought person who is able to appreciate right and wrong and for whom no medical, scientific or psychiatric reason can be found for his loss of self control can be acquitted due to lack of criminal capacity because the mind is capable of creating a retrograde amnesia. See *S v Gesualdo* 1997(2) SACR 68. The reason being that an overwrought mind might not appreciate what it had done and also be unable to exercise control over a person's actions.

This over-reliance on psychiatrists who sometimes tend to be credulous and can be misled by the accused takes place at a time the findings of psychiatrists have been found to be capable of being contradicted by other proved facts. In *S v Potgieter* 1994(1) SACR 61 South African courts found that in their findings of "sane automatism" psychiatrists rely on the truthfulness of the alleged offender as a crucial factor which also found their defence in courts. In that case, it was found that despite the psychiatrist's report that was favourable to the accused, the wounds on the deceased as other circumstantial evidence showed, deceased had not been killed where the accused had said he had. The accused's defence was rejected. The trial court noted that facts relied upon in substantiating the defence of "sane automatism"

are often consistent with a deliberate unlawful act.

Over time, the south African courts began to highlight presumption of the law in cases of sane automatism. In the case of *S v Cunningham* 1996(1) SACR 631 they clarified the law on "sane automatism". In that case at page 635H Scott JA re-emphasised that the onus on the State is to establish the voluntariness of the act, but added that the State in proving the *actus reus* is assisted by the natural inference that in the absence of exceptional circumstances sane persons engaged in conduct which is regarded as criminal do so consciously and voluntarily. This eliminated the tendency to vaguely allege the defence of "sane automatism" simply because the Crown had the formidable task of proving that the accused had the necessary criminal capacity to act. Scott JA found at page 638J in *S v Cunningham* that "no factual foundation had been laid to displace the inference of voluntariness, in other words, sufficient to establish a reasonable possibility that he drove in a state of automatism.".

Scott JA in *Cunningham* at page 636 further put the South African legal position straight that it is the court which decide not psychiatrist where he said:

> "It follows that in most, if not all cases, medical evidence of an expert nature will be necessary to lay a factual foundation for the defence to replace the inference just mentioned. But ultimately it is for the court to decide the issue of the voluntary nature or otherwise of the alleged act and indeed the accused's responsibility for his actions. In doing so it will have regard not only the expert evidence but to all the facts of the case, including the nature of the accused's actions during the relevant period."

The case before me has no medical evidence. Although cases of "sane automatism"

do not always have to have medical evidence, its presence is often (if not always) of great assistance. The case before me involves an accused who has shot and killed a person. It has a lot of similarities with the case of *S v Kok* 1988(1) SA 538. In *Kok*'s case, the accused was a Superintendent in the South African Police Service and a Commanding Officer of the Public Order Policing Unit in Portshepstone. He killed a man and his wife and missed their son with a shotgun and a 9mm pistol. The accused (Kok) had been drinking with friends. After accused, who was at a meeting of the South African Police Service Angling Club, received a distress call from his own wife. She was very upset that the Deputy Sheriff was enforcing a judgment of R600-00 which the Small Claims Court had granted against her in respect of two table cloths from Mrs Botha (one of the deceased in the case). Accused's wife had been denying liability, but judgment went against her. One of the accused's fellow police officers had offered to lend him the R600-00 owing, but the accused had declined the offer.

Kok, the accused, found his wife hysterical. Accused was heard saying he was going to sort out a few people. He went to the police station where he armed himself with a rifle, shotgun and ammunition, a 9mm pistol and ammunition, a hand grenade and military combat jacket. Accused went to the deceased's home where he killed husband and wife and their son escaped through the window. When a Sergeant went out to investigate the cause of shooting and of gun reports, accused threatened him with a shotgun and the sergeant retreated. Accused had fired several rounds of shotgun ammunition and 9mm pistol ammunition. Accused said he only remembered getting to the deceased's house and being pushed out of the deceased's house by Mrs Botha, one of the deceased, whom he later shot together with her husband whom he also killed.

There was medical evidence of two doctors which was taking into account many similar factors but their conclusion differed. Dr Futter found accused suffered post traumatic stress disorder namely a dissociative behavioural re-enactment (sane automatism) triggered by a minor push from the deceased (Mrs Botha) on the chest of the accused. Dr Dunn concluded accused was burnt-out, interference from politicians had been frustrating and galling. When she faced Mrs Botha (the deceased)something snapped. Accused was undoubtedly under a great deal of stress, emotional and work-related. "Dr Dunn did not think that the accused had gone out to the deceased's home with an intention of seriously injuring them, but with the stress heightened by alcohol and the deceased's attitude, he reacted the way he did. Dr Dunn was of the view that he acted in a situation of diminished responsibility".

The court in *S v Kok* disbelieved a lot of what the accused said in evidence. Disbelived Dr Futters' evidence and conclusion of "sane automatism"and believed Dr Dunn's evidence and conclusion that the accused was a case of diminished responsibility. On the basis of that medical evidence and the evidence of other witnesses the accused was found guilty of two counts of murder and one of attempted murder. It is significant that diminished responsibility was translated into "sane automatism" in the case of *S v Gesualdo* 1997(2) SACR 68. That being the case, the creation of "sane automatism" by the South African Courts and making it in a complete defence has left the South African criminal law into a parlous state. Its contradictions will take time to resolve.

Inevitably South African courts have over the years realised that "sane automatism" has been, or might be abused by those accused who do not wish to take the consequences of their misdeeds. It is not out of disrespect for the medical

profession that courts are emphasising that it is them that decide not the medical experts that give evidence to assist them—See *S v Kok (supra)*. The fact of the matter is that psychiatrist work under conditions that are far from ideal. They initially rely on the accused (if not exclusively) for what happened before or during the occurrence which is the subject of investigation. For family history, accused personal background, domestic situation, even what happens at work, psychiatrists have to rely on the accused and his family. The information psychiatrist get might be false and incomplete because of the bias towards the accused that the accused's family often have. It is on the basis of this information that psychiatrists make their reports *post facto* about what happened in their absence.

"Sane automatism" might have a potential of being an unruly horse, consequently South African courts are beginning to hold their reins tightly in order to ensure it remains under control. In *S v Ngema* 1992(2) SACR 651 the accused claimed he killed deceased in a dream thinking deceased was a "tikoloshe". The psychiatrist said because accused remembered vividly his act was not involuntary and the accused was found guilty. I have difficulty with this reasoning because most people I know remember their dreams. In Scotland, in the case of *HMA v Fraser* (1878) 4 Couper 70 (Gordon *Criminal Law* 2nd Edition at page 74) the accused was acquitted, but then it was not just one case of sleep walking—accused had a history of somnabulism. Fraser had an attested history of sleep walking and committing acts of violence in a somnabulistic state. The South African courts' ' attitude in rejecting *Ngema*'s story makes sense while the psychiatrist's reasoning does not.

In line with *S v Cunningham*, *S v Kok* (already discussed above), South African courts insisted on a proper basis being laid in *S v Van der Sandt* 1998(2)

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SACR 627. In *S v Pederson* 1998(2) SA 383 a South African court insisted in a case of "sane automatism" that expert evidence and all facts of the case, including the accused's actions during the relevant period should be scrutinised. At page 388 of *S v Pederson* Marnewick AJ in scrutinising the statements of accused noted the following:

(i) The statement accused made before the magistrate had been seen by the accused's attorney before and that a number of ideas might have been planted in the accused's head or might have developed in his head.

(ii) A year later accused was seen by a clinical psychologist who gave a favourable "sane automatism" report.

In emphasising the need to scrutinise expert evidence was echoing the words of Kumleben JA in *S v Potgieter* 1994(1) SACR 61 at page 73 to 74. The court in *S v Pederson* went so far as to reject retrograde amnesia as automatically a material on which "sane automatism" could be based. The reason for the court's conclusion was that retrograde amnesia occurs where the accused's psyche merely suppresses memory of events. At page 390 Marnewick AJ said courts accept a situation where truly there is no memory of the events concerned rather than retrograde amnesia.

> "Retrograde loss of memory on the other hand, is a device used by the psyche to suppress unpleasant memories and a man can only have a memory of an incident or event, if he had sufficient intellectual capacity left at the time of the incident or event to have a measure of control over his actions."

The court found *Pederson* guilty of murder despite the evidence of two medical experts, a clinical psychologist and a psychiatrist. *S v Pederson* should be contrasted

with *S v Gesualdo* 1997(2) SACR 68 (decided almost a year before) where Borschers J in acquitting the accused of murder and discharged him on the grounds that the Crown had not discharged its onus of rebutting "sane automatism" said at page 77 FG:-

> "The question is whether, while acting unconsciously, he was unable to control what he did. If the human mind is capable of creating a retrograde amnesia because the mind cannot tolerate an appreciation of what it had done, it seems possible that it may also be unable to exercise control over a person's conscious actions in certain circumstances."

From the aforegoing, it is clear that doctrine of "sane automatism" was initially warmly and uncritically embraced by the South African courts. But now they are treating it with reserve and caution. In *S v Henry* 1999(1) SACR 13 the South African Supreme Court Appeal after noting the natural inference that some people are deemed to act voluntarily reaffirmed that evidence of "sane automatism" should be carefully scrutinised. It is not sufficient that there should have been loss of temper. Loss of temper in the ordinary sense is a common occurrence—On the other hand, non-pathological loss of cognitive control or consciousness, arising from emotional stimulus and resulting in involuntary conduct is most uncommon. These two conditions should not be confused. Problems still remain as the case of *Molefe v Mahaeng* 1999(1) SA 562 reveals, there is still a tendency to put onus of proof on the Crown and ignore the logical inference about sane people. The Crown is expected to prove even what is essentially the private mind of the accused. At page 569 of *Molefe v Mahaeng* Melunsky AJA in upholding the High Court's overturning of a finding on credibility by a magistrate said:

> "It is true that the respondent, despite his evidence to the contrary, did not mention the black-out to the nurse and the doctor who attended him on the 11th and 12th August. Indeed he first complained to the medical personnel three weeks later and after he had received a demand from the appellant's attorney. These facts do not mean he was deliberately untruthful in his evidence or that the complaint of a black-out was a fabrication, but they are of sufficient importance to negative a finding that his version was the more probable one.
> Having regard to the evidence as a whole, and despite the shortcomings in the respondent's own testimony, I am not satisfied that the appellant has discharged the onus of proving that the respondent's conduct in driving on the incorrect side of the road was due to his voluntary act."

Having thus shown the problems of "sane automatism" and the problems it is causing the courts, it is time to apply it to the facts of the case. Before doing so it is important to find out what the law of Lesotho on automatism is.

LESOTHO'S LAW OF HOMICIDE

There is an inevitable confusion between South African law and the law of Lesotho because we inherited Roman Dutch law from the Cape of Good Hope like the rest of South Africa, Zimbabwe and Swaziland. The close relationship between our law and that of South Africa was deepened by the fact that all the above countries were British Colonies, and part of the British Empire and the Commonwealth. What is true is that the Common-law of Lesotho and that of the rest of former British Southern Africa (which has a Roman Dutch law base) is the same up to 1884—See the *General Proclamation 2(13)* of 1884.

Lesotho's law gradually changed from the law of the Cape of Good Hope from 1884. Because we use South African text books and South African trained judges our courts have often regarded South African law as the same as the law of Lesotho,

even where the laws are clearly different. For example, the Court of Appeal and the High Court treated a marriage by Basotho custom as if it was a South African Bantu union. See *Zola v Zola* per Jacob CJ 1971-1973 LLR 1 and *Mokhothu v Manyaapelo* 1976 LLR 281 per Smith JA. This was so, despite Section 3of the *Marriage Proclamation No. 7* of 1911 which declared in no uncertain terms that a marriage by Basotho custom is a marriage and it shall be optional to register the first of the said marriages. It was only after the case of *Makata v Makata* 1982-1984 LLR 29 for the Court of Appeal per Goldin JA that the status of an African custom was accepted as a marriage. Even Section 42 of the *Marriage Act* of 1974 had no effect, the South African perception that it was a Bantu Union had persisted.

In respect of homicide the same problem has surfaced. Lesotho's law of homicide took a different direction from that of South Africa. Before 1959, the homicide law of South Africa was dominated by English law thinking, but it was beginning to take its own course. In the area of *mens rea*, the first area where a gulf began to develop was on the effect of provocation on *mens rea*. Dealing with this issue Snyman in *Criminal Law* 3rd Edition page 222:

> "The question to be discussed here is whether and to what extent X can rely on his anger as a defence on a charge of committing a crime while he was thus enraged."
> Provocation and anger like cause and effect, are two different things. What must be examined here is not so much the provocation which has caused X's state of mind, as the state of mind itself....
> Like the subject of intoxication, the effect of provocation on liability is a subject that can be properly understood only once one has knowledge of both criminal capacity and the forms of culpability—that is intention and negligence."

Indeed *mens rea* and *actus reus* are so closely interlinked that it is sometimes said

actions speak louder than words. Drunkenness and provocation are similar in that they often cause an accused to lose self-control. In many cases they act together to cause a person to lose self-restraint. It will be observed that it is in this area that the defense of "sane automatism" operates.

The significance of the developing difference between the English approach to provocation had not been brought into sharp focus because the result was often the same although the approaches differed. It took the case of *R v Krull* 1959(3) SA 392 to highlight the difference between the developing South African law and English law. In *R v Krull* the case of *R v Tenganyika* 1958(3) SA 7 was discussed and its reasoning and the law applied were found not to be in accordance with South Africa law. They were both the cases of appellate courts—*R v Krull* being of the South African (Appellate Division) and *R v Tenganyika* being of the Appeal Court of the Federation of Rhodesia and Nyasaland. The case of *Tenganyika* was from Southern Rhodesia (Zimbabwe), a country which, like Lesotho and the rest of South Africa, inherited Roman Dutch law from the Cape of Good Hope.

The facts of *R v Tenganyika* and *R v Krull* were virtually identical - in that in them both accused who were highly intoxicated had killed peoole who had made them very angry. In *R v Tenganyika*, the Southern Rhodesian High Court had found the accused guilty of murder with extenuating circumstances. The Federal Court of Appeal in reversing the verdict of murder per Tredgold CJ at page 11GH said:

> "Once it is accepted, however, that provocation may sometimes prevail as a defence even if an intention to kill exists the position is simple. The court in a homicide case would first of all enquire whether an intention to kill was present and in so doing would take into account all

> the facts of the case, drunkenness, the fact that accused was provoked and every piece of evidence that could possibly have a bearing on the point. If satisfied that the intent to kill was proved, the court would then enquire objectively, whether accused was so provoked that, in the sane circumstances, a reasonable man would have lost his control."

In the case of *R v Krull* which was heard by the South African Appellate Division a year later Schreiner JA felt the reasoning in *R v Tenganyika* did not successfully harmonise the subjective and objective elements in the law of homicide. At page 399 AB and EF Schreiner JA said:

> "Whether one says a provoked man loses the power of self-control or unable to form the intention to kill seems to me to be substantially a question of choice of words. Either form - is probably only a roughly approximate description of the actual mental processes. Legal systems can only attempt by one process or another to give effect to the basic idea, which is that the provoked person may have been so upset that the mental element requisite for murder may not have been present.... Since a merely provoked killing is never justified, there seems to be no good reason for holding it to be less than murder."

There seems to have been an assumption that South African law was similar to Section 141 of the *Transkeian Penal Code* of 1886 (which is based of English law). Initially the differences seemed to be of a verbal or linguistic nature, and Schreiner JA observed after discussing the issue of provocation:

> "That acts done after a man has lost control of himself may still in a sense be intended is no doubt true. But also it may fairly be and is, said that such acts are not intended."—*R v Krull* at page 398 A.

He rejected the *Transkeian Penal Code* approach (which is English) for applying provocation after concluding that the intention to kill exists. In South African law,

provocation is applied earlier while the issue of intention is being investigated. Once intention to kill has been found, murder has been established because provocation had already been applied. Schreiner JA felt Tredgold CJ was not correct in saying in Roman Dutch law:

> "When it is found that an intent to kill is proved, the question still remains whether the accused did not receive sufficient provocation to deprive an ordinary man of self control and lead him to act as did the accused. If so he may be convicted of culpable homicide only, despite the intention to kill."—*R v Tenganyika* page 13D.

It was the belief of Tredgold CJ that "what difference there is between the English law and Roman Dutch law systems is more theoretical than practical"—*R v Tenganyika*. Schreiner JA demonstrated in *R v Krull* showed there was a substantial difference although the end result is often the same—though not always.

These two cases namely *R v Tenganyika* and *R v Krull* led to a re-examination of Lesotho law of homicide. An examination of the homicide law of Lesotho of the *Criminal procedure and Evidence Proclamation* of 1939 reveals that nothing was said about extenuating circumstances in that *Proclamation* in Volume I of *Laws of Basutoland* 1949. The *Criminal Procedure and Evidence Proclamation* of 1939 was amended by *Proclamation 45* of 1959 and a new Section 290 was added. This put the law of Lesotho in line with the South African law in Act 31 of 1917 which introduced the concept of extenuating circumstances in South African law of murder. When this was done the *Criminal Law (Homicide Amendment) Proclamation 43* of 1959 had already introduced in the Law of Lesotho or adopted Section 141 of the *Transkeian Code* of 1886 which Schreiner JA had just rejected as being part of the law of the entire South Africa in *R v Krull* earlier in 1959 about five months before.

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In *R v Thuto Mabea* 1991-1996 LLR 1192 this court commenting on the *Criminal Law (Homicide Proclamation 43* of 1959 commented at pages 1197 to 1198:

> "The provocation that is referred to in the *Criminal Law (Homicide Amendment) Proclamation* of 1959 does not affect provocation as a "special kind of material" which, according to our common law, has to be examined with other evidence to determine whether the accused subjectively intended to kill. It is an English law concept that was meant for murder whose *mens rea* was objectively determined. This type of provocation is a special defence (grounded in English law) where murder could have been found. It can cause confusion sometimes, but so far it has been reconciled with the rest of the existing law although imperfectly. I submit it is too much of a good thing, it should not be a "special material" to determine subjective intent and then be a special defence after intention to kill has been established."

The South African courts in 1971 respected the legislation of the Transkei for that territory, and in the case of *S v Mkonto* 1971(2) SA 319 at 326 G said "Section 141 of the *Transkeian Penal Code* should be confined to the territory for which it was passed". It is the duty of the courts of Lesotho to apply the *Criminal Law (Homicide Amendment) Proclamation* of 1959 because it is the territory for which it was passed. The courts of Lesotho are bound by it.

In the case before me we are undoubtedly dealing with a defence that amounts to a form of reaction that is not far from provocation. In it we are confronted with the twin problem of *mens rea* that is inseparably attached to *actus reus*. It is so because if there is no act of the will there is no act or (*actus reus*). If there is no will to do something there can be no intention. Consequently there can be no legal

liability for the homicide that took place.

According to Snyman *Criminal Law* 3rd Edition at pages 222 to 223 there are two approaches to the issue before me, namely:-

(i) The "separation doctrine approach which descended from English law.

(ii) "The General Principle" approach which has been developed by Rumpff CJ in *S v Chretien* 1981(1) SA 1097 from which descended the "sane automatism" principle which we have already discussed.

Lesotho was by legislation in the field of provocation and intoxication wedded to English law through two laws:

(i) The *Criminal Liability of Intoxicated Persons Proclamation 60* of 1938—treated all persons who commit crimes such as murder liable to indefinite detention, because they had rendered themselves unable to know what they were doing because of voluntary intoxication, and thereby becoming temporarily insane. They were to be committed to prison pending the signification of His Majesty's pleasure. In other words they will be treated like insane people. The case of *S v Chretien* would not have led to acquittal in Lesotho. See the case of *Tšitso Matšaba v Rex* 1991-1996 LLR 615.

(ii) The *Criminal Law (Homicide Amendment) Proclamation* of 1959 which introduced the English law principles of provocation at

> the time South Africa was taking a different direction in *R v Krull* 1959(3) SA 392. Our reference point is therefore the old Section 141 of the *Transkei Criminal Code* of 1886 which is based on English law as already stated.

In the light of the two abovementioned Proclamations, the "sane automatism" which was born in South Africa through *S v Chretien* in 1981 could not be appropriate for Lesotho, unless the courts of Lesotho ignored the law of Lesotho as made by the legislature. While South Africa followed the separate doctrine approach, there was no major problem, because as Snyman in *Criminal law* 3rd Edition page 223 states:

> "In the era before 1970 the South African courts mostly applied the separate doctrine approach. This aproach which hails from English law, found its way into our law through Section 141 of the old *Transkeian Penal Code* of 1886.... Provocation could never be a complete defence, that is a defence which, if successful, would result in X being completely acquitted."

It seems to me therefore that since in Lesotho Section 141 of the *Transkeian Penal Code* of 1886 was reinforced with the enactment of the *Criminal Law Amendment Proclamation* of 1959 and while it is still in the statute books of Lesotho no one can say of Lesotho "The present position in our law is that the special approach adopted in Section 141 of the *Transkeian Penal Code* of 1886 is no longer followed".—Snyman *Criminal Law (supra)* page 224. South Africa may be free of its English heritage—but Lesotho is not.

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In the light of *Tšitso Matšaba v Rex (supra)* which is a decision of the Court of Appeal of Lesotho *S v Chretien* and its offspring the "sane automatism"development in South Africa cannot have any applicability in Lesotho. It will be noted that even Namibia is not happy with the way non-pathological temporary aberration has developed in South Africa including the issue of onus. Consequently O'Linn J in *S v Shivute* (3) SACR 656 at 660 had to make this observation:

> "The New Namibian High Court and Supreme Court is no longer compelled to follow the decisions of the Appellate Division of the Supreme Court of South Africa on this important question and will hopefully in future in an appropriate case reconsider the issue."

In the case of Lesotho, it is not just the sovereign nature of Lesotho but also the laws that are still in force that are in the way of the acceptance of the South African legal development of "sane automatism" in Lesotho of the type of *S v Chretien*..

Another problem which Lesotho shares with Namibia about the doctrine of "sane automatism" is the problem the onus of proof is giving to the South African courts. In discussing "sane automatism", I had already said there were, after 1981, earlier South African cases courts tended to hold that merely because the onus of proof is always on the State, once it is raised, the accused was likely to be given the benefit of the doubt. This is because what happens in another man's mind can never be satisfactorily proved against his word unless there is evidence *aliunde*. —See *S v Wiid* 1990(1) SACR 561 (A). Despite the case of *S v Cunningham* 1996(1) SACR 631 (A) and a series of cases that have culminated in *S v Henry* 1999(1) SACR 13 which emphasised the natural presumption of liability of a sane person for criminal

and delictual acts, South African courts are still sometimes dealing with onus of proof as they did in the late eighties and early nineties—See *Molefe v Mahaeng* 1999(1) SA 562 (A). The facts in *Molefe v Mahaeng* are in many respects similar to *S v Trickett* 1973(3) SA 526. In both cases there was no evidence of a psychologist or a psychiatrist on the black out that had caused the collision with the oncoming vehicles involved in each case. Furthermore in both cases the trial magistrate had found the driver that claimed automatism liable because he did not believe him. Both matters went on appeal.

In the case of *Trickett*, the appellate court dismissed the appeal while in *Molefe v Mahaeng* it was upheld. In *Molefe v Mahaeng* the driver, whose vehicle was the cause of the accident, had earlier fallen down when he slipped because of a banana peel. His right thigh had been injured and had received medical attention. The doctor and the nurse who treated him had not been told that the driver might have hit the ground with his head. The trial magistrate had not made strong findings on the credibility of the driver and his witnesses. The magistrate had not believed them and criticised their evidence on justifiable grounds. That driver had first mentioned the blackout three weeks later, after he had received a letter of demand from the attorney for the other driver. Both the High Court and the Supreme Court of Appeal reversed the appeal and found for the driver who claimed he had had a blackout. In *S v Trickett* the accused had been found to have been to have lied or coloured her story in any way. She had to just come out of hospital and had recovered from a long illness. No known reason was advanced for her blackout. The Provincial Division noted however that there is no "expert evidence at all, and for a lay court to speculate on medical issues without expert evidence is wholly pointless, if not dangerous". *Trickett*'s appeal was therefore dismissed on the grounds that she had not discharged

the onus on her to make out a case of automatism on the balance of probabilities. I have already noted that there was also no expert evidence in *Molefe v Mahaeng* on the driver's black-out, yet the evidence of a blackout was accepted on appeal on the ground that plaintiff had not discharged the onus on him that there was no blackout..

Blackstone's *Criminal Practice 98* at pages 37 to 38 says this about automatism in English law:

> "The defence of automatism arises where the accused's conduct lacks the basic requirements of being voluntary.
>
> The defence is limited to cases where there is a total destruction of voluntary control, impaired or reduced control is not enough. Where the accused is conscious, automatism will be rare but possible (e.g. reflex actions when startled by a sudden loud noise or when stung by a swarm of bees while driving: See *Hill v Baxter* [1958] 1QB 277 and *Burns v Bidder* [1967] 2 QB 227 at p.240.... The law imposes serious restrictions on such a defence, however, through the rules on voluntary intoxication and insanity to be discussed."

Therefore the jurisprudence of *S v Chretien*, in English law could not grow because, under English law:

> "Intoxication is not a defence as such.... On the contrary, intoxication operates so as to restrict what would otherwise be valid defences of mistake, inadvertence or automatism. The responses which the law imposes on defences caused by voluntary intoxication are in response to the evidential power of intoxication in supporting such defences and to the frequency and ease with which such defences could be put forward."—Blackstone's *Criminal Practice* 1998 page 39.

Gordon *Criminal Law* 2nd Edition (1978) writing about the law of Scotland said this

of automatism, at page 78:

> "It needs no reference to the High Court to establish that from the point of view of *mens rea* conditions short of insanity do not affect responsibility...."

I find it strange in the light of what is happening in South Africa where reported cases of "sane automatism" since the case of *R v Chretien* in 1981 are over twenty, in Scotland there was not a single one still not overruled. It seems therefore that automatism had not met with favour in Scotland by 1978. In *HMA v Ritchie* 1926 SLT 308 Lord Murray directed the accused to acquit a motorist who had run over a pedestrian if it believes he had "temporary mental dissociation due to toxic exhaust fumes". The jury believed the accused and acquitted him. In the case of *HMA v Cunningham* 1963 SLT 345 the accused who had driven (under the influence of drugs) recklessly colliding with another motor vehicle and pedestrians. He raised the special defence of lack of responsibility on account of incidence of temporary dissociation due to epileptic fugue or other pathological condition. The High Court of Justiciary in its appellate capacity, per Lord Justice-General Clyde at page 347 said of this defence:

> "For this I can see no warrant in principle. On the contrary as has been pointed out more than once in previous cases such a novel type of special defence would be a startling innovation which would lead to serious consequences so far as safety of the public is concerned.... It follows therefore, in my view that the case of *HM Advocate v Ritchie* 1926 SLT 308, where an opposite view was taken by Lord Murray sitting alone was wrongly decided. To affirm and even extend, that decision would lead to laxity and confusion of our criminal law which would do nothing but harm."

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That case was in many respects similar to *S v Chretien*. It is significant that in Scotland the attitude of the court was conditioned by considerations "safety of the public" and avoidance of "laxity and confusion in our criminal law" than what Rumpff CJ called "legal purity".

It seems to me both in England and in Scotland there is more concern for safety of the public than academic pursuits such as "legal purity" or making legal principles logical. That being the case there is not much to recommend the "sane automatism" of the type that is the offspring of *S v Chretien*. While there is automatism in our law, it will continue to follow the lead of English law as South Africa used to do. It might diverge, but it will do so as much as possible as conditions in Lesotho permit. Sufficeth to say *S v Chretien* and the sane automatism it has bred is not part of the law of Lesotho.

I was referred to the case of *Rex v Moteane* CRI/T/5/97 (unreported) whose judgment was delivered on the 8th day of May 2000 can be distinguished. This case was decided as if South African law that descended from *S v Chretian* was identical to the law of Lesotho. Secondly in *Rex v M Chobokoane* CRI/T/90/99 two psychologists said "sane automatism" of the type that was in *R v Moteane* would have been classified as temporary insanity over fifty years ago. As already stated, Lesotho follows what Snyman in *Criminal Law* 3rd Edition page 222 calls the "separate doctrine approach" which South Africa abandoned prior to 1970. South African law follows the "general principles approach" which south Africa developed from *S v Chretien* which collides head-on with the *Criminal Liability of Intoxicated Persons Proclamation 60*of 1938 which in terms of Section 2(2) treats dead drunk people as

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temporarily insane. See *Rex v Matšaba* CIV/T/18/89 (unreported). In *R v Matšaba* before Lehohla J expressly disapproved of *R v Chretien*. The history of that case is the following: The accused Tšitso Matšaba was a policeman and had due to stress developed rash for which the drug phenergan was prescribed. He became addicted to it and was taking higher doses than those originally prescribed. He obtained this drug illegally as his rash was not cured. Phenergan merely alleviated his discomfort.

According to evidence of a pharmacist, phenergan makes the effect of alcohol worse if accused takes phernegan along with alcohol. Accused had drunk alcohol together with phernegan. He became so drunk that he did not know what he had been doing. During his drunken black-out, the accused shot and killed five people. It was accepted by all that accused did not know what he was doing.

The defence relied on *S v Chretien* in the mistaken belief that the law of Lesotho on intoxication was the same as the law in South Africa. Mr *Mokhobo* for the Crown showed the law was different. Because of extreme intoxication, the accused should be dealt of Section 2(2) and (3) of the *Criminal Liability of Intoxicated Persons Proclamation 60* of 1938 read with Section 172(3) of the *Criminal procedure and Evidence Act* of 1981 because of his temporary insanity induced by alcohol potentialed (made worse) by the drug Phenergan. The effect of this was that the accused was insane and would be committed to prison pending the signification of the King's pleasure.

After reviewing the evidence, Lehohla J in *Rex v Tšitso Matšaba (supra)* dealt with the legal argument from counsel in particular *S vs. Christien* 1981(1) SA 1097. Lehohla J quoted English cases in support of the legal position in Lesotho and said the following:

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

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

Agreeing with Lord Goddard, Lord Denning at 312 said:

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

Our law governing criminal liability of intoxicated persons is to be found in Proclamation 60 of 1939; Section 2(2) of which is in keeping with the English authorities cited above."

The case and its judgment went to the Court of Appeal and its judgment was confirmed in *Matšaba v Rex* 1991-96 LLR 615.

That being the case, the case of *Rex v Matšaba* by my brother Lehohla J is the one that I am bound to follow. It clearly disapproves of *S v Chretien* and the jurisprudence it is based on.

The case of *R v Mosuoe Moteane (supra)* was heard at a time the 1960 *Laws of Basutoland* are out of print. Miss *Dlangamandla* for the Crown said the Law

Office does not have these *Laws of Basutoland* 1960. Mr *Mosito* confirmed he also has no personal copy of the *Laws of Basutoland* 1960. The High Court library does not have *Volume II* of the *Laws of Basutoland* 1960. Only a few judges' chambers have them. The Law Office, where the Director of Public Prosecutions is situated only has the first edition of Burchell and Hunt *General Principles of Criminal Law*Volume I and *Common Law Offences* by Hunt Volume II of the *South African Criminal Law and Procedure* 1970. At that time the case of *S v Chretien* 1981(1) SA 1097 had not been thought of. It will be observed that psychologists in *Rex v M Chobokoane* CRIT/T/90/99 (unreported) for and against accused said "sane automatism" was part of insanity not so long ago. Therefore it used to be called temporary insanity. If accused is believed, then, according to the law of Lesotho he in effect says he was temporarily insane. Legal terms do not change as often as psychological terms do. In fact (according to Dr Olivier in *R v M Chobokoane*) the term insanity is no more used in psychology.

Crown Counsel and Defence Counsel did not have the recent third Editions of Snyman *Criminal Law* and Burchell *General Principles of Criminal Law*, "sane automatism" which is a shift by South Africa from the English law position that reached culmination point after 1970 was unfamiliar. The Office of Attorney General has been warned before against its failure to equip Crown Counsel with books and materials for applying and developing the law of Lesotho. It was therefore inevitable that since the Attorney General does not equip his office with what Lesotho Law Reports which exist for the period between 1926 and 1996, such oversights as occurred in *Rex v Mosuoe Moteane* are inevitable.

As if Lesotho's problems were not enough, two judges chambers (one of

which had Volumes of Laws of Basutoland 1960) were burnt during the 1998 political disturbances. In Volume II of *Laws of Basutoland* 1960 was contained the *Criminal Law Homicide Amendment Proclamation 45* of 1959 which changed Lesotho's direction. As already stated, our law of provocation in homicide took a turn towards the English approach after the case of *R v Krull* when the *Criminal Law (Homicide Amendment) Proclamation No.45* of 1959 was enacted. Consequently the "sane automatism" which was bred by *S v Chretien* is not law in Lesotho. Unfortunately the Law Office is not equipped to deal with these current problems because it does not buy or preserve law books.

EVALUATION OF EVIDENCE

There can be no doubt that the accused had a grievance and a smouldering resentment because he had been dismissed from the police force after nine years' service. He was charged disciplinarily and found guilty of tearing the picture of the Commissioner of Police and dismissed from the police force as punishment. His appeal to the Police Board of Appeal failed, and even his review application to the High Court was unsuccessful. The Commissioner of Police accepted the recommendation of the disciplinary panel and dismissed him from the police force. This dismissal forms part of the case as background to the killing of deceased and also as what the accused claims was the trigger mechanism to the black-out he suffered when he saw the deceased who was his commanding officer. Accused claims he had a black-out and does not know how he came to kill the deceased.

The accused says he went to the Prime Minister's public meeting (pitso). There is no dispute that he had the right to attend that pitso. The accused who had been an escort of important people and who had been a policeman for nine years

knew that the police regulate public meetings as a matter of law. See the *Internal Security (Public Meetings and Processions) Act* of 1966. We can expect that he knew that (as the Prime Minister is the most important politician) the deceased Colonel Kholokholo the Officer Commanding Butha Buthe district would be there. I do not believe the accused when he says he did not expect to see anybody. Even so, I am not entitled to assume that the accused went to the pitso with the intention to find him and kill deceased. We will never know what was in the mind of the accused.

The accused claims when he saw the deceased, the deceased was 15 paces from him. He went for his gun because he felt like shooting the deceased. He got hold of the gun, as he got hold of it, everything went blank - he had a black-out and only recovered at the charge office under arrest. He does not know what he did or said. He heard the police saying he has done this or that.

PW1 Sergeant Maime said that while he was talking to the deceased, he saw the accused walking behind the deceased. Soon thereafter he heard two gun reports. This took him by surprise, he then saw deceased fall. Then saw the accused firing three times at deceased. As this was happening, Sergeant Maime says he was very frightened. Sergeant Maime says he then caught the accused from behind. A man he had never seen before helped him hold the accused. The gun from the accused fell down. Senior Superintendent of Police Tšilo took that gun. PW2 Senior Superintendent Tšilo confirms he saw deceased while he himself was talking to a police officer known as Theko who was in a landrover although PW3 Theko says he was dozing at that time. He saw the accused coming behind the deceased, and then heard gun reports. Then saw deceased fall. PW2 says he ran behind a landrover, when he emerged, he saw accused firing at deceased a number of times while

deceased was lying prostrate on the ground. PW1 grabbed the accused from behind. He (PW2) ran to grab the gun from accused and handed it to another policeman. Accused was grumbling and because people had gathered making noise he did not hear what accused said. This evidence is not disputed by the accused and it has to be accepted.

Cross-examination of PW1 seemed to be directed at what accused or deceased said during or a little after the shooting. PW1 fared badly under cross-examination because he was saying what he did not write in the written report he made after the shooting. He also was saying what he himself said: This was also not in that written report. I will return to this aspect of PW1 (Sergeant Maime's) evidence.

It was put to Sergeant Maime that the accused will say when he fired at deceased, he was not there. Sergeant Maime denies this. He also denies that it was only the accused who was near the deceased (if that is what deceased instructed his counsel). Sergeant Maime says that he and the accused were the near the deceased at the time the shooting commenced.

What PW3 who was very near the deceased, says the accused said something and he was not seriously challenged. Senior Inspector Theko (PW3) said he had been sleeping or dozing in the vehicle in which he was sitting in when he was woken by fire-works. Deceased was a metre from him. Accused fired again at the deceased. He saw Sergeant Maime holding the accused from the back restraining the accused and gripping the accused firmly. Accused asked deceased what he was doing, killing a person in this way. The accused replied "I am killing him, he caused my expulsion from work". Accused added that justice had not been done in his case.

Senior Inspector Theko said he did not see Sergeant Maime earlier, nor did he hear deceased say anything. PW4 Moferefere Senokoane says after hearing three gun reports he rushed to the scene of the shooting. People had all run away. He saw a person who was later identified as the accused firing. There was someone who seemed to have been the first to arrest the accused. Some policemen in uniform came to help them later. PW4 Moferefere Senikoane says he heard the accused say he should not be treated badly, he would put his case where he was going. "Ke tla bua pele". This portion of what PW4 said is not challenged.

In cross-examination however PW4 was challenged about what he said in his evidence-in-chief to the effect that when they were in a police vehicle, he asked accused why he had shot the deceased. Moferefere PW4 insisted that was true, he does not understand why it does not appear in his statement, which he made to te police. He insisted accused had answered that the deceased had dismissed him from work. If accused will say that is not true, it is the accused who is not truthful, not him.

I was impressed by the two witnesses PW3 and PW4, they were not shaken in cross examination. I note that PW2 claims he was speaking to PW3, but PW3 says at that time he was dozing, but for the corroboration her evidence received.

I heard the evidence of PW5 on what the accused said to effect that he shot the deceased for having dismissed from work. I conclude that she might have heard that, but as I was not impressed by her demeanour and her evidence in general, I would have not given it much credence.

It seems to me like the first witness Sergeant Maime and PW5 became so scared that a lot of things that she said are disjointed to the point of being unreal. She must have received a slight shock or what Sergeant Maime called a trauma. The sequence of events may be coming to her slowly and hesitantly. Had they not between corroborated by people who sought safety by either running away like PW2 or being inside in the safety of a motor vehicle like PW3, I might have rejected the evidence outright. I accept that PW1 and PW5 are telling the truth, though what they say in view of their great fright and confusion needs to be treated with caution.

I note that there was, according to PW5, the car of the Commissioner of Police not far from where deceased was shot. In the absence of evidence that the accused knew the Commissioner of Police would be there, I cannot associate it with the accused's purpose for going to the Prime Minister's pitso. I have also said the same about the accused's attendance of the Prime Minister's pitso—the only difference is that there was a great possibility that the deceased would be there as the Chief Security Officer in the district.

Accused claims he was most aggrieved for being dismissed from the police force for being alleged to have torn a paper which had a picture of the Commissioner of Police. He had just heard from his attorney Mr *Khasipe* that his application for a review of proceedings of the disciplinary panel and the Appeals Board of the police force had been dismissed. He saw his future as bleak and his children to be going to miss their education. He claims he was innocent of the commission of the offence for which he had been convicted. He went through a forest, by a short cut. He went towards the back of the Prime Minister's tent. He forgets whether this was condoned off with a yellow tape to exclude the public as a security area should. Accused saw

deceased (Colonel Kholokholo) whom he was blaming for his expulsion from the police force. All his troubles came to him in an instant, he became very angry when he saw the deceased.

Accused, from the nature of questions put by his Counsel and what he was going to say, reveal that he knew that deceased was alone when he (to use his words he felt like shooting him. He put his hand on his pistol which was on his left hand, in its upholster. (He even made a demonstration). Just as he was about to draw it he had a black out. Yet he remembers what he said (from the nature of questions his Counsel put to witnesses - during the black out. Accused was asked whether those were in fact his instructions to his Counsel, the accused said yes. During addresses I asked his Counsel (Mr *Mosito*) whether he knew if in asking questions to a witness which are not based on accused instructions but merely to test the credibility of a witness, he should suggest to the witness rather than put statements; the accused's counsel said he knew. If accused knew what he said or did not say then accused had no black out.

Accused said he had had a fair trial and he did not blame Colonel Ntlama who presided over the hearing of the case. When asked why he did not go for him - after changing what he had said to having had an unfair trial, accused said he did not really think about those who tried him. Had he done so he probably would have blamed Colonel Ntlama as he recommended his dismissal to the Commissioner of Police. Deceased only made a supporting recommendation or a recommendation that he should be dismissed. Deceased's recommendation would not be binding. It was entirely up to the Commissioner of Police to decide whether or not he should be dismissed.

Accused (after his disciplinary case) had gone to the deceased in order to ask deceased to make a recommendation in his favour so that he should not be dismissed on the recommendation of Colonel Ntlama and the disciplinary panel. Deceased told accused, after asking for pardon, that he was powerless. Perhaps Colonel Ntlama, the Chairman of the disciplinary panel might help if accused approached him. When accused got to Colonel Ntlama, he was told the decision had been reached by those in authority. This could mean either the deceased or one who is even more senior (according to the interpreter). Counsel for the accused said accused the correct interpretation was that the decision was reached by the deceased. Deceased told the accused that he had no power to reverse that decision. According to the accused, he knew it was the Commissioner who made the decision, but he made the decision on the recommendation of the District Commander (meaning the deceased).

Summarising the facts, accused said he had just relieved another group of policemen. They had told him everything was in order and he took over together with his group. Accused had gone to make a 'phone call when he discovered the Commissioner of Police's picture torn. He went to ask policewoman if she knew who had torn that paper. Police woman Thakheli left the police station as fast as her feet could carry her, saying she was doing so because she was prone to getting into trouble. Therefore, she was going away. Accused said he was not going anywhere, whatever happens to him should do so while he was on duty. He reported the matter to his imediate superior who passed it on through the proper channels. Accused gave the impression that he was victimised for having the courage to report the incident.

The accused in his confession, before the magistrate, had said the deceased was among the people who had caused his dismissal. He had shot deceased at the

pitso because his heart went black when he saw deceased. Counsel said this meant the accused had a black-out. The interpreter and the court were of the opinion that when someone's heart became black is when he becomes very angry or very depressed. Both counsel and the court have Sesotho as their first language (mother tongue).

Towards the end of his cross-examination, accused revealed the policewoman Thakheli had decided to run away because a policeman who had been found guilty of tearing a picture of the Commissioner of Police in Leribe had just been dismissed from the police force. It is clear from the start that even before the case started, accused knew that if he was found guilty he would not be allowed to remain in the police force. Tearing a picture of the Commissioner of Police was a very serious offence at that time. That was why it was presided over by an officer who commanded another district of the rank of Lieutenant Colonel. Accused had been telling a lie when he said deceased was responsible for his expulsion. Before the magistrate, in a confession, he said deceased was among those responsible for his dismissal. This I accept as the truth.

Accused's black out was very unconvincing, he was in many respects an untrue witness, not only his answers betrayed this, his demeanor was also unsatisfactory. What was really his grievance was being dismissed from the police force for being alleged to have torn a paper on which there was a picture of the Commissioner of police. When he saw the deceased, he had the urge to shoot him, went to the deceased and shot him. He was asked why, in answer he said justice had not been done, accused had caused him to be expelled from work. This was something he was aware was not true, because in his confession, he says deceased

was only among those people. As the Commissioner of Police had a car parked near-by, accused might have shot him too if he came to the view of the accused. He got deceased and shot him to make a point against the police system. He wanted to be heard in some other forum, and consequently asked those who wanted to assault him not to do so.

We do not believe that having formed the intention to kill and got hold of his gun he could suddenly have a black-out as he claims he did. Accused is a former policeman, one would expect him to be aware that something which amounts to an impairment of his bodily function has to be backed up by medical evidence unless there are many people who can give circumstantial evidence as to the dysfunctioning of his body. On this black-out, to quote from Marais J in *s v Trickett* 1973(3) SA 526 in case of a black out, he said:

> "On neither point is there any expert evidence at all, and for a lay court to speculate on medical issue without medical expert evidence is wholly pointless if not dangerous."

In *S v Cunningham* 1996(1) SACR 631 at 636 B Scott JA said:

> "It follows that in most cases (if not in all cases) medical evidence of an expert nature will be necessary to lay a factual foundation for the defence and to displace the inference above."

The inference is that "the state is assisted by a natural inference that (in the absence of exceptional circumstances) a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily".—*S v Cunningham* at page 635 J. There is no medical evidence whatsoever nor is there

evidence of a circumstantial nature to support the allegation that accused had a black-out. Not even his confession before a magistrate reveals that such a black out occurred. It supports only the inference that he became very angry. Smith & Hogan *Criminal Law* 7th Edition (1992) says at page 40, in English law where an act is alleged to be involuntarily "Lord Denning has said that the accused's own word will rarely be sufficient, unless it is supported by medical evidence". In this case before me, the accused wants me to accept his word on a black out when he is in our view a clearly untruthful witness in many respects.

Having concluded that the accused had no mental blackout, the next point to determine is whether the accused had the requisite intention to kill. In determining this we have to decide whether the accused had the subjective to kill. See *S v Sigwahla* 1967(4) SA 566.

Accused himself says in his anger he had the desire to shoot the deceased and put his hand on his pistol. We have found as a fact that he went to the deceased and shot him. He did not normally carry his gun cocked. He lied on this point. No reasonable person would do so. He must have shot the deceased as he wished or felt like doing. Therefore we have come to the conclusion that the accused had the subjective intention to kill deceased. He did so to demonstrate his anger against deceased as representative of the police force who was immediately available. If the Commissioner of Police had been near his car, he might have been also shot.

Having decided that the accused had he intention to kill, the next issue (though tautologous) is whether there was provocation within the meaning of the *Criminal Law (Homicide Amendment) Proclamation 42* of 1959. Section 3(1)(a) of that

Proclamation provides:

> "A person who—
> (a) unlawfully kills another under circumstances which but for the provisions of this section would constitute murder; and
> (b) does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is a time for his passion to cool,
> is guilty of culpable homicide only."

Section 4(b) of this *Proclamation* obliges the court in judging the situation to take into account the class of the community to which the accused belongs. Sub-section (d) and (f) in defining provocation states that a person performing his lawful duty cannot by so doing be deemed to have provoked anybody. Even the act of a policeman who unlawfully effects an arrest cannot be ordinarily be regarded as provocation.

If facts were appropriate in this case, I would observe that loss of temper (sometimes causes a temporary loss of mastery of the mind) this is a common feature in provocation—See the case of R v Whitfield (1976) 63 Crim App Reports 39. In fact Lord Goddard CJ in R v Duffy [1949] 1 All ER 932 E F endorsed the following definition of provocation in murder:-

> "Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of control, rendering the accused, a sudden and temporary loss of self control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind. Let me distinguish for you some of the things which provocation in law is not. Circumstances which merely predispose to a violent act are not enough. Severe nervous exasperation or a long cause of conduct causing suffering and anxiety

are not by themselves sufficient to constitute provocation in law."

Deceased had done nothing that had suddenly provoked the accused. He was going about his lawful duty of maintaining security at the Prime Minister's pitso. Even if he had, accused should have had a lot of time to cool down when he left the Butha Buthe magistrates' court to go and tell his wife about the failure of his application for review in the High Court. Accused also had time to cool while walking from his home to the Prime Minister's pitso. I have already found it as a fact that accused did not believe that deceased had in any way caused his expulsion from the police force. He and policewoman Thakheli knew of a similar expulsion of a policeman, when the picture of the Commissioner of police was found torn. A policeman in Leribe, who was found guilty of a similar offence, had just been expelled from the police force.

In the light of the aforegoing, accused had not been provoked by the deceased in any way. Smouldering anger is not provocation, although it is taken into account for other purposes.

Stand up accused. We find you guilty of Murder as charged in Count I.

You are also guilty as charged in respect of Count II for possessing an unlicensed fire-arm and contravening Section 3(a) of the *Internal Security (Arms & Ammunition) Act* of 1966 by not renewing the licence for your pistol.

My Assessors agree.

.....
WCM MAQUTU
JUDGE