

**IN THE HIGH COURT OF LESOTHO**

In the Matter Between:

REX

vs

TSIETSI MOCHOTOANE

**Judgment**

**Delivered by the Honourable Mrs Justice A.M. Hlajoane on 12<sup>th</sup> November, 2002.**

The Accused in this case appeared before me charged summarily of the murder of one Bonakele Mxele, it being alleged that on or about the 29<sup>th</sup> September, 1998 at or near Van Rooyen's gate in Mafeteng he unlawfully and intentionally stabbed the deceased with a knife causing his death.

When the charge was put to him, the accused tendered a plea of not guilty and his legal representative, Mr Makholela showed the plea was in accordance with his instructions. The plea of not guilty was accordingly entered.

In support of the Crown case, Ms Ntene for the Prosecution led evidence of four crown witnesses, and the post-mortem report was admitted by consent of both parties and therefore read into the machine in terms of section 223 (5) of the Criminal Procedure and Evidence Act 7 of 1981. The defence called two witnesses, and the accused himself went into the witness box and gave evidence as the first defence witness.

The first crown witness P.W.1 Sera Oriel Adoro testified to the effect that, he knew the accused well as they came from the same village. He also knew the deceased well as his friend working in South Africa, Wepener, as a Policeman. It was P.W.1's evidence that, on the day in question, the 29<sup>th</sup> September, 1998 he had been drinking beer at one Tseli's place. He was in the company of one Makhabane, the deceased and Sheila Mochotoane, who is related to the accused.

The evidence went further to show that he knew that Sheila Mochotoane and the deceased were lovers. It was at about 7 p.m. when P.W.1 and Makhabane left for the later's place to collect more beer, leaving Sheila and the deceased behind. On their way they met the accused, who asked about the deceased and showed that deceased had no respect for him and therefore wanted to kill him (deceased) that same day. Accused explained the reason for his wanting to kill the deceased as that, deceased was freely visiting his (accused) home to go and visit Sheila.

P.W.1 said he tried to discourage the deceased from going on with his plan and thought he had finally won his trust as the deceased even handed over his knife to him

which he showed was the one he was intending to use. The knife was what the witness called a rumbo knife. The reason for handing over the knife could have been that P.W.1 showed he had promised the accused that he (P.W.1) was going to talk to the deceased to stop going to Sheila.

It was only when there was a noise coming from direction of Frasers shop that accused snatched the knife from the witness and rushed to where the noise was heard. P.W.1 showed he had been from Frasers shop which was at the time 4 metres away (estimated).

The witness showed he followed the accused immediately only to notice when he got there that the accused was holding the deceased and heard deceased ask as to what accused wanted from him. The reply from accused was that he wanted to show the deceased that he had no respect. The witness said, at that time one Sheila was the one who was next to the deceased. The witness tried to intervene by asking accused to release the deceased but instead accused stabbed the deceased on the left hand side with his knife. The witness showed the accused stabbed for the second time using these words, "Are you not yet dead." He stabbed him still on the left side. Deceased was said to have screamed, walked for some two to three paces and fell down.

It was P.W.1's evidence that the accused after this ran away. A Police officer by the name of Rankhelepe came and after looking at the deceased left to report. Police came and removed the body. According to the witness when the stabbing took place one Makhabane was not there but still coming from behind. From this witness it came out that the deceased had nothing in his hands. In his testimony the witness

also showed that the accused as he knew him was not drunk, but that the deceased was moderately drunk. The witness concluded by identifying the knife which was before Court as the one the accused used in the stabbing of the deceased.

Under cross examination the witness explained that they had started drinking from around past four in the afternoon until around 9.00 p.m., but that there had been intervals as they would run out of cash to pay for more beer. This witness was aware that during that time accused's grandmother had passed away and that funeral arrangements might have been in progress.

I must mention here that it would seem P.W.1 told the truth when he said he took the knife from the accused because under cross examination accused himself showed that in fact the witness deliberately handed back to him his (accused) knife as he (P.W.1) was going home. When asked about the deceased being seen whilst putting his hand on his waist, the witness showed that he never saw such a thing neither did he see a gun in the possession of the deceased. When asked as to how far he was when he witnessed the stabbing, the witness showed that he was about two paces away. His cross-examination also revealed that the deceased was on that day *question putting on a T shirt (skipper).*

The cross examination to this witness revealed that the accused was pleading provocation, emanating from the fact that he was annoyed. Accused did not approve of the relationship of the deceased and his sister who later became P.W.2 in this trial. Deceased and that witness were so to speak living as man and wife and were sleeping at Accused's place, and this behaviour, the accused could no longer contain as funeral

arrangements for his (accused's) grandmother were in progress.

The Crown had called Sheila Mochotoane as Prosecution witness 2. This female Mosotho adult, after being duly sworn in stated that the deceased in this case was her lover, whilst the accused was his brother, their mothers being sisters. The witness told the Court that on the day in question she talked to one 'Maitumeleng her aunt's wife and their conversation resulted in her (witness) asking 'Maitumeleng to call the deceased for her from a sheeben.

According to P.W.2, the deceased was called and he came in the company of P.W.1 and some two other gentlemen. The witness remained behind with her lover, the deceased, whilst the two gentlemen went ahead of them. The witness and her lover later followed P.W.1 and the group to a shebeen, but only found P.W.1 there. As they were there the other two gentlemen joined them with some beer which they wanted to exchange for cold beer. Having failed to get cold beer the two left and P.W.2 and deceased followed them. The witness showed they found the accused outside, but only went passed him, whilst P.W.1 remained behind with the accused.

The witness went further and told the Court that it was when they were near Frasers shop when she saw someone coming towards them running, and said the person was holding a knife. As the person came closer to them she could identify him as the accused. She said they tried to run away with the deceased but both fell. The evidence went further to show that the accused then caught hold of the deceased's hand whilst the other hand held the knife. The accused was then heard saying he was going to stab the deceased till he expelled faeces from his body, but deceased asked

the accused as to what he needed from him. In response the evidence shows that the accused repeated his words of stabbing the deceased.

The witness went further and told the Court that she ran away shouting for help, and on her way met P.W.1 whom she asked to go and stop the accused and the deceased as accused wanted to stab the deceased. According to the witness the accused and the deceased were still in friendly terms prior to this. She said she later went back to the accused and the deceased and when she got there she saw accused's hand striking the deceased. She witnessed this when she was some paces away, estimated at 20 paces. The evidence showed that there was moon light and could again see the accused stabbing the deceased with a knife after remarking that the deceased was still alive. The witness showed she witnessed the second stabbing on the left side as she was then nearer to them. She saw deceased walk for some three paces and fell down. The accused then ran away.

In describing the deceased's attire on that day, the witness showed that he was dressed in a long pair of trousers and a shirt which was tugged in. According to this witness the deceased was not armed.

The witness and P.W.1 remained there and later one Makhabane came and they explained to him all what had happened, and they also pointed out to him the deceased on the ground. The accused had prior to that day never asked P.W.2 about her relationship with the deceased.

Under cross examination P.W.2 also confirmed that her grand-mother had passed away and that funeral arrangements were under way. She did not dispute that she was sleeping with the deceased at her home even when funeral arrangements were in progress. She denied that the accused had asked P.W.1 to go and talk to the deceased to stop sleeping at P.W.2's place. This could be true because according to P.W.1's evidence he had promised to go and talk to the deceased on the very day that the deceased met his death, so that he did not have that chance to talk to the deceased but was overtaken by events.

The cross examination also revealed that in fact the accused was going to show that he acted under provocation. He was provoked by the behaviour of the witness, P.W.2 of sleeping with her boy friend at her home even before the burial of their grand-mother. This witness under cross examination also showed that he did not see the accused and the deceased struggling for deceased's gun. The cross examination also revealed that the deceased was in fact a South African Police stationed at Wepener.

When asked if the deceased was in the habit of telling her when he had his gun, the witness replied in the positive and showed further that the deceased used to have his gun when they were staying together in Wepener but that during the period under review he did not have his gun as it had been taken away from him by his authorities.

It is important at this stage to mention that P.W.2 in her evidence in chief had stated that when he saw the accused holding the deceased on one hand and having his knife in the other, she ran away. She had met P.W.1 on the way and asked him for

help. But P.W.1 in his evidence never mentioned that he met P.W.2 when he had followed the accused to where they meet with the deceased. What is common between the two witnesses is that they both saw the accused stab the deceased with a knife as they were there where the stabbing took place. They both also told the Court that the deceased was not armed.

P.W.3 D/Tpr Kibiti in his evidence told the Court that he had been in Police Service for 12 years. After receiving a report on the 29<sup>th</sup> September, 1998 he proceeded to the scene where he found the deceased lying prostrate on the ground. According to him the time was around 7 to 8 p.m. and deceased was already dead. The dead body was taken away by other Police Officers to the Police Station. He went to look for the accused at his place but did not find him but left the message that he should go and report at the charge office at Van Rooyens. Indeed the accused did report to him the following day in the morning. After the necessary caution and warning the accused had given his explanation which did not satisfy the witness. The explanation being that accused killed the deceased because he (deceased) was in-love with accused's sister, P.W.2.

The witness showed he was amazed to hear that the accused killed the deceased out of jealousy as he (P.W.3) had been seeing the deceased staying at P.W.2's place always without any objection from the accused. Deceased had been seen sleeping there most of the time.

Under cross examination the witness explained that he observed the wounds on the dead body. In describing the wounds he said he saw one wound which went



straight to the heart, and the other wound which he described as a scratch on the left side of the ribs. The witness showed as they normally do he had searched the deceased when he entered into Lesotho some days before he met his death. He had been visiting P.W.2 as usual. He further explained that Police from South Africa never cross over to Lesotho with their guns, and that each time they enter they are searched.

The cross examination to this witness still emphasized the point that the accused was provoked by the behaviour of the deceased of sleeping with P.W.2 at her place even when the family was making funeral arrangements. At the same time the accused says he felt provoked when deceased grabbed him by his clothes and putting his hand on his waist and producing a gun. Accused showed they struggled over the gun and as he felt threatened, he took out his knife and stabbed the deceased with it in self defence. The witness also showed that the deceased was putting on a shirt.

The last witness for the crown was P.W.4 D/Tpr Latsi, who told the Court that accused reported at his place of work on the 30<sup>th</sup> September 1998 at Van Rooyens Police Post. He handed over to him a knife with which he explained had stabbed the deceased. The witness showed the knife before Court and handed it in as an exhibit.

cross examination the witness denied that the accused in the explanation that he gave him, indicated that he acted in self-defence.

The post-mortem report which was admitted by the defence was in terms of section 223 (5) of the C. P & E Act 7 of 1981 read into the machine as part of the evidence in this case. The report showed that death was due to haemorrhagic shock

resulting from stab wound on the chest. The wound penetrated both the lung and the heart. There were also bruises on the mandible.

At the close of the Crown case the defence applied for the discharge of the accused relying on the provisions of section 175 (3) of C.P &E Act. The Court ruled that there was a case for the accused to answer, and dismissed the application for the discharge. Without at this stage going into the question of credibility of the Crown evidence, there had been evidence of two Crown witnesses who saw the accused stabbing the deceased with a knife. Such evidence did establish a prima facie case for the accused to answer, **R v Nsabimana Shabani & Others 1991-92 LLR 55.**

The accused then went into the witness box and gave evidence. In his evidence he showed that he knew the deceased well and was also aware that the deceased and his sister P.W.2, were in love. He was also aware that the deceased was sleeping at P.W.2's place always, but showed he was not against that.

His evidence went further to show that it was only when the funeral arrangements of his grandmother were underway that he felt annoyed to see deceased still sleeping with P.W.2 at his (accused's) grandmother's place. According to his evidence, he even approached P.W.2 and his lover, the deceased and told them to desist from sleeping at P.W.2's place, and he showed they were agreed.

On the afternoon of the same day the accused met P.W.1, whom he considered as deceased's friend and asked him to talk to his (P.W.1's) friend that he (deceased) should stop sleeping at his place again. P.W.1 promised to convey the message.

P.W.1 and the accused went together to accused's home. At accused's home the accused asked P.W.1 to go to another room and get his knife that was being used there whilst he was talking to some members of his family.

According to the accused, they both later left accused's place with P.W.1 for some drinks. Accused took the knife from P.W.1 as he (accused) was going home and P.W.1 voluntarily gave the knife back. Accused showed that he was now with his neighbour Mphethe, who later became D.W.2 in this proceedings, when she saw P.W.2 and the deceased. Accused had approached them with the intention of going to ask them if they were still going to sleep at his place. He said as he approached them P.W.2 ran away.

It would seem that P.W.1 had not had the occasion of conveying accused's message of telling both the deceased and P.W.2 to stop sleeping at accused's place. It will also be remembered that the accused had himself shown that he had talked to both the deceased and P.W.2 and showed that they were agreed that they were not going to sleep there again, but when he saw them together same day he was again going to tell them the same story. Accused's evidence showed that to get to his home he had to pass near Frasers shop which is the place where the fight took place. Accused went further and showed that his place is not far from Frasers shop.

It is worth mentioning that when accused refers to his home he must be understood to mean the place where P.W.2 stayed but where both P.W.2 and accused grew up together, their grandmother's place. The accused had his own home where he stayed different from where P.W.2 stayed. The funeral arrangements were

therefore being done at P.W.2's place which is the accused's grandmother's place.

Accused showed that as he approached the deceased and P.W.2, P.W.2 ran away even before the accused could utter a word to them. Accused showed that he concluded that the deceased and P.W.2 were going to his home to sleep there. He had earlier on under cross examination been asked whether the scene of crime was at Frasers and had shown it was. Further under cross examination when asked if he considered it to have been reasonable for P.W.2 to just run away without him having said anything to her, he then changed and said P.W.2 ran away after he had posed a question of whether they were still going to put up with the deceased at his place.

It will be remembered that P.W.2 in her evidence showed that she ran away together with the deceased as they saw the accused running towards them with a knife in his hand. She is supported in that evidence by P.W.1 who said accused snatched the knife from him and ran towards Frasers shop where the noise came from. The evidence of the two crown witnesses sounds to be more probable than that of the accused in this respect. To be remembered also is the evidence of both those two crown witnesses, P.W.1 and 2 when they showed that they heard accused make death threats against the deceased, his reason being that deceased had no respect for him as he (deceased) slept at accused's place even when they were making funeral arrangements.

It came from the accused that he had himself talked to both the deceased and P.W.2 to stop sleeping at his place on that very same day. The accused did not even wait to see if in fact P.W.2 and the deceased were actually going to sleep at his place

even after the warning, bearing in mind the fact that accused himself showed that his place was near Frasers shop. On the other hand P.W.2 explained that in fact they were not going to sleep there (accused's place) as they had been warned, but were going to one Tlokotsi's place. She showed that the path leading to Tlokotsi's was near to her home and this the accused did not dispute.

Accused showed that as he asked both the deceased and P.W.2 whether they were still going to sleep at this place, the deceased's reply was that the place did not belong to the accused. As he was saying these he caught the accused by his clothes and even threatened to shoot him. Accused said he saw the deceased put his hand in his pocket, but he (accused) got hold of that hand. According to the accused, the deceased must have taken out his gun from his pocket, because the accused then said, they both fought over the gun until they both fell to the ground. It was when they both stood up that the accused then produced a knife which he then stabbed the deceased with it. Accused showed he stabbed the deceased in self defence as the deceased had threatened to shoot him. He inflicted only one wound between the chest and the stomach. This of course was confirmed by the post mortem report which showed a deep laceration on the chest which went straight to the lung and the heart.

Under cross examination, the accused was asked as to what happened to the gun which the deceased had during the struggle and he said that deceased still had it in his hand even as he fell down after the stabbing. Looking at this piece of evidence and the other evidence where we have been told that the deceased was a south African Police Officer an explanation would have to be given or a reason that might have prevented him from using his gun. The accused has told this Court that as he

produced his knife to stab the deceased, the deceased himself still had his gun in his hand. Unlike in stabbing a person, to shoot at someone would not require a person to be in close contact with his victim. If the deceased had his gun in hand we have not been told the reason that might have stood on his way to prevent him from using the gun. He had the gun in his hand but waited for the accused to take out the knife, draw it and then stabbed.

To the observation that it looked like the deceased did not overpower the accused, the answer from the accused was in the positive. The accused has pleaded both self defence and provocation. But it would seem that on the evidence before this Court, the accused was the one who started the fight. The Court has already shown that the only reasonable inference to be drawn from the behaviour of P.W.2, running away as she saw the accused running towards them was because she saw the knife in his hand. Same way that the accused might have seen the gun in the dark P.W.1 must have seen the knife shining through the help of the moonlight as we were told there was moonlight on that fateful evening.

Accused has shown that there were the only three of them at the scene when he stabbed the deceased, being himself, the deceased and one Mphethe who was his neighbour. He said P.W.2 was no longer there as she had run away, and that P.W.1 arrived after the stabbing, but added that unless P.W.1 had been hiding. But accused himself showed that he left the scene immediately after the stabbing thus making it possible that P.W.1 might have been already there when the stabbing took place but because the accused was absorbed in their struggle with the deceased, only noticed him after the deceased had fallen.

It will be remembered that the accused in cross examination to P.W.1 had shown that P.W.1 had deliberately handed over to him the knife. But in his evidence in chief, the accused told the Court that he asked for his knife from the witness, P.W.1, as he (accused) was then going home. I have already shown that the accused had given two different versions as regards the reason why P.W.2 ran away as he (accused) approached them. First accused had said P.W.2 only ran away even before he had said anything to them, but when asked whether there was any sense in saying P.W.2 ran just like that, he changed and said it was after posing a question to them. This was a clear indication that accused was not telling the truth. The explanation by D.W.2 has been the most probable and reasonable.

The accused called D.W.2 Mphethe in support of his evidence. His evidence in a nutshell had been that he had been at the scene of crime when the stabbing took place. Like the accused, he also told the Court that there were only the three of them at the scene when accused stabbed the deceased, being the accused, the deceased and himself. He also witnessed only one stab wound being inflicted on the deceased. D.W.2 knew both the accused, deceased and P.W.1 though P.W.1 in his evidence had shown that he did not know D.W.2. In his evidence he indicated that he knew P.W.1 very well as he (P.W.1) was the one who raised him up. D.W.2 and the accused were neighbours.

As was said by the accused this witness also showed they met the deceased and P.W.2 on their way home and that P.W.2 ran away as they were being asked if they were going to sleep at the place where they had been warned not to sleep at. He showed the deceased replied and showed they would sleep there as accused had his

own home somewhere. He said then the deceased caught the accused by his clothes and showed he would shoot him. It was at this stage that the witness saw the deceased put his hand on his waist and produced a gun. They both struggled over the gun till when they fell down, and when they rose up the accused then stabbed the deceased once with a knife.

The witness did not say where the knife came from which the accused used to stab the deceased. He only showed that the stabbing was after struggling over the gun but did not also mention where the gun was as the deceased was stabbed. The witness had not seen P.W.2 but had only noticed her run away. He did not observe if P.W.2 had come to the scene. He only saw P.W.1 arrive after the stabbing. As P.W.1 arrived the witness, D.W.2 left the scene for his home and did not report the incident to anybody, not even the chief. He was called by the Police to go and give his statement, but showed that he was expelled by the police as they said his explanation was the same as that of his friend. The police never recorded his statement. The witness indicated that he had seen the deceased's gun and according to him the accused acted in self defence.

Under cross examination the witness showed that the deceased was putting on a shirt on the day in question which was not tugged. The events according to him took place just after sun set. The witness explained that he had said P.W.1 had had a hand in his growing up because though they were not staying together, he used to be with him most of the time.

The witness only said P.W.2 ran away but did not say how far she went. He



could not be sure whether P.W.2 could see them from where she was. The witness had left the scene immediately after P.W.1 had arrived but showed they never exchanged any words before he left for his home. P.W.1 being the person who according to D.W.2 been responsible in his (D.W.2) growing up. Someone had been stabbed and was lying on the ground, and D.W.2 wanted the Court to believe that he just left without even giving a report or explanation of what had happened to P.W.1, his friend, who according to him, had only just come to the scene. P.W.1 also did not ask D.W.2 to explain as to what had happened more so because the accused had already left and D.W.2 was the only one remaining there.

D.W.2 would have been considered to be the suspect if at all P.W.1 had not seen what had happened, but he (D.W.2) was only called to go and give his statement to the Police which statement according to him was never even reduced to writing and never used in evidence. There can only be one answer to this, that D.W.2 was never at the scene of crime as none of the crown witnesses ever saw him there. He had, it would seem, only been called by the accused to say what the accused had told him to come and say for his defence. D.W.2 never even volunteered to explain to the witness P.W.1 when the latter failed to ask. D.W.2 wanted the Court to believe that he had been at the scene and saw what happened but failed to even assist the deceased after the stabbing. He only left him there in the hands of people who did not know what had happened. His story if he were to be believed fell far short of what a reasonable man could have done under the circumstances.

The gun with the deceased had only been seen by the accused and D.W.2. None of the crown witnesses saw it. Even besides, the deceased according to P.W.3 had

been searched as he entered the country and no gun was found in his possession. In his evidence P.W.3 showed that he had personally searched the deceased prior to his entering the country some few days prior to the incident. His evidence further revealed that South African Police reported themselves to the Police Post in Lesotho once they enter the country for them to be searched and leave their guns there. His evidence corroborated that of P.W.2 who said that accused had no gun with him as authorities had taken his gun away from him. Accused said the deceased took out the gun from his pocket, whilst D.W.2 said he took it from his waist. Because he had been taught what to come and say, D.W.2 has given on this point a version different from that of the accused.

As it were, D.W.2 wanted the Court to believe his story that he in fact saw P.W.2 running away as he was only three paces away from the scene as he came following the accused. He nonetheless purported also to say that P.W.2 could not have seen him. It was the crown's submission that in fact D.W.2 was never there at the scene and the Court was inclined to agree with that, since both P.W.1 and 2 who were at the scene did not see D.W.2. D.W.2 even showed that P.W.1 and 2 had no reason to implicate the accused or deny that he (D.W.2) was not there when in fact he was there.

The defence submitted that the accused had been provoked, first by deceased's behaviour of having no respect for him by continuing to sleep at his (accused's) place even when funeral arrangements were underway. Here the Court also considered that it was an unacceptable behaviour for a girl of P.W.2's age, 23 years in 1998, to be freely sleeping with men at the her place, worse even when there was death in the

family. This must have provoked the accused as according to P.W.2, they had fallen in love with deceased since 1996 and had always been sleeping at that place ever since. But for this defence of provocation to succeed in reducing the accused's blame worthiness the act must have been caused by sudden provocation, **Tsibela v R 1995 - 96 LLR and LB 140 and R v Pitso 1982 - 84 LLR 230.**

The other reason for feeling provoked was when deceased strangled the accused by his clothes and threatening to kill him. Here the Court has already shown its attitude basing itself on the reasonable inferences, that P.W.2 could not just have ■ in away without accused having done or said anything to her. P.W.2 said she saw accused running towards them holding a knife in his hand. Evidence by P.W.1 and P.W.2 has been to the effect that the accused had prior to that day made death threats to kill the deceased with a knife, and when she saw accused with a knife she had to flee for her life.

The accused also pleaded self defence because he showed that it was the deceased who first grabbed him by his clothes. P.W.1 on the other hand had given evidence to show that when he had followed the accused to Frasers shop he found the ■ used holding the deceased by his clothes. He also heard deceased say "you man, what do you want from me" and accused replied, "I want to show you that you have no respect towards me". That was when P.W.1 asked the accused to let go of the deceased.

P.W.1 was corroborated in that respect by P.W.2 who also heard deceased ask the accused as to what he needed from him. P.W.2 also asked the accused to let go

of the deceased.

The accused could therefore not be heard to say he acted under self defence as he was the one who came rushing to the deceased with a knife already in his hand. There was a premeditation for his acts as he told both P.W.1 and P.W.2 that he wanted to kill the deceased with a knife and even repeated similar words as he stabbed the deceased. The Court in **R v Tlaitlai 1995 - 96 LLR & LB 140** showed that, "where a person stabs another with a sharp instrument and foresees that death would result from such conduct but acting reckless of such result, such behaviour satisfies the element of legal intention to kill."

The accused has shown that the deceased was armed with a gun and threatened to shoot him with it, but the gun had only been seen by him (accused), as the Court had concluded that D.W.2 was never at the scene. Even the Police who visited the scene never found any gun near the deceased. Even the accused when giving his explanation to the Police never showed that the deceased had a gun. I have already shown that there had not been any reason advanced as to why the deceased could have become so stupified as to just be holding a gun in his hand without shooting, having been a police officer. In the absence of the gun therefore, there could never have been a stage where the accused could have felt his life threatened except that he already had the requisite intention to kill the deceased which he had been formulating some days before the incident.

Assuming the correctness of my finding, that when the accused so stabbed the deceased had the requisite intention to kill. In the result, I come to the conclusion that

the defence of self defence was not justifiable. I accordingly find the accused guilty of murder.

My Assessors agree with my finding.

### SENTENCE

I have already found the accused guilty of murder and I was addressed on Extenuation. The Court in making a determination of the existence or otherwise of extenuating circumstances is guided by section 296 (1) and (2) of the Criminal Procedure and Evidence Act 7 of 1981.

The Court was told that the accused being a young man of only 26 years in 1998 when the offence was committed, was a first offender. There was some element of provocation though, which the accused allowed to accumulate over a period of time. The behaviour of both P.W.2 and the deceased was not at all acceptable in the circumstances, which was the kind of behaviour the society frowned upon. We have been told that though he was not drunk the accused had been imbibing in intoxicating beverages on that day which may have effected his right judgment.

The accused showed remorse by voluntarily reporting to the Police on the following day and handing over the knife he had used. He has displayed to the Court that he wanted to see his case to finality as the case was never postponed due to his non attendance. Counsel was only told on Monday to come and note Judgment the

following day but the accused did not fail to attend despite the short notice. The Court has also considered all the other factors that were placed before it in considering the appropriate sentence to be imposed.

The Court was told further that there had been no bad blood between the accused and the deceased. Accused may have been overcome by his emotions. In passing sentence therefore, the Court if wisely advised should always allow room for flexibility because no two cases are absolutely identical and as such, punishment should not be imposed in *abstracto* but with specific reference to the convicted person.

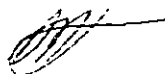
It was said in the case of **Thonga, 1993 (1) SACR 365**, that the punishment must firstly be reasonable. This means that it should reflect the degree of moral blame worthiness attaching to the offender, as well as the degree of the seriousness of the offence. What this ideally means is that, sentence must be in keeping with the particular offence and the specific offender. It is therefore necessary for the punishment to clearly reflect the balanced process of careful and objective consideration of all relevant facts, mitigation and aggravating. Consistency as far as humanly possible with previous sentences imposed on similar offenders committing similar offences must be reflected, lest society should believe that justice was not seen to be done.

In **S v Mantusse 1973 (3) S.A. 223** it was stated by Marai J that,  
"It is clearly the duty of the trial court to ascertain all the facts, whether the state or the accused present such or neglect to present such, which will place it in a position

to impose an appropriate sentence.”

Application of the provisions of Section 296 (1) and (2) of C P& E Act has taken care of the above concern. But killing a human being is considered to be a very serious offence.

Having therefore considered all the personal circumstances of the accused, I sentence you the accused to a term of eight (8) years imprisonment.



**A. M. HLAJOANE**  
**JUDGE**

For Crown : Ms Ntene

For Defence : Mr Makholela