

**CRI/T/13/92****IN THE HIGH COURT OF LESOTHO**

In the matter between:

**R E X**

v.

**SEHLOHO JOSEPH MAPHIRI****J U D G M E N T**

To be delivered by the Honourable Mr. Justice G.N. Mofolo  
on the 13th day of June, 1997.

The charge against accused is murder in that:

upon or about the 25th day of February, 1989 and  
at or near Ha 'Makhoroana in the district of Berea the  
said accused did unlawfully and intentionally kill and  
murder one Katiso Molete during his life time.

After the charge was read to the accused the accused had pleaded not guilty.

The Crown had then called P.W.1 War. Officer Lelala who was P.W.6 at the Preparatory Examination and duly sworn he had stated that he was a member of the Lesotho Mounted Police stationed at Mafeteng. He remembered February, 1989 when then he was stationed at Mapoteng. He knew accused before court. While he was at work at Mapoteng on 25 February, 1989 a Lt. Tseka had invited him to go to 'Makhoroana with him. At 'Makhoroana he had found accused surrounded by many people who were desirous of assaulting him in spite of the fact that he had already sustained injuries. He had then given an order for the accused to be taken to Maluti Hospital.

The witnesses further testified that one Steve Frank had given him the knife with an accompanying explanation. The knife was a long one and was kept in the exhibit room though, at present the storekeeper was on leave. He had taken the body to Maluti Hospital. The following day accused was discharged from the hospital and he had identified the knife as his and had given an explanation regarding the knife. Accused said he had stabbed the deceased with the knife. He had also taken a cap from Steve Frank - it was deceased's cap. When he took the deceased to hospital he had not been able to examine him and had done so the following day and he had found a wound on the left side of the breast. He had then transported the corpse to Teyateyaneng mortuary. From Maluti hospital to Teyateyaneng deceased had sustained no injuries. He had warned accused and given him a charge of murder. He had done so after accused was released from hospital. The knife and cap were exhibits at the preparatory examination.

Cross-examined by Mr. Lesuthu for the defence the witness testified after Steve Frank had given him the knife accused had acknowledged the knife as his and further went on to say it was the one he used on deceased. He says he did ask accused why he stabbed deceased and the reply was he did not know because he was drunk and the explanation had satisfied him. Put to him accused would deny this he says accused would be wrong to do so; accused would also be wrong to say the knife was not his.

According to his investigations the knife was not sent for finger prints because on a metallic object fingerprints are not detectable - he says the same goes for a table for fingerprints are not detectable thereon. While he would not deny one can see fingerprints with one's naked eye he had personally not seen them. He could not tell what had led to the fight. According to his investigations only accused was assaulted after stabbing deceased. These things had happened at the bus stop and he could not tell whether it was in a coaster. Accused was outside the coaster and he had not investigated whether he was a passenger in the coaster. He says he cannot deny *there was fighting in the coaster before the stabbing*. He could not deny that accused was a passenger in the coaster nor could he tell whether a group of people attacked the bus.

That accused was attacked because it was claimed he was conductor of the bus he also says he cannot tell. That these people were saying accused stabbed deceased because he was the conductor he says the reason he came on the scene was because accused had stabbed deceased and the reason for assaulting accused was because it was claimed accused had stabbed deceased. His investigations had

revealed accused had stabbed deceased without provocation. Frank had fled the country because he had many cases against him - they were criminal cases; robbery and murder. He had fled 2 years after the incident. According to his investigations Steve had not assaulted anybody. He had not heard of a person who had carried a pig-axe. The Steve he has been referring to is Steve Frank. He knew Simon Frank and all he knew about him was that he is a witness in this case. What he had told the court is what he knew as an investigating officer. There were other investigators but they did their own job.

The witness insists he meet accused the following day being the day gave he the explanation about the knife. He says the accused will not be telling the truth when he says they did not meet the following day. The witness denies that the accused was in hospital from by 25th February - 14 March, 1989 for the accused went to the hospital after he had given him an explanation.

He say he doesn't know whether when he saw him he had been released from hospital on 26 February, 1989 though he had sent the accused back to hospital because of the seriousness of his injuries. When the accused made the admissions to him he was in the condition he had described.

No re-examination and assessors not asking accused questions.

Mr. Lesuthu for the defence admitting evidence of P.W.1 and P.W.4 at the P.E. and the evidence was read into record. Mr. Lesuthu also admitting the post-mortem report and Medical report which were read into the record and marked Exh

“A”; accused’s medical report marked Exh. “B”.

The matter which started on 11th May, 1997 was postponed to 26 - 27th May, 1997 and on the 26th May, 1997 Mr. Lesuthu admitted the evidence of P.W.2, 3 and 5 at the P.E. and the depositions having been read into the record were admitted as evidence.

P.W.2 (P.W.1 at the P.E.) Shai Mohanoe duly sworn stated he was residing at Fobane and aged 24 years; he was literate and had known accused recently. On 20th February, 1989 he was driver of a coaster. They were travelling from TY to 'Makhoroana and at Mapoteng one man had boarded the bus and was drunk. He says they came with another drunken man and at Mokoalong the man who boarded the bus at Mapoteng and was drunk quarrelled with a drunken woman. He had then reprimanded them and they had stopped their quarrel. When they came to 'Makhoroana passengers 'lighted those who quarrelled'. (This is what the record says).

The two drunken women in the bus instead of paying the bus 'she had removed her shoe and alighted without paying'. When she got out she spoke to a drunken man from TY. She had got into the bus and paid the bus fare. He had given her charge but it had been seized by the man she had been talking to and handed back to the woman.

The man had pulled the woman out of the bus but the woman had struggled and he had talked to the man to have the woman to go out but he resisted pulling the

woman until he had caught hold of the handle and 'did not go out.'

Many boys had come carrying knives and swords. They had asked him whether he was fighting and he had replied that he was not fighting but he was pushing out a man to allow a woman to go out. He ran back into the bus and had not identified any of the people who asked him whether he was fighting. He had taken a knobkerrie on the shelf of the vehicle. He had gone to them at the door but some had run out while one of them caught hold of it. They had struggled over the knobkerrie till they had gone out of the vehicle and others were surrounding him saying they would stab him.

The one holding the knobkerrie had let go and he had gone back into the bus and he was followed by a young man carrying a radio and he had put the radio on the dash-board and asked him what was happening. He had not replied but went back into the bus. He had seen him attempt to drive the bus but it could not move; one Simon had pulled him through the window and assaulted him with a pick-axe. He had gone to the window to reprimand Simon. He had picked up the pick shaft and thrown it into the bus. The knobkerrie had fallen outside after many people who had knives then threw stones at the bus and he had gone out of the bus and fled. He had met policeman Tseka on the way and he came from Sebedia. He had stopped the vehicle and he had got in; the people holding knives had come and ordered Tseka to take him off the vehicle so that they could stab him. Tseka had inquired of them what the matter was and they said he had killed a person. He then said it was perfect he had arrested him.

Another group had come and while they were assaulting a man who was carrying a radio someone shouted that 'I have not killed a person, a killer is the one other you were arresting'. They had gone back and he had been taken to Mapoteng police, had been left there and 'they went by themselves.' After some time a vehicle came carrying a corpse and he had suspected it was his colleague working with him but he could not identify him for it was a new face altogether. Thereafter policemen had come with a coaster he had been driving driven by Simon followed by a man who was holding a radio fatally injured and had passed onto the hospital. He had got into the bus 'to check the money, it was partly there and they had gone to the hospital without policemen and the patient's clothing was brought by the van was searched he had asked them to buy them beer and some money was found in his pockets and it was clipped like his; it was seized and taken to the police it was accused before court. They had then been released to their homes. He had seen accused entering and when he attempted to drive the vehicle and even when he left as he was assaulted by Simon and lying on the steering wheel.

P.W.3 (P.W.2 at the P.E.) 'Mapeete Matsora sworn stated that she resided at Khotso, was born in 1964 and knew Katiso Molete in his lifetime. She was literate and on 25 February, 1989 she was at 'Makhoroana and had entered the bus at Harabane where she found her brother Naha Matsopa and talked to him on reporting that he was arriving. He had asked where she was going and she had replied that she was going to Makhoroana.

When the bus came to 'Makhoroana other passengers alighted and her brother said 'Malefa was also to alight from the bus but she refused to go out and

her brother had got into the bus, pulled 'Malefa who was in front seat and she did not know what P.W.1 (P.W.2) talked to his brother. P.W.1 (P.W.2) had pushed her brother outside and when he resisted P.W.1 (P.W.2) had turned and taken a knobekerrie from a boy behind him while her brother was outside the vehicle and he went to P.W.1 (P.W.2) and pushed him out again and she had seen many people outside and identified Katiso, Simon, Tumo, 'Mika and had seen accused carrying a knife at the entrance of the vehicle; he was facing outside and the knife was the one before court with blades on either side. Katiso was holding her brother by hand near the door. Accused had gone down and stabbed Katiso on the chest with the knife and ran into the bus; accused was not working at the bus; he twisted the steering and outside people stoned the bus and they hid under the seats.

When Katiso was stabbed with a knife he had staggered back to Simon behind him and fell supine. She had seen Steve peep at the window of driver's seat and had pulled accused out and seized the knife and after that Simon had taken them through that window. After that one woman had asked her if she knew Naha and she affirmed and she told him 'Malefa had taken her brother's money; she had demanded it from 'Malefa and she produced them and cut them torn.

She had run to Ralitaele and given him a report that Katiso is dead at the bus stop. She said he was assisting her brother who was fought, they had gone and found him. They had then found Simon holding accused, pulling towards his house and had met Tseka's vehicle going to the bus stop and they had taken her brother to her sister's house and when she returned to the bus stop there was nobody when accused was pulled by Simon he had blood on the face.



P.W.4 (P.W.3 at the P.E.) Simon Frank sworn stated he was residing at 'Makhoroana and was 36 years old. She was literate and knew accused and the deceased Katiso Molete in his lifetime. On 25th February, 1989 he was at 'Makhoroana bus stop with the deceased Katiso, Violet, Leuta etc. Deceased had told him to Violet when he left him at home; he had told him not to leave him and they went together.

When Violet went to the coaster of Mathepa it was driven by P.W.1. He had asked if Violet was not going to the bus and he had replied in the negative. When they neared the bus they found Violet pulling a woman from the bus saying the woman should get out; deceased had then pulled Violet and asked him to leave the woman alone because she was not her woman. When deceased was straightening from Violet accused stabbed him into the chest - accused was appearing at the entrance of the coaster, deceased asked accused why does he stab him with a knife what is the matter, accused did not reply but went on drinking his quart bottle of beer.

Many people noticed that accused was holding a knife then insisted getting into the coaster. He had attended deceased. After deceased died he had covered him with a blanket and he had found people belabouring the accused. He had taken accused to Tseka but Tseka was also taking P.w.1 (P.W.2) who was running away. The people had come and removed accused from him; he had begged them not to kill accused because the law was going to take its own process and the police had come.

They had seized accused and the dead body to the police station. He had taken the coaster to Mapoteng Charge Office. Accused was not working at 'Mathepa's coaster. He could identify the knife before court and it was the one before court.

P.W.5 (P.W.4 at the P.E.) Mohlolo Nqhamo sworn stated:

He was residing at Maresenyane, knew deceased Katiso Molete during his lifetime; he was related to him for he was his maternal uncle and he was his nephew. He knew of his death the night of the same day he was stabbed. He had identified him at the T.Y. mortuary before the doctor. After the performance of postmortem the corpse had been released to him for burial.

P.W.6 (P.W.5 at the P.E.) Lt. T. Lehlohonolo Tseka sworn had stated:-

He was a member of the R.L.M.P. stationed at Mokhotlong; on 25th day of February, 1989 he was in charge of Maputsoe station; he was at 'Makhoroana from his home at Sebedia; while at 'Makhoroana he had seen a group of people chasing one. He had stopped at once. He had inquired what the matter was and he had seen a chased man enter his vehicle and closing the door at once. He had identified him as Shai (P.W.2 and P.W.1 at the P.E.). The group were furious and wanted to pull out that man. He says he had explained to them that P.W.1 (P.W.2 herein) had surrendered to him and they were to leave him out, while standing there the group rushed back to the bus and he entered the vehicle and took him to Mapoteng police and when he passed he faced that group on another man and P.W.1 (P.W.2 herein)

explained to him that someone had fought another in the bus so they were mistaken it was him.

They had gone back to 'Makhorona with other policemen and found accused lying down, he had sustained some injuries and they were handed the knife which accused used by Simon others, it was handed to Sgt. Lelala they had taken accused to Maluti Hospital there another person who was dead there at the scene he was also conveyed to hospital already dead, it was conveyed on police van and did not sustain any other injuries on the way.

The Crown had then closed its case.

This court is to mention that the evidence as recorded was difficult to understand.

An application by Mr. Lesuthu to have accused discharged and found not guilty at this stage was refused.

The defence had then called the accused to testify and D.W.1 Sehloho Joseph Maphiri duly sworn had stated that he knew the fateful day when he came from Sebedia and at 'Makhorona had boarded a coaster headed for Mapoteng. He had got into the coaster and whilst seated many men had entered and were saying: 'here is one of them' and they started assaulting and belabouring him. He did not know what for he was being assaulted. He was not drunk. He had boarded the bus at about 3.00 p.m. He had risen in hospital not knowing what had happened to him.

He was 19 years old having been born in 1972. He was illiterate and his occupation was to help his uncle load and unload sand. He had seen two men getting into the bus armed and saying something. They were Simon and Sehloho. He pointed at Simon (P.W.3 at the P.E. and P.W.4 herein).

As for stabbing, the witness maintained he had not stabbed anybody with a knife. He had not been carrying a radio. He was not drinking then for he does not take liquor and had taken none that day. He did not know the knife. He was admitted to hospital, took a month there and some weeks. He denies he was admitted to hospital today and went to the police station the following day to make an explanation. When the fighting started he was in the coaster being where he was assaulted. He had seen no dead person and was asking the court to release him because he did not know what wrong he had committed.

Cross-examined by Ms Nku for the Crown the accused said he did not know how it came that so many people came to court to say he had stabbed somebody nor could he say why these people were picking on him. As for Sgt. Lelala (P.W.1) he could not say why he says he gave him a knife for this was untrue. He had not known deceased. He first heard of the deceased on being arrested because it was said he had killed somebody. He reiterates he does not take liquor to date. It was not true he was drinking from a quart. He says it is wrong to drink because it interferes with ones duties. Because he does not take liquor he was sober all the time. He was not aware that 'Mapeete (P.W.2 at the P.E. and P.W.3 herein) had said he had stabbed the deceased and thereafter set at the steering wheel. He had not seen accused straightening. Nobody had ever said to him why do you stab me

nor did he go on drinking beer. He says he is not aware that evidence of 'Mapeete (P.W.2 at the P.E.) was admitted.

The witness further testified under cross-examination that ever since being discharged from hospital he had incessant headaches; he had also developed falling sickness; his headaches come before or after falling. He denies that his headaches are caused by lying. He says the evidence that he has stabbed has been admitted.

By Assessor Mr. Ramoseme: He had not taken liquor at any time. When the fighting took place he was in the coaster and he was in the coaster when he was assaulted.

By Assessor Mr. Khoboko: He was from Zebedia, boarded the bus at 'Makhoroana bound for Mapoteng where he lives. He was assaulted whilst in the bus. At Mapoteng he went there to help his uncle with odd jobs like loading and off-loading sand; they used a tractor for the purpose. He was sending messages home to Mapoteng. At Zebedia he had not had a tiff with anybody and he was surprised when people fell upon him and assaulted him. This had taken him much aback. He had had no time to report to his chief for he was in hospital and from there to the police station in Teyateyaneng.

By Court: He says he cannot say whether there was any reason to stab deceased nor does he know why they said he had stabbed deceased. He agrees he was seen in the coaster.

The defence had then closed its case.

In address Ms Nku submitted the defence having admitted the evidence of P.W.1, P.W.2, P.W.3, P.W.4 and P.W.5 at the P.E. to the effect that accused stabbed deceased in the chest region, a vital part of the body and the post-mortem report showing cause of death to be stabwound in big body vessels and blood loss coupled with the fact that the accused handed in the knife he stabbed deceased with, the accused could not be heard to say that he did not stab the deceased with a knife and Petlane's case (without citation) was given as authority for the proposition. According to Ms Nku, one cannot admit and deny. Although accused said he was not drunk, there was evidence that he was drunk and this was the reason for the assault on the deceased. There was no doubt, so Ms Nku submitted, that accused was responsible for the murder.

Mr. Lesuthu for the defence has submitted that the accused was not drunk and that this is the stand the defence is taking come high or low water. The Crown was using accused's so-called state of drunkenness as a weapon to account for accused's motive. For the defence it was a case of mistaken identity. By admitting the Crown evidence accused was not admitting his guilt for he had, after all, pleaded not guilty to the charge. All that the accused was doing was to admit crown evidence conflicting and messy as it was.

A question was to be asked whether accused rushed out of the coaster after stabbing the deceased or set down drinking his quart of beer undisturbed as if nothing had happened. There was also evidence that while accused set on the

steering wheel somebody said 'here is another one.'

Mr. Lesuthu has also made a strong plea that in view of the knife not having been exhibited before this court the court was obliged to make a finding whether the knife at the P.E. was the knife that fatally killed the deceased.

In reply Ms Nku has said the admission of evidence denied the Crown an opportunity of discrediting any posers against it.

One of the most astounding features of this case is that the Crown has expressed its distaste of the remote prospect that the accused would be found not guilty as charged. Equally, the defence has in no uncertain terms expressed its horror of the accused being found guilty. The defence has gone as far as to submit that if the accused is found guilty, there being no circumstances to lessen his guilt, so be it

Of course courts of law go by the evidence and now that most of the crown evidence was admitted by the defence, this is evidence which this court has to go by in determining whether or not accused is guilty.

The accused has vigorously protested his innocence and the question is whether there is sufficient evidence by the Crown to convict accused.

In his evidence, P.W.1 War. Officer Lelala says that Steve Frank 'handed me a knife it was a long knife, it had bloodstains, and the cap before court' (p.7 of the

P.E. record) P.W.6 Lt. Lehlohonolo Tseka has said that 'we were handed the knife with accused handed to us by Simon and others c/f was handed Sgt. Lelala.' P.W.3 'Mapeete Matsora has testified that 'I saw Steve peeping at the window of driver's seat, pulled accused out and seized the knife after that Simon took us out through that window \_\_\_' (p.4 of the P.E. record). P.W.4 Simon Frank says nothing of the fact that he and others handed P.W.1 the knife and while he says 'I took accused to Tseka' (P.W.6 p.5) P.W.6's evidence points to contact with Shai (P.W.2) and no mention is made of P.W.4.

It could be said that P.W.6's evidence is laced with lack of syntax and grammatical errors but one thing is sure that it is not the same as that of either P.W.3 or P.W.4. The question necessarily arises: who, exactly, handed P.W.1 the knife? For purposes of deciding this case, this is absolutely crucial because the chain of events between the accused and the knife must be established by the crown. Can it be said that such chain of events has been established when P.W.1 says he was handed knife by Simon Frank and P.W.6 says they were handed 'the knife with accused by Simon?'

I have searched to find a witness who says he seized knife from accused and handed the same to P.W.1; as I have said P.W.3 has testified that 'I saw Steve peeping at the window of driver's seat, pulled accused out and seized knife \_\_\_' but unfortunately, Steve Frank, a necessary witness has not given evidence to confirm this. According to the evidence of P.W.1, Steve Frank fled the country 2years after the incident and the reason for doing so is that he had many criminal cases against him including murder and robbery so that in view of the conflicting crown evidence



as to who, exactly, handed the knife to P.W.1 Steve Frank has not been of assistance and this court has to rely on the evidence of P.W.1, P.W.3 and P.W.6 which, as I have said, is not saying the same thing.

A question, though, must be asked why these witnesses are not saying the same thing. Evidence of P.W.1 and P.W.6 is easily explainable for they were together when the knife was handed to P.W.1 and one would expect them to say the same thing. Why they differ is something that baffles this court.

As for Mr. Lesuthu's query regarding the knife that it was not an exhibit before this court, it was not denied the knife was exhibited at the P.E. and the admitted medical evidence and post-mortem report shows a knife was used on deceased.

As for P.W.3's evidence, it is most muddled. She says her brother had pulled out 'Malefa who was in front seat. P.W.2 had pushed her brother outside and P.W.2 had taken a knobkerrie from a boy behind him and her brother had gone in again and P.W.2 had pushed him out so that there was this riff-raff between P.W.2 and her brother. Then she saw accused carrying a knife at the entrance of the vehicle facing outside. Katiso (deceased) was holding her brother near the door and suddenly accused had stabbed deceased and ran into the bus, closed the door and set at the steering wheel. The witness then says she made a report to the effect that deceased died while assisting her brother who was fought. The impression one gets is that deceased was stabbed while assisting her brother against P.W.2's assaults. If so, one does not figure out how accused would get involved in the scuffle between

P.W.2 and P.W.3's brother. It is to be recalled that according to P.W.6 fingers were pointed at P.W.2 as the culprit and P.W.2 had in fact fled the safety of his bus.

Against the background of P.W.3's evidence is that of P.W.2 Shai Mahanoe who testified to a series of drunken individuals and their episodes. Most disturbing of all is the account of 'many boys came carrying the knives and swords who asked me whether I was fighting' (p.1 of the P.E.) And noticeably this incident occurred before deceased was stabbed. According to him and contrary to P.W.3's evidence sketched above, P.W.2 says 'I took a knobkerrie on the shelf of the vehicle' (p.1 of the P.E. record). One or the other of these crown witnesses could not have been telling the truth though P.W.3's evidence is most suspect.

P.W.2 goes on to give a graphic account of his struggles with the gang including 'struggling over the knobkerrie and the threat that 'they would stab' and what for is anybody's guess. He then goes on:

'The one holding the knobkerrie left it and I went into the bus, I was followed by another young man carrying a radio he put the radio on the dash-board and asked me what was happening, I did, not reply him, but went back into the bus, saw him attempting to drive the bus but it could not move, one Simon pulled him through the window and assaulted him with a pick-axe. (P.2 of the P.E.)

He says the same people holding knives ordered P.W.6 to take him off the vehicle so that they could stab him. Noticeably, throughout his account although he was in the bus with accused, P.W.2 saw nothing and heard nothing of what accused had done save that it was him and not accused that was given chase. The young man referred to by P.W.2 in the quotation above was undoubtedly accused for evidence says he was carrying a radio. According to him, the same young man put the radio on the dashboard and innocently asked him what was happening; prove that it was accused is found in the fact that P.W.2 says 'I saw him attempting to drive the bus but it could not move.' Notice P.W.2 says nothing that accused set nonchalantly by the steering wheel drinking his quart of beer. Also while this witness says one Simon pulled accused through the window, notice that it was P.W.3 'Mapeete's evidence that 'I saw Steve peeping at the window of driver's seat pulled accused out \_\_\_' (p.4 of the P.E. record). And against all this evidence as I have said is that P.W.4 Simon Frank said nothing of the sort.

Question must be asked why crown witnesses are so different on material aspects of the case and the answer is that there was evidence that there was unexplained spate of drunkenness and commotion at the bus stop making it difficult for witnesses to identify positively the actual culprit.

I have said that crown evidence is conflicting in material respects and this court is not prepared to take the risk of believing it in all respects.

Now, Ms Nku for the Crown has contended that accused is bound by the admissions he made. That may well be though the additional inquiry must be

whether on all the evidence presented by the Crown it can be said that accused is guilty or put in another way, whether there was evidence on which a reasonable man could find beyond reasonable doubt that the accused killed the deceased. And though admitted facts cease to be in issue, the question must still be asked whether, all in all they are consistent with the guilt of the accused. Moreover \_\_\_\_

‘The witness who enters the witness box swears to speak the truth \_\_\_\_’ (see JORKSHIRE ins. Co. Ltd. v. Standard Bank of S.A. Ltd, 1928 W.L.D.; Simmons N.O. v. Gilbert Damer v. Co. Ltd, 1962 (2) S.A. 487 (D.))

According to Hoffman (the South African Law of Evidence - 4th Ed. p.432) formal admission of facts before the coming into existence of the Criminal Procedure Act, 1977 difficulties arose when attempts were made, at the trial to admit elements of the Preparatory Examination record and the case of S. v. Thomo and Others, 1969 (1) S.A. 385 (A.D.) is given as an example. For an purposes, what is relevant is S. v. Thomo’s case above is admission of evidence at the Preparatory Examination.

In terms of sec. 284 (1) of the Criminal Procedure Act, 1977 an accused person may ‘admit any fact relevant to the issue’ and such admission ‘shall be sufficient evidence of the fact.’ I have looked at our Criminal Procedure and Evidence Act, 1981 to note any similarities or discrimilarities.

In terms of sec. 273 of the Criminal Procedure and Evidence Act, 1981

sub-section (1)

*An accused or his representative in his presence may, in any Criminal proceedings, admit any fact relevant to the issue and the admission shall be sufficient evidence of that fact.*

It will be noticed that the South African version of sec. 284 (1) is in precise terms as our sec. 273 (1) and the similarity is hardly surprising as it appears we always copy our statutes from South Africa in the majority of cases.

With the above observations in mind Wessels, J.A. in the appeal of S. v. Thomo and others above said at p.389:-

‘Since the purpose of making admissions of facts is to dispense with the need to call evidence to prove those facts, the reference to ‘evidence’ is inappropriate unless it is understood to mean ‘proof.’

In S. v. Thomo and others case post-mortem report had been admitted in terms of the code and furthermore accepted as proof of the truth of the contents thereof by the defence and furthermore, was read into the record.

At p.388 Wessels, J.A. had continued:

‘Unless care is taken in the precise formulation of admissions of relevant facts in terms of sec.284, uncertainty would arise as to what fact an admission was

intended to relate to.' (My underlining).

Further on the same page:

'The apparently increasing practice of recording admissions in terms of sec. 284 by 'reading into the record' evidence given at a preparatory examination accepting as 'proof of the contents thereof' is to be discouraged.' (I have underlined and also see S. v. Serobe and Another, 1968 (4) S.A. 420 (A.D.) at p.426 C - F).

Please note that in the instant case evidence given at the preparatory examination was not accepted as 'proof of the contents thereof'

As to the admissions under the section Wessels, J.A. had continued at p. 398

B - C :

'The state was content to rest its case on an admission made on behalf of the accused that the cause of death was a compound fracture of the skull \_\_\_\_\_. In relation to the stab wound it was content to rest its case on an admission made on behalf of the accused that the stab wounds were of such a nature that it might have resulted in the deceased's death if the head injuries had not been inflicted. These admissions were made and recorded in

terms of sec. 284 (1) and constituted sufficient proof of the facts to which they relate. In the result no evidence directly relevant to these facts was led either by the state or on behalf of the accused.’

According to the learned judge of appeal at p.398 D

‘These admissions do not, in my opinion, justify a finding that the stabbing contributed to the death of the deceased, i.e. that it was casually related to his death. Neither is there any relevant evidence to justify the conclusion in question.’

It is precisely on the above reasoning and amongst other things the fact that the report of the district surgeon and his post-mortem report were admitted by the defence in their entirety as proof of their contents when, in fact, the report was fraught with ambiguity on an issue of great importance.

In the instant case, the admitted crown-evidence is not only fraught with ambiguities as I have shown above, it is littered with contradictions, conflicts and inconsistencies on issues of great importance. In the instant case, too, what transpired was the mere admission of evidence at the preparatory examination in terms of sec. 273 (1) of the code and the evidence was read into the record not as ‘proof of the truth of the contents thereof’ nor did the defence admit same as ‘proof of the truth of the contents thereof.’ Indeed it appears over the years in this court

it was considered sufficient if, in terms of sec. 273 (1) of the code an accused or his representative having admitted the evidence at the preparatory examination and the same having been read into the record it was mission accomplished without the necessary verification, namely: reading evidence into the record as proof of the truth of the contents thereof and an accused or his representative confirming or admitting this.

S. v. Mjoli and Another, 1981 (3) S.A. 1233 (A) at 1247 A - B per Viljoen, J.A. is quoted as authority to the effect that 'sufficient proof' has been judicially interpreted not to mean 'conclusive proof' though the same case at 1247 - B - C it is said an admission formally made by, or on behalf of, an accused, is that an admitted fact 'virtually becomes conclusive proof against him \_\_\_ and any effort by him or on his behalf to adduce evidence countervailing such fact would be inconsistent with his having made the admission'. With respect, this would depend on whether the evidence was admitted 'as proof of the truth of the contents therein' and whether the defence had admitted it as such. Moreover, the question would also arise as to its uncontantious and unequivocal nature.

Admission of evidence can be seen as a two-wedged sword likely to slash the homologator or the crown. Ms Nku has bitterly complained that by admitting the evidence and turning midstream to deny it or as was said above countervailing the admission, this has placed the crown in an invidious position for the crown is incapacitated to react to accused's stance and therefore the crown was prejudiced. I could not disagree more for in its best interest and mindful of the fact that it behoved the crown to prove its case beyond reasonable doubt, the crown could have



preferred leading evidence other than timidly succumbing to the dictates of the defence.

S. v. NZUZA, 1963 (4) S.A. 856 (A) is a milestone in the principle of admissions in terms of the code and c/f S. v. Mboyi, 1981 (2) S.A. 494 (E.C.D.) which illustrates the principle admirably.

The accused was charged with murder and the proceedings were starkly brief, according to Hoffinan (the S.A. Law of Evidence 4th Ed.) Counsel for the defence had admitted, formally, all the facts stated by the prosecution witnesses in the record of the preparatory examination. No evidence was led by either the prosecution or the defence and the accused being convicted was sentenced to death.

On appeal Hoexter, A.J.A said there had been no trial for, according to him, the formal admissions were 'sufficient proof' of the facts admitted but did not constitute 'evidence' of those facts. For the sake of emphasis, it has to be stressed that this is where our Criminal Code, 1981 is at present. Because sec. 156 (1) of the Criminal Procedure Act, 1955 required witnesses to give their evidence viva voce in an open court, 'prima facie, therefore' Hoexter, A.J.A. said 'no evidence at all was led before the trial court' and the accused 'had been convicted on no evidence at all.'

The similarities between the present case and Nzuzza's case above are striking save that in the instant case one crown witness gave evidence as well as the accused person.

It was as a result of the judgment on appeal in Nzuza's case that sec. 141 (3) of the Criminal Procedure Act, 1977 came into play and provided

- (3) *The record of the preparatory examination shall, upon proof thereof in the court in which the accused is arraigned for trial, be received as part of the record of that court against the accused, and any admission by the accused shall stand at the trial of the accused as proof of such admission. Provided that evidence adduced at the preparatory examination shall not form part of the record of the trial of the accused, unless*
- (b) *the parties to the proceedings agree that any part of such evidence be admitted at the proceedings.*

and thus, according to Hoffinan, the effect of the sub-section was to neutralize S. v. Nzuza. Question is whether the decision in R. v. Nzuza has been neutralised, by a similar section, in our Criminal Procedure and Evidence Act, 1981 for if there is such a section the ghost in R. v. Nzuza in our law will have been laid to rest. My inquiries are there is no such similar provision in our law.

There was considerable *mélee* at the bus stop and there were too many flaws in the Crown evidence resulting in too many 'buts' and 'ifs' making it dangerous and unsafe to convict quite apart from the fact that the admitted evidence is in no way conducive to a verdict of guilty.

This court finds it as a fact that it cannot be said that having regard to the circumstances of this case it can be said that the crown has proved its case beyond reasonable doubt. Accordingly, the accused is found not guilty, he is acquitted and

discharged.

It is strongly recommended that the Criminal Procedure and Evidence Act, 1981 be amended to bring it in line with unassailability of admitted evidence as was done to the South African Criminal Procedure Act, 1977 by adding sec. 141 (3) (b) thereof.

My Assessors agree.



**G.N. MOFOLO**  
**JUDGE**

**12th June, 1997.**

For the Crown: Ms. Nku

For the Defence: Mr. Lesuthu