CRI/T/2/99

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

v

MOSEKESEKE MAKOLOANE

Judgment

Delivered by the Honourable Mr. Justice T Monapathi
on the 5th day of April 2001

The Accused herein was charged with the crime of murder. It was alleged that on or about the 24th December 1997 at or near Hlotse in the district of Leribe, the said Accused did unlawfully and intentionally kill one Mpho Neo. The Deceased had been a co-worker with Accused at Flying Squad Security firm which operated at Hlotse. The Accused pleaded not guilty to the charge. He said he killed the deceased in self-defence. The question then for decision of this Court was whether he had had the necessary intention to kill.

The Crown called the evidence of four witnesses who had also testified at a Preparatory Examination (PE) held at Hlotse which ended on the 11th January

1999. The Accused also testified on his own behalf at the close of the Crown's case. He did not call any witnesses. The four Crown witnesses were PW 1 No. 8139 Detective Trooper Tahleho (PW 1 at PE) of the Lesotho Mounted Police Service (LMPS), PW 2 No. 9926, Policewoman Rakhoboso of the LMPS, PW 3 No. 9382 Trooper Lekatsa of the LMPS and lastly PW 4 David Nyakane a co-worker with Accused and Deceased at the said security firm.

The following depositions of the witnesses at the PE were admitted by consent and recorded into the machine to become evidence. First it was that of Nyatso Neo (PW 6 at PE). The witness said he came from Linotšing . He had been employed at Flying Squad Security firm until 1997. He was no longer employed at the firm at the time that he testified. He knew the Deceased during his lifetime. Deceased was his brother. Deceased was unmarried. The witness was informed of the Deceased's death. He identified his body before a post mortem examination was carried out. The witness and his family buried the deceased.

Second to be admitted as above was the deposition of Dr. Seqhobane who was PW 7 at the PE. He testified to say that he was a District Medical Officer in Leribe Government Hospital. On the 31st December 1997 he examined the body of Mpho Neo (Deceased in this case). The doctor made a written report of his findings. He found that the Deceased had died of acute blood loss. The Deceased had had only one injury on his body. This was a stab wound on the left side of the chest left- haemothorax. He adhered to the contents of his report which he handed in as an exhibit. The contents of the report were also read into the machine.

After close of the Defence the Court resolved, in the interest of justice, to hold an inspection in-loco in Hlotse, Leribe at the area of the bus stop terminal, described as the old Hlotse Bus stop. I refer to the report of the inspection made

as Appendix "AI" and the map or diagram Appendix "AII" as if specifically incorporated herein. The contents of the two documents were accepted by Counsel after which judgment was reserved by this Court having already received Counsel's submissions in addresses and argument

PW 2 testified to say that she was patrolling the streets of Hlotse in the early evening, having just gone past a passage that leads into the Bus Stop area from the west where there is the Police Charge Office which is their station . It was on the 24th December 1997. It was on the day the Deceased died. The witness was in the company of PW 3 and both were in police uniform. They were later joined by one police officer (Lehloenya) who was not putting on a police uniform.

PW 2 said she saw a group of boys standing outside Free State Butchery which is part of a building complex. Some boys were involved in a scuffle. PW 3 called out in an attempt to reprimand them. They ignored him and continued in their scuffle. A short while thereafter the witness (while still in the company of PW 3) having gone (from point 1 in the drawing) a few paces down (eastwards) to (point 2) where there were some shelters, she saw two young men running one chasing the other towards the east. The one who was being chased had a white skipper on. It was the Deceased. Accused was the one who was giving chase and he was putting on a brownish top (skipper/shirt). They were running in a north easterly direction (towards point 4). They then turned towards the south in that chase and moved to the spot where the three police officers stood.

The Deceased who was being chased had a gun in his hand. He run straight to where the police officers were. The witness said she tried to get hold of (disarm) the Deceased's gun while the Deceased tried to get in between (hide) the police officers. It was then that the witness said that the Accused who was having a knife

(shiny object) in his hand followed. He was focussed on the Deceased. He closed in and reached the Deceased. It was then and suddenly that the Accused made a stabbing movement aimed at the Deceased. It was after there had been some movement as if the Deceased was attempting to hide and the Accused following as aforesaid. Deceased was stabbed once on the left breast. Then the Deceased and the Accused could not have been more than two paces from the witness and another police officer. Accused and Deceased had abandoned chase. Deceased moved towards the place where they came from and ran to the left side of the entry door to Free State Butchery where he rested near a window but collapsed. His body sagged down. It was said he assumed a sitting position. He had been bleeding profusely.

The witness said at that time he realized that another police officer PW 1 was near the Accused. Suddenly other police officers and people had come after the witness had made a radio message to the police Charge Office. A vehicle was sought from the owner of the Free State Butchery. It was found that the Deceased was looking tired and when he was carried in the vehicle he was breathing slowly and weakly. He was taken to hospital where he died on a hospital trolley. The witness got the report when she was already at the Charge Office. She had gone with the Accused to the Charge Office. The Accused was then kept under arrest and charged with murder. The witness did not recall as to what happened to the gun that the Accused had had in his possession.

PW 3 who was a fellow officer of PW 2. He corroborated PW 2 in all respects except that he appeared only to have seen the two people who were chasing when they were approaching the witness. He was in company of PW 2 when he saw that scuffle near Free State Butchery. There were a lot of people walking around. He called out to the mischievous people to stop what they were

doing but to no avail. It was afterwards that Trooper Lehloenya joined them. He was only able to see the two people who were chasing when they were about twenty four (24) paces away from them (police officers). He came to realize that it was the Deceased and the Accused. They were running towards where the police officers were. When they reached the witness and his group the Deceased who had a gun attempted to hid behind them. Trooper Lehloenya tried to hold him but failed because he was avoiding the Accused who had closed in and had a knife in his hand. The Accused was able to stab the Deceased with that knife. The latter was able to run on towards the Free State Butchery where the witness said the Deceased then fell down. The witness was not able to talk to either the Accused nor the Deceased. The Accused was wild. The witness observed the Deceased was doing nothing but merely protecting or refusing with the gun and was focussed on avoiding the knife wielded by the Accused. The witness and PW 1 moved towards Free State Butchery where the Deceased had gone. He was able to observe before he reached the spot that the Deceased had already fallen down. The witness was going along with the Accused "following his recognition that he had caused injury." He observed later that the Deceased had a wound on the left side of the chest.

In his cross examination of the witness Mr Mokatse suggested that the Accused had acted in self defence because a gun is more dangerous than a knife. This proposition was accepted by the witness. But the witness then revealed that the Deceased was not fighting and in fact he was the one who was running away and who was being chased. The witness conceded that he had not known or particularly seen what happened before the chasing. The witness would not deny that the Deceased had before the chase beaten up Accused who fell down as a result and at the same time threatened to shoot the Accused. This was following on the struggle between the Accused and PW 4. It was put to the witness that the chasing by the Accused followed the struggle over the gun between the Accused and PW

whereupon the Deceased took the gun into his possession and the gun having previously been in possession of PW 4. The witness had not seen the Deceased beat up the Accused. He denied seeing this what Counsel said was unlawful attack on the Accused. All he had seen was the chase which ended when they reached the place where the police group was. It was when the two people were actually running towards the witness' group.

PW 4 had been still in employ of the Security firm on the day of the "fight". He was at work. The Deceased was of a senior rank while Accused and the witness were of the same rank. The Deceased later arrived at the shop at Hlotse where the witness was on duty. Accused was not on duty. Accused arrived. He found them in front of Free State Butchery. Accused then asked the witness whether he had a gun. Then witness agreed that he had possession of a gun. The gun belonged to Leabua Mariti. When the Accused asked the witness whether the gun was loaded he answered in the affirmative. Accused had wanted to take away the gun from the witness. The witness says he showed the witness the gun and took out the magazine which had six bullets.

Accused then asked for the gun. He wanted the bullets. He said that the gun in question which had been in possession of Leabua Mariti contained bullets he (Accused) had taken from one Indian friend. He wanted to take them back. The witness refused. Then a struggle for the gun ensued. It was near the door. He fell. As a result the Accused wrested the gun from the witness. He ran off. The magazine fell. The witness ran after the Accused and caught up with him. They held on to each other. The witness was attempting to win back the gun and they struggled towards one door of the shopping complex of which Free State Butchery was part. It was at that moment that one police officer called out to reprimand or order them to stop. The struggle continued until Deceased appeared.

Deceased asked the witness and the Accused as to what was happening. The witness explained that the Accused wanted to take away the gun. Then the Deceased kicked the Accused and violently took away the gun from the Accused. The Accused then took out his knife and went after the Deceased who ran towards the police. The witness suggested that he also ran away. The Accused and the Deceased ran on towards the group of policemen who dispersed. The Accused was chasing the Deceased. Then the Accused was holding a knife up in a way suggesting that he was about to make a stabbing movement. This the witness demonstrated. Then the witness heard the Accused remark that the police should or may shoot him. The Deceased had been running while at the same time holding the gun in his hand. While following on the Deceased and while nearing the police the Accused was saying to them that they should shoot and kill him if they wished.

Among the police was a lady officer who later used a radio. The witness said that the Deceased was stabbed while very much close to the police group. The witness said police officers were at most about four paces away. One of the police officers then got hold of the Accused. Deceased who was bleeding profusely exclaimed that the Accused had already stabbed him. He then walked away towards the shop. The witness while at the police station learned that the Deceased had passed away. The witness confirmed that he heard Deceased say that he would kill the Accused. And yet he did not shoot the Accused. The gun was not loaded. Deceased had not known that the gun was not loaded. The Accused knew that it was not loaded.

Under cross examination by Mr Nchela the witness stated that the only reason why the Deceased assaulted the Accused was because the latter was refusing with the gun which was not his property. There had not been any previous quarrel between the two. The threat that the Deceased issued came only after the Accused

had taken out the knife. Not only did the Accused threaten the Deceased he approached both Deceased and the witness. Both ran away. He repeated that the Accused had said the police should shoot at him if they liked. Not only did the Accused threaten the Deceased he approached both the Deceased and the witness. Both ran off. He repeated that the Accused had taken out the knife. They then dispersed when he approached them. The witness said he ended up being behind the police group. This aspect was not mentioned by any witnesses.

The witness answered that he had taken out the magazine from the gun and during his struggle with the Accused the magazine fell. It was correct that most of the things that the witness stated before this Court had not been referred to in his statement at the PE. For example he had not mentioned that he also ran off and was chased after by the Deceased. This aspect (that he was also chased after) was referred to by none of the witnesses. He had not said that the Accused challenged the police to shoot if they wished. There had not been reference to the magazine having fallen off from him nor that he took out any bullets. I however found the witness to be a reliable witness despite the unsatisfactory features of his evidence which could only result from his wish to embellish the evidence while he was before this Court. For instance he could not have been chased after by the Accused. Nor could he have run to the police group and hid behind them as he suggested. If he had done so this was so significant that the police witnesses would surely have stated this, not just but most emphatically. The reason being that it would augment the impression that the Accused was bent on violence and attack. I observed most importantly that the witness did not attempt to lighten the act of violence of the Deceased on the Accused except to say that it was primarily geared towards winning possession of the gun from the Accused.

PW 1 was the of Criminal Investigation Department of the LMPS then

stationed at Hlotse at the material time. On the day of the fight he was on duty and on patrol around the Bus Stop Area around Pitseng Terminal. He testified that he proceeded towards Free State Butchery. It was then that he saw two men chasing each other. They were then about twenty (20) paces from where he was. Two men passed a distance from the witness. The one being chased had been putting on a white skipper. It had blood stains on it. The two men came towards M & R Supermarket. But the one in the white skipper went towards Free State Butchery. He then said "Mosekeseke has stabbed me with a knife." He then leaned against a window from the outside at the Free State Butchery. After this remark the man in a white skipper fell. The witness referred to a statement made by the Accused as to why Deceased had assaulted him. He had then been about two paces from the Deceased.

The witness said he approached the Accused and asked for an explanation from him. He then asked the Accused about the knife he had used. Accused handed over the knife to the witness. It was a brown type with a gold "M" sign or motif. This he handed in to this Court as Exhibit "1". The witness examined the Deceased who had an open wound on the left side breast area. It appeared to have been caused by a sharp instrument. He then told the Accused that he was putting him under arrest for the injury that he caused. He had introduced himself as a policeman. The Deceased was still alive. He was carried to hospital on a vehicle belonging to Free State Butchery. The witness then went to Charge Office with the Accused. He learned soon after arriving at his office that the Deceased had died. He also proceeded to the hospital accompanied by another policeman. There he saw the dead body of the Deceased. The wound on the Deceased had been sutured. The witness searched the Deceased's clothing. He discovered an employment card and a wallet. He then went back to the Charge Office.

When cross examined by Mr. Nchela the witness said he had not observed "with his own eyes" who caused the injury on the Deceased. Neither had he known about the circumstances that led to the fight except that it was alleged that they fought over a gun which the Accused wanted to take away. The Accused had given an explanation which the witness said he followed. This resulted in his getting possession of the disputed gun from another witness.

The witness was quizzed about the absence of remark in the PE record that Deceased had said that the Accused had stabbed him. He attributed this to a mistake in the record. But he said that this would be borne out by his note book wherein indeed this was recorded. The queries from the defence included the absence of a statement from the witness in the PE record that the Deceased in fact leaned against the shop window. This he re-iterated but attributed the absence to the fact that events had taken place a long time ago or it was a mere omission on his part. I however found this witness a reliable witness who gave his evidence in a straight forward manner. It appeared that although he was the first police officer to have reached the Deceased he witnessed the preceding events much later than others. Although he witnessed the chase he had not, not the actual fight which was seen by other witnesses including PW 4, this could be attributed to the fact that the witness did not come from the same direction as witnesses PW 2 and PW 3. It was however clear that PW 1 reached the Deceased first when he had rested. The impression was that he was the first to charge the Accused, but he made no reference to other officers. That was why he did not refer to the contact of the Accused and the Deceased with other police officers.

Accused testified under oath in his own defence after close of the Crown case. He stated that he was twenty seven (27) years of age and was unmarried. He was literate having gone up to Standard Seven (7) class at school. He was then

unemployed. He stayed at Ha Mosili in Leribe district. On the day in question he was at Hlotse. At around the hour of seven o'clock or eight o'clock in the early evening he arrived at a butchery at the bus stop. He was going to fetch bullets from PW 4. He had previously used the gun carried by PW 4. He had borrowed those bullets from an Indian man. He intended to take back the bullets to the Indian man. He had kept watch at the Indian man's shop in the past. He knew that the bullets were in the gun which was in possession of PW 4. The gun had been used by one Leabua Mariti (PW 5 at PE). They had used that gun both of them at different times as security guards. He had also used that gun because he had been colleagues of PW 4.

On arrival at the Free State Butchery that evening he met PW 4. He explained to him that he had come to fetch the bullets because he was resigning from work. PW 4 refused to release the gun or the bullets. The Accused wanted to take the gun by force. PW 4 resisted and they struggled. Deceased then arrived and asked the Accused what he was doing. Deceased then hit him with an open hand and kicked him. He fell down. They had never had any quarrel before. At that time the Deceased won possession of the gun. He had ben about two or three paces from the Accused when he said he was going to shoot. The Accused then took out a knife and unclasped it when he realized that the Deceased was approaching. He stabbed at the Deceased once. The Accused said they then moved together with the Deceased towards the Free State Butchery portion of the complex. It was the three of them, that is Deceased, PW 4 and him (the Accused). It was thereafter that the Deceased leaned against the front window. He ultimately slid down.

He said he became aware that injury to Deceased had resulted from the stabbing and that is what he said to the Deceased because the Accused had not

known why he was assaulted by the Accused. He had stabbed because he was angry after the assault on him by the Deceased. Prior to this incident their relationship had always been good. When his Counsel put to him that he stood charged with intentional killing of the Deceased he replied that it had not been intentional. Accused said he even assisted the Deceased who had been getting weak to a sitting position. It was then that that policeman who had testified first (PW 1) arrived. It was a male officer.

On his arrival PW 1 asked the Accused why he had stabbed the Deceased. He said he replied that they fought over something. PW 1 then asked where the knife was. He took it out from his pocket and handed it over to that witness. He asked the Accused to accompany him to the Charge Office and left Deceased behind. It was there at the Charge Office where he learned that the Deceased had passed away.

Accused re-iterated that he had not intended to kill the Deceased with whom they had always been on a cordial relationship. He had even known Deceased's brother with whom they had worked together. The Accused's father had even contributed to funeral expenses for burial of the Deceased which was a coffin and a beast because his family had known the date of Deceased's burial.

Accused denied that he had chased the Deceased for a distance of about 120 paces i.e. from the Free State Butchery to Matlameng (Pitseng) taxi terminal and almost back to original place. Accused added that it could not even be that far. Since it was dark only that area around the shopping complex was under electricity light. He denied that the lighting extended up to the bus terminal. He denied that police officer ever tried to intervene as suggested by Crown witnesses. Nor that he had been uncontrollable. Nor that he threatened or missed one LMPS Officer

Lehloenya with a knife. He denied that Deceased ever ran towards the police to seek refuge therefrom when he and PW 4 were being chased by the Accused. He denied further on approaching the police he ever said they should shoot if they so wished. He agreed that they struggled with PW 4 but not that as a result Deceased wrested the gun from Accused. PW 4 had refused to give the Accused the bullets. He denied because at the time of the stabbing PW 2 could not have been anywhere near. Neither were the other police near except that they came well after the even including PW 1. Nor that PW 4 was behind the Deceased.

On being put to the witness by his Counsel Accused denied that the magazine fell down during their struggle with PW 4. He had asked PW 4 to give him the magazine and not the gun bullets. As the Accused said and despite what PW 4 had said the bullets were found still in the gun. Even at the time the Deceased had got possession of the gun. He saw all other police after the incident including PW 1. He did not see what they were doing where they were. He only spoke to PW 1. All the others arrived after PW 1. Including one male officer who was Tahleho (PW 3). It surprised me that he did not see the lady officer at all despite that this was the officer who beamed a radio message reporting the occurrence. In addition it became quite a surprise because there was never a suggestion to PW 2 that she was never around or in the picture. Accused was also surprised that the Crown had never been challenged about this PW 4 even spoke about PW 2. This was not even denied in cross examination by the defence. Why would the Accused deny this? Mr. Nchela however said he had challenged all the police officers that they only arrived and surfaced after the stabbing incident. He said PW 1 arrived first. He said he did not see what others were doing because he had been busy talking to Tahleho (PW1). He denied further that he ever chased PW 4 for 20 paces causing him to go around the shelters.

Accused knew this passage from which the police had emerged and near which they said they had momentarily stood. He was asked how far it was in relation to Free State Butchery. He said it could be about 25 paces. He knew the shacks. They were about 8 to 9 paces from the Free State Butchery. When asked as to the distance between the Free State Butchery and Matlameng Bus Terminal he replied that it was a great distance which he could not estimate. When pressed he said it was as far as the forecourt or about forty (40) paces.

The Accused was cross examined by Miss Makoko Accused denied that the Deceased had hid or shielded behind the police. Counsel further put it to the Accused that PW 2 had not been challenged in that regard. Accused agreed. Accused was unable to explain why she was not challenged. It was suggested by Crown Counsel that the reason was that she was telling the truth. I could only accept PW 2's evidence in that regard as unchallenged truth. This hiding or seeking shelter had even been testified to at the PE. When asked about the evidence that he made an attempt with a knife in aiming between PW 3 and PW 2 which resulted in PW 2 having to duck behind the Deceased, he agreed that there was such unchallenged evidence. When asked that there was a further unchallenged evidence to the effect that PW 2 tried to disarm the Deceased of the gun, he agreed. He was asked why he thought the evidence was unchallenged he gave an incoherent explanation that it was the evidence that the witnesses gave in Court.

It was put to the Accused that the evidence alluded to above went unchallenged because it was the truth and what had in fact transpired. He replied to say that the witnesses were not telling the truth because that was what they did not say before the magistrate's Court (PE). He was told that his two Counsel (Adv. Mokatse and Adv. Nchela) had not suggested the latter defects in the evidence before this Court. He agreed. Miss Makoko further suggested that the PE record

however showed the witnesses to have stated these facts which she even just repeated before this Court. This the Accused denied. This Accused was however not able to demonstrate this on the record when probed. He denied furthermore that PW 2 is recorded to have stated that the Accused and Deceased ran towards the police officers' group which was near the shelter where then PW 2 was near police Lekatsa (PW 3). It was when Deceased shielded behind or between the two officers when he was stabbed. The Accused said this was not recorded at the PE. I thought that although the Accused's Counsel objected as to the place where PW 2 was, that is at the passage as against at the shelters, the most important thing was that where she was, she was in company of other police officers when Deceased and Accused came running and approached them. This was what was not challenged and was on record. I did not see why a point was taken that that is not what PW 2 said at the PE. Accused ultimately agreed that this was unchallenged in either version at PE or before this Court. I concluded that whatever denied by the Accused before this Court in that regard had been an afterthought.

Following on above the Accused was further challenged that if he had instructed his Counsel this would have been put to the Crown's witnesses. He could not explain why his Counsel did not put the question to the witnesses. I did not see it in any other light. It was this that PW 2 said she saw that Deceased had a gun which she sought to disarm the Deceased. This the Accused denied. This had again been unchallenged. He agreed. I thought PW 2 was telling the truth. There would be no reason for her (at least it was not suggested) why she should have so elaborately embellished the plot if ever she did. She had been truthful witness in my respectful view. Her evidence had become formidable as fortified by my observations at the inspection-in-loco.

The evidence of PW3 was referred to in cross examination of the Accused.

He had said he reprimanded the Accused and the Deceased. This the Accused denied. It was not suggested that the witness had been lying on that account by Counsel. This the Accused could not explain. Indeed inasmuch as the struggle had overwhelmingly been confirmed and corroborated I did not see why the very natural reaction of a police officer to have attempted to quell the disturbance could be denied. It only showed that the Accused was bent on denying everything. PW 3 said he noticed the struggle to have involved the Deceased and the Accused who later were seen chasing after the other I could accordingly not find that the police only came into the picture after the stabbing this was most improbable. I found it proved beyond doubt that quite before the stabbing the police had been aware and had kept the Accused and Deceased's fracas under surveillance. This was overwhelming.

I did not doubt that, following the unchallenged evidence of PW 2 the Deceased had been stabbed at the place where the police witnesses except PW 1 had been positioned. The contrary had not been put to any of the witnesses. It was very important. I concluded that this was what happened. The stabbing happened right in the midst of police officers or before them as the Crown Counsel suggested.

PW 1 also confirmed that he saw the chasing by Accused of Deceased. He was not challenged on that except that the stabbing was in front of the Free State Butchery. This witness had said that when he saw the two some there must have already have been the stabbing. If not he would have seen that event. What could have been a defect in the way he was led or the way he was questioned was the the matter of the distances. This was not done in the elaborate way that PW 2 went about. And if there could have been any contradiction between the two witnesses the same should have been demonstrated. Indeed I saw no such contradiction having been demonstrated. PW 1 had also spoken of there having been a chase

except that he was not made to speak of those distances that were the forte of PW 2. I also believed PW 1 as a witness to the truth.

That the Accused chased after the Deceased showing intention, as it were by the way he held the knife and that he aimed at stabbing the Deceased was not challenged. PW 2 had stated so and had shown that this was the attitude (of wanting to stab) of the Accused over a long distance over which he chased the Deceased. Accused agreed that this was not denied nor challenged so as to deny it when PW 2 testified to it. PW 2 also said it was over long distance of about 120 paces. This was also not challenged, at least the distance that was suggested. I concluded that although it was revealed that this distance was exaggerated, as the inspection-in-loco ultimately showed, it did not remove a clear impression that the chase in any event was over a considerable distance. Accused ultimately agreed that he saw the woman police officer who had been standing nearby. I accepted PW 2's as telling the truth.

Accused said he had left the bullets in the gun. The gun was left with his superior Leabua Mariti. He went to PW 4 to ask for the bullets because he knew they were with him. He did explain why he left the bullets in the gun. He said he had not resigned then. It was after his resignation that he wanted the bullets back. He had already released the gun. It after his resignation. His superior had refused to release the bullets. It was four (4) bullets. That is why he approached FW 4, who was on duty, for the bullets. He found him outside and not inside the shop. The Accused is said to have snatched the gun and ran off. He said he did not deny that. The initial impression had been that Deceased found the Accused and PW 4 grappling for the gun. But what is important is that the Deceased arrived got the gun from the Accused after kicking him and making him fall. Accused was not able to explain why the Deceased did not shoot him. I thought another explanation (not

necessarily the true one) would have been that the Accused had made it difficult for the Deceased to shoot while he was being chased or that things might have happened suddenly.

Counsel put it to Accused that the Deceased ran away from the former because he had no intention of killing the latter, when he had a more dangerous weapon. The reply was that the Deceased had actually said would shoot the Accused. He could not explain why the Deceased was not able to shoot when as he alleged he had threatened to shoot him. Crown Counsel made two suggestions to the Accused in showing that he may have said so only with intention to get him off not with intention to shoot. Firstly he did not attempt to shoot and secondly he ran to the police. Accused replied that he would not know if the Deceased had not been serious when threatened. When it was asked whether Accused then wanted to kill Deceased by stabbing him he replied that he did it in self defence. He denied however that he did not stab the Deceased while he was at or in the vicinity of the police officers group. PW3 had even said the stabbing took place before PW 2 and Lehloenya and himself. I did not see why these police officers would fabricate and corroborate each other with an ulterior motive except that this is what must have happened as I concluded.

It was put to the Accused that he stabbed Deceased with a knife when the latter posed no threat to the Accused's life. Accused replied that he was threatened. When questioned as to why he stabbed the deceased on a very vital part of the body on the left chest, on the heart area. He agreed that he stabbed a person who was running away despite being in possession of a gun but not before nor in close vicinity of the police. He denied almost everything. I thought the Accused was not faring well in the light of his inability to shake the Crown witnesses. I therefore considered his version on the events simply unbelievable and I inclined to take his

story as false beyond any reasonable doubt.

Faced with a suggestion that his life had not, as a result of the assault, been in danger but that he could have been angry and severely provoked, Accused did not agree. I will later in my judgment conclude by showing that the Accused must have been angry and provoked despite the denial. When it was said he had originally not challenged his having chased after the Deceased but only that it was over a short distance he agreed that that was the correct impression. He had however stuck to having acted in self defence. He however stuck to having been angry and provoked and that as soon as he rose he was threatened with being shot and then it response he stabbed the deceased. In saying so he projected the stance that he fell rose and stabbed without any long or short chasing having taken place before. Having believed PW 2 about the considerable distance over which the chase took place, I thought the Accused was prevaricating.

The distance over which Accused chased Deceased, I repeat, may have not been the one of 150 paces but lesser as the inspection-in-loco revealed but it was still considerable. That is why Counsel suggested that this was such that a person chasing for such a distance must have had his temper cooled down as a result. Accused kept on denying the distance. In the premise one could take it that the answer remained one of a complete denial. I noted that he said: "Yes ones temper can go down but I did not run that long distance" (Bo ka theoha empa 'na ha kea mathat sebaka se sekalokalo). I noted further that the distance although originally exaggerated by PW 2 (until at inspection-in-loco) it was not originally challenged. Counsel for the Crown suggested to the witness that that considerably long distance would have allowed the Deceased to shoot if he wanted to. The Accused could only say he did not know.

I would feel that one of the things to consider would be that even if the Deceased wanted to shoot this would depend on the pressure put on him by the pursuer or attacker. In this case it appeared that the pressure was great behind the Deceased. That is why Counsel for the Crown put it to the Accused that he ought to be disbelieved in contending that Deceased seriously wanted to shoot him even if he had used words that threatened so. Accused surprisingly answered to say that the Deceased could still shoot in those circumstances of hot pursuit. Deceased insisted that the Deceased could still shoot him and he was capable of doing so in those circumstances. As I observed the Accused was shifty and evasive. I did not see that his evidence had had any ring of truth in it. It was riddled with improbabilities when regard was had to the very convincing and impressive account of PW 2. I have already commented about the real impression about distance which the Court discovered after the inspection-in-loco. Accused's story warranted total rejection by the Court as being false beyond a reasonable doubt.

The burden is on the Crown to prove every element of the crime beyond a reasonable doubt as opposed civil standard of proof on a balances of probabilities. See **Miller v Minister of Prisons** 1947(2) ALL ER 372 at 373. In all criminal cases it is for the Crown to establish guilt of the accused not for the accused to establish his innocence. The onus is on the Crown to prove all necessary elements to establish guilt. See **R v Ndlovu** 1945 AD 386-7. I agreed that "where self defence is raised the Crown must negative this beyond a reasonable doubt. The Crown does not discharge this onus if the version of the accused though improbable might reasonably be true." See **Lehoqo v R** 1981 LLR 163.

I now turn to Counsel's submissions. Miss Makoko spoke about the three essential elements of crime murder which were as follows: First, unlawfulness. Second, intention to kill. And lastly, death of a person. She said in regard to the

first element that in order to establish whether the killing was justifiable the accused had to show, in the particular circumstances of this case, that he was acting in self defence. He has to show that life was in danger. In that the Deceased posed some imminent threat to his life.

Following on the question of danger the life or threat the evidence of PW 2 and PW 3 showed that the Accused was chasing the Deceased who was holding a gun while the Accused had an unclasped knife. PW 2 further told the Court that she tried to disarm the Deceased but she could not. Then the Accused stabbed the Deceased with the knife. Then as the Crown submitted there was no reason for any inference to be drawn towards a defence self defence succeeding in favour of the Accused.

Crown Counsel admitted that the Crown witnesses evidence did have some contradiction with respect to the distances of the chasing. All witnesses put up different distances. That this was understandable in that they had not compared notes or put their heads together. The Crown wished to submit that the Court should note that some considerable chasing nevertheless did occur and the absence of agreement might be owed to the fact that the case occurred some time ago. I observed even by Accused's own pointing the stabbing occurred at about six paces from where he said they had originally been. The significance of all the distances was that they all showed that there was in fact a chasing. I agreed with respect.

Mrs Makoko further stated that in order for the defence of self-defence to be raised successfully it should be shown that the Deceased had the power to carry out the threat immediately. If the Deceased had intended to kill the Accused he could have killed him. And that there was nothing which barred him from shooting at the Deceased. It depended not on whether the gun had bullets or magazine in it.

An attempt to shoot should have been demonstrated. I observed in any event that that the Deceased made no tangible attempt to shoot at the Accused.

The Crown wanted an inference to be drawn from the fact that Deceased ran away because he did not intend to shoot the Accused and that his statement that he would shoot the Accused amounted in the circumstances to fighting him in the quest for possession of the gun. So that the Accused should have foreseen that the Deceased posed no threat tho his life. I thought this inference was most reasonable and irresistible judging from the running away by the Deceased and at least from the fact that he sought take refuge at the police group.

Finally on this point, if not by way of repetition, it is to say that the attempt by the Deceased to seek refuge from the police was a sign that the Deceased posed no threat against the Accused. The Accused might as well have reported the matter to the police. It was submitted that the Accused deliberately and unlawfully killed the Deceased. An answer is given to this later in the judgment.

Next was the submission that the Accused killed the Deceased intentionally. In that regard reference was made to **R v Huebsch** 1953 (2) SA 561(AD) where it was held that:

> "The intention to kill I snot restricted to a positive wish to bring about death of the person attacked. If one person commits an act upon another, knowing that this act is likely to cause death but is reckless whether death results or not he is held in law to intend to kill."

That furthermore as was submitted intention to kill could be inferred on the part of the body where injury was inflicted. In the present case injury was inflicted on the left side of the chest which was a vital part of the body inasmuch the heart is situated in that area of the body. I agreed with respect. Finally on the elements of

murder that the evidence before Court showed that the Deceased died due to a stab wound. That Accused had caused the fatal wound was undeniable.

Besides the issue of the distances which was raised by the Accused the following was submitted. That Accused's Counsel had when cross-examining the Crown witnesses, put it to them that the Accused had killed because he was extremely angry. That he was angered by the Deceased who had hit him and kicked him causing to fall down. But later on in the defence Counsel for the Accused raised the defence of self-defence. I will make further comments about the first defence later in the judgment.

It was submitted by the Crown that the Accused had killed the Deceased for no good reason. That he had not been acting in self-defence. Deceased was being disarmed by PW 2 having run towards the police officers. This Deceased had been doing nothing except to run to PW 2 and fellow officers with an obvious intention to take refuge. It was then that he was stabbed. He had not posed any danger inasmuch as he was not at any stage in the chase pointing the gun at the Accused. He ran away even though he carried a more lethal weapon than that of the Accused. The Crown finally submitted that it had proved its case beyond a reasonable doubt.

In reply Mr. Nchela started off in promoting the defence of self-defence in his client's case that in **R v Atwood** 1946 AD 331 at 340 Watermeyer CJ had enunciated the principles of the defence by saying:

(a) that the accused was to show that he had been unlawfully attacked and had reasonable ground for thinking that he was in danger of death and serious injury (although there may be cases of lawful self-defence where the accused was the original aggressor). See **R v**

Ndara 1954(1) SA 182 (AD) at 184E.

(b) *that the means of self-defence were not excessive in relation to the* danger.

(c) that the means he used were the only or least dangerous means whereby he could have avoided the danger.

Next, Counsel contented that the Accused did not in the circumstances have any choice or alternative in that he had to do what he did because he had no other choice. In that regard Counsel referred to a case which he regarded as the mainstay of our criminal law where self-defence is raised namely **The Minister of Railways and Harbours v Dunn** 1914 AD 273 at 386 where Innes JA is reported to have said:

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

I was also referred **R v Moeti Mohale** CRI/T/45/94.

Then followed the aspect of a "well grounded apprehension of death or serious injury". In that regard the Counsel referred to the words of Lehohla J at page 4 of **R v Moeti Mohale** (supra) where the learned judge had the following to say:

> "The question is not whether what ultimately was found to be frightening him was a harmless stick wielded by or sozzled out on drunk man where because of his drunkenness could never really pose any danger. The test is whether the accused was sufficiently apprehensive of danger that is befalling him". (Counsel's emphasis)

I would comment that the difficulty would be as a matter of fact no threat to the Accused was observable. Anyway reference was also made to **R v Hele** 1947(1) SA 272 at 276.

Counsel quoted from **R v Masupha Seeiso** CRI/T /92 at p.41-2 in his comment about the existence or the effect of contradictions and conflicts in the Crown witnesses' testimony. In that case Lehohla J is said to have stated that:

> "Another point which becomes even more inexcusable as a sign that the witnesses have concocted their story was when they testified alike or something that is not real or true, such as was the case in the matter of CRI/T/3/86, **R v Mafole Sematlane** (unreported). Regrettably this court has had about surfeit of that kind of diet in this instant case."

I have observed that indeed there were contradictions in the Crown's testimony. For instance on the question of the distance over which the chasing occurred. In addition PW 1 did not make reference to other officers. I remarked that on inspection-in-loco PW 2 could have exaggerated the distances. These conflicts and contradictions have to be material. In my view there were none.

I agreed with defence Counsel that no onus rested on the accused to convince the Court of the truth of any explanation which he gives. If he gives an explanation even if the explanation is improbable, the Court is not entitled to convict unless is satisfied not only beyond a reasonable doubt that it is false. If there is any reasonable possibility that of his explanation being true he is entitled to an acquittal. See **R v Difford** 1937 AD 370 at 376 per Greenberg J. I would observe that it makes for an explanation that stood to be tested and not made for the mere showing. In the present case the Accused gave two explanations. He abandoned the first over which Crown witnesses were tested. As was observed he later changed to the story of self-defence. In regard to Counsel's proposition he had also brought

forward the authority of **R v M** 1946 AD 2023 at 1027 where Davis AJA had said:

> "The Court does not have to believe his story less still does it have to believe all its details, it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true." (Counsel's emphasis)

I was however mindful of the care needed in matter of putting the defence case to the Crown witnesses where Rooney J said in **Rex v 'Mota Phaloane** 1980(2) LLR 260 that it was important for the defence to put its case to the prosecution witnesses to see and hear the witness's reaction:

> "But failure to put his defence does not always imply acceptance of the evidence of the Crown. The evidence for the defence is entitled to the same careful consideration as if the elements of the defence case had been put to the witness for the Crown."

Indeed this remains to suggest that the accused's story must still be tested on its own probability and/or on the opposite that is of its falsity beyond a reasonable doubt on all the elements of his defence as if they have been put to the Crown.

Defence Counsel submitted that the Accused ought to be acquitted on his version as being reasonably possibly true which fact was borne out by evidence which even comes from PW 4. This became difficult to understand in my view when regard was had to the fact that PW 4 corroborates other Crown witnesses on these important aspects as to that there was a chasing and that the stabbing was done at the place where the police group was stationed. In any event the Accused did not elaborate as to how PW 4's version coincided with his.

The Defence said if the Court does not believe Accused's version, since there were conflicting stories from the Crown on some important stages or incidents in the evidence and that the safest way would be to reject both as false. Otherwise spinning the coin to decide which version to accept would be as precarious as

relying on guesswork. In this case the Accused ought be given benefit of doubt. It was interesting as how the conflicts and contradictions in the Crown witnesses were detailed and how they were said to be material in some respects aspects. I thought they all went back to what is natural. That witnesses who have not been schooled will differ in some minor aspects. Indeed they cannot recall events or express observations in a similar way. Those alleged contradictions were as follows: First, PW 1 stated that PW 2, PW 3 and Lehloenya arrived after him whereas they say they were at the scene of the crime. Where PW 1 met the deceased and the Accused was at the shopping complex quite after the event. Incidentally it was not suggested to PW 1 that other officers were absent or he himself was absent.

Secondly, that there was no consistency about the chasing. PW 1 said after stabbing the deceased was chased for 40 paced. PW 4 said they were walking. PW 2 said prior to the stabbing, the accused chased the deceased for a distance of 40 paces. PW 4 said they were walking. PW 2 said prior to the stabbing, the accused chased the deceased for a distance of 150 paces and 20 paces. PW 3 stated that the chasing had to be roughly 23 paces. PW 4 estimated to be 20 paces. I accepted that the inspection-in-loco confirmed some of the discrepancies and their lack of agreement. There could have been a doubt as after the stabbing as to what the Accused and the Deceased did i.e. walking slowly or briskly or even the chasing that one witness spoke about. But the formidable evidence of PW 2 convinced so well about the events immediately before the stabbing. This was where the real issue was. Not each and every detail. That would make proof of evidence so difficult, fanciful and unreal if it was sought that witnesses must agree on every detail.

That furthermore that there was also "inconsistably about the position of the three witnesses namely PW 2, PW 3 and PW 4 were standing when the stabbing occurred. PW 2 said they were standing at the passage PW 3 said they were next

to Free State Butchery PW 4 states that he was behind the Deceased when the Deceased was stabbed. PW 2 also claimed to have been there. PW 2 was 10 paces away where she was seen making a radio message. My comment is as follows: PW 2 had said she and another officer had moved to a point further from the passage. PW 3 said they were at the bus stop next to Free State Butchery. This does not mean that they were at the Free State Butchery. Indeed PW 4 stated that he was behind the deceased. This issue could have been explored better. It is because at the PE the impression given by PW 4 was that things happened where the group had originally been. That is why he said "police emerged". I never doubted that PW 2 was at the scene. She said she only moved away from the group after the event to make a radio message. That is why she could have been 10 paces away.

Another inconsistency is this obvious inconsequential inconsistency. It was about what was said at the scene of the crime. PW 4 is said to have said that Deceased said : "Mosekeseke why are you stabbing me?" Indeed why should this be important when Accused does not deny the stabbing.

Defence spoke about another alleged inconsistency. It was about how the fight started and what happened thereafter prior to the stabbing. It was suggested that PW 2 said there was a group of boys struggling which group were reprimanded by Lekatsa and none of whom chased each other. That Lekatsa talked about two people involved PW 4 said the people who were reprimanded was him and the Deceased. Whereas PW 2 and PW 3 said it was accused and deceased. There might as well have been conflict as to who originally were involved or were reprimanded. To me the most important thing was that the episode ended by involving Deceased and Accused and it is where the whole thing or matter of the case is about. I did not see how witnesses who may have been positioned differently or observed the scene from different movements or angles would agree on any

aspect.

I repeat that it would be unusual in a trial involving PE deposition police statement and testimony before a trial Court there would not be discrepancies. More often than not a witness will when confronted with his prior statement at a PE or the absence of such a statement place the blame on a magistrate or mistake in recording. While this could mean shiftiness , trickiness or evasiveness. This will always need to be demonstrated. It could not always be a fabrication. It could definitely be that the scenario in **R v Masupha Seeiso** (supra) was as has been explained in the quotation therefrom as stated earlier in this judgment. But that definitely was not the situation here.

Defence Counsel finally submitted that as the offence was committed on the spur of the moment and therefore without any premeditation and therefore a verdict of Culpable Homicide should be returned. And he then cited **Molatoli Tsibela v Rex** 1991-1996 LLR 1663 which this Court had no trouble in accepting as valid in the circumstances of this case. I found that as between the stage when the Accused was beaten, kicked and fell he was in blind rage which could have persisted up until that stage when he did the stabbing. Despite that this as defence was virtually abandoned later. I could only recognize and note that it was borne out by the real events. It had been considerable provocation to the Accused. He could not have had any premeditation. As these elements of the defence had been put to the witnesses for the Crown I found specifically proved that. That was the state of mind of the Accused. He could not have intended to kill the Deceased. He acted on spur of the moment. My Assessors agreed.

As I concluded it could not have been more than two minutes as from the time of the assault and the stabbing. I could not doubt that the facts amply

supported a finding abased on considerable provocation and blind rage inasmuch as one witness observed that the Accused was uncontrollable. I was satisfied that I ought to apply the provision of section 3 and 4 of the Criminal Law (Homicide Amendment) Proclamation 1959 and thus return a verdict of guilty of Culpable Homicide. And following on the case **Molatoli Tsibela v Rex** (supra) this seemed to be a proper verdict. I so ordered.

T. Monapathi
Judge

For Crown : Miss L Makoko

For Defence : Mr T Mokatse and Mr L Nchela