

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**REX**

versus

**SHAO MING SHENG**

**JUDGMENT**

Delivered by the Honourable Mr. Justice W.C.M. Maqutu  
on the 25th day of August, 1997

The accused is charged with three counts of murder:-

**COUNT I**

In that upon or about the 6th day of August 1994 and at or near Top Top, Lekhaloaneng, in the district of Maseru, the said accused did unlawfully and intentionally kill one Xu-Wenda by shooting him with a gun with intent to murder him.

**COUNT II**

That the said accused is charged with the crime of murder.

In that upon or about the 6th day of August, 1994 and at or near Top-Top, Lekhaloaneng, in the district of Maseru, the said accused did unlawfully and intentionally kill one Ha-Ja-Mei by shooting her with a gun with intent to murder her.

**COUNT III**

That the said accused is charged with the crime of murder.

In that upon or about the day 6th day of August 1994 and at or near Top-Top, Lekhaloaneng, in the district of Maseru, the said accused did unlawfully and intentionally strangle Yiao Yi Xu with a rope with intent to murder him."

Before the accused pleaded, Mr. *Phoofolo* for the accused challenged the court's jurisdiction to try the accused because he claimed the accused had been abducted from South Africa and handed to the Lesotho police. This could according to Mr. *Phoofolo* have been done by the South African police or agents of the Lesotho police.

At the time the objection was made, Mr. *Phoofolo* was not sufficiently equipped with authorities to back up his objection to the court's jurisdiction. He promised to bring authorities on which he founded his application. I dismissed his objection and promised to give my reasons later while giving him the right to bring the authorities on which he based his application.

Roughly speaking my reason for dismissing this application was that there has always been an exchange of non-political prisoners between the Lesotho and South African police forces. There was no extradition treaty at the time. Nevertheless criminals knew that they could not commit crimes and hope that just by crossing the border they were safe from the arm of the law. Somehow a suspect used to pitch up at the border for the police who wanted him to receive him into custody.

Our courts never asked any questions because there was no extradition treaty or any legal machinery for the extradition of fugitive offenders. It is common cause that in 1994 no such treaty existed. I noted that police used to say a suspect just made himself available for arrest. I added that everybody knew this was not true and that he must have been sent by the police on the other side of the border.

The case proceeded and at the end of the trial Mr. *Phoofolo* revisited the question of jurisdiction with full force. By then he had all the authorities. Crown Counsel was not adequately prepared to meet Mr. *Phoofolo's* argument. I heard both sides and gave them leave to file written argument on this point. During trial, the method of accused's arrest and facts that preceded it were elicited as part of the evidence.

I am of the view that I cannot go into the merits without disposing of this point. It is all the more so because if indeed the court had no jurisdiction, this could vitiate the entire proceedings in this trial.

It is common cause that on the 6th August, 1994, accused left Lesotho for the Republic of South Africa. All three bodies of the deceased were discovered that day. It is common cause that accused came into the hands of the police on the 11th August, 1994. It is not denied that a man of Chinese origin had something to

do with the manner in which accused came into the hands of the Lesotho police by tipping them that accused was on the way.

The only dispute is the manner and degree of police participation. PW7 Sergeant Ramakeoana says he was 'phoned by a man of Chinese origin telling him to receive the accused at the border. Accused says three black men forcibly pounced on him at a Bloemfontein bus stop while he was waiting for taxis from Bloemfontein to Lesotho. Two Chinese gentlemen identified him to these black men by nodding with their heads. PW7 says accused crossed the border still armed with a loaded a pistol and he duly received him, he subsequently searched him and arrested him. Accused says he was taken straight to a Lesotho police station by these men who had forcibly seized him in Bloemfontein.

All these facts lead to a strong suspicion that whatever accused's intentions might have been, other people were involved in his return to Lesotho. After seeing and hearing PW7 Sergeant Ramakeoana, I have no doubt that he has not been frank with the court. The accused was brought to Lesotho by some people and he was not a free man. Some people who might or might not be policemen did bring accused to Lesotho or the border where the police received him and subsequently charged him. Consequently accused is entitled to say he was kidnapped and brought to Lesotho. The South African police might have been involved for it is

/...

unlikely that the South African police were not made aware of what is happening. There is however no evidence that the South African police knew what was happening.

My initial approach was that since the arrest was made in Lesotho, that was the end of the matter. This court had no obligation to protect the sovereignty of the Republic of South Africa. Indeed it has no authority beyond the borders of Lesotho. This approach is simplistic and cannot be proper and civilised now that the Republic of South Africa is no more seen as a delinquent State because of its apartheid policies.

Matthews in *De Criminibus* Volume III (Hewett & Stroop translation) page 472 in dealing with criminal jurisdiction in antiquity concluded:

“Therefore, in the City The Prefecture of the City arrogated to itself absolutely all criminal cases, not only those committed within the city but also those which were committed within the hundredth milestone...”

In our law today there can be no doubt that our courts have jurisdiction to try all criminal cases committed within their area of jurisdiction. There is no dispute about this court's jurisdiction to try the three counts of murder, committed in Lesotho

/...

within this court's area of jurisdiction.. What is in issue is the manner in which the accused, who was outside this court's jurisdiction, was brought back to Lesotho so that he could be arrested.

It is the duty of law enforcement authorities to find offenders and to bring them before courts. If the offender is outside the court's area of jurisdiction Matthews in

*De Criminibus* says:-

"Of course, if the accused was arrested in some other place, the governor of the province in which the offence was committed can require the offender to be sent to him with an appropriate guard."

This is what was expected to happen if the accused was in the Republic of South Africa. To put this in the words of Voet 4·2·34 (where there is an agreement between States):-

"... those who have a court and carry on juridical proceedings in a foreign area in virtue of some concession would not rightly order arrest against persons...for they are not in control over it, but only conduct judicial proceedings there by agreement or sufferance."

By this I understand that territorial boundaries have to be respected. They can only be crossed by judicial authorities by agreement or sufferance. Between Lesotho and South Africa there was (at the time) no such an agreement (express or tacit). Even if there had been such an agreement, judicial organs in Lesotho could not lawfully arrest accused in the Republic of South Africa.

Mr. *Phoofolo* for the accused relied on the case of *S v Ebrahim* 1991(2) SA 552 for the proposition that this court had no jurisdiction to try the accused. Mr. *Phoofolo* argued that *Ebrahim* had been abducted from Swaziland by agents of the South African State and handed to the South African police, was arrested, tried by the courts for treason, convicted and sentenced. The Appellate Division took a dim view of the abduction of the accused. It found it violated human rights, good relations between States and sound administration of States.

It was part of Mr. *Phoofolo*'s case that at the accused's bail application, the Crown conceded that the accused was arrested in Bloemfontein in the Republic of South Africa. The Crown did not seem to dispute that this was its position during bail application proceedings. At the trial, accused's position was now that he was

/...

abducted by the Lesotho police or their agents. Accused could not have definite knowledge on this aspect of the matter as only the police could know the truth of the matter as it was peculiarly within their knowledge.

At the outset I have to point that *S v Ebrahim* involves a political refugee who was trying to overthrow the South African government because he was a member of the military wing of the African National Congress. Lesotho is a signatory of international conventions on refugees. In these conventions political refugees are exempted from the traditional courtesy between rulers to return criminal fugitive offenders to neighbouring States in which they committed serious offences. Even so, no State is entitled to violate the territorial integrity of another by exercising the power of the sword within it, seizing or abducting people from it.

The case of *Ebrahim* is in Afrikaans, a language which this court does not understand. Nevertheless I have the benefit of the argument of I. Mahomed SC who was then the President of the Court of Appeal of Lesotho. This argument has been reported in full in *S v Ebrahim* at page 556 and 557. I would follow the foreign authorities that I. Mahomed SC has quoted which he summarises as follows:

/...



"In the first case, a person who is unlawfully apprehended by a private citizen cannot object to the court's jurisdiction to try him for a criminal offence in a court hearing the matter in the country to which he has been brought after his unlawful apprehension."

In this case, there is no proof that accused was arrested by agents of the Lesotho Government. All accused can say is that three black men seized him, abducted him to Lesotho and handed him to the Lesotho police. Two Chinese gentlemen identified him to these three men.

I can only harbour a suspicion that the three men might have been South African police or Lesotho police or hired by the Lesotho police. If there was an allegation that accused had been put in a boot of a car when accused crossed the border between Lesotho and South Africa, I might have concluded that the Lesotho police smuggled him into Lesotho without the participation or knowledge of the South African police.

It is not unlikely that the Ta Hwa Company (that had brought accused and several Chinese to Lesotho and South Africa for reward under false promises) might have hired these three men who abducted the accused. If the South African

/...

police were not informed that accused was wanted by the Lesotho police, then as accused told the court, the South African police might have been bribed not to ask questions. It is more reasonable to assume the South African police arrested accused or at the border were told and co-operated in the return of the accused to Lesotho.

I do not agree that this court has no jurisdiction to hear this matter, I prefer to say in certain cases this court can decline to exercise its jurisdiction for good reasons. This approach is aptly put by I. Mahomed SC at pages 556 to 557 of *S v Ebrahim* in the following words where he deals with kidnapping of an accused person by the police:-

"There is an inherent objection to such a cause, both on grounds of public policy pertaining to international ethical norms and on grounds that it imperils and corrodes peaceful co-existence and mutual respect of sovereign nations. Sometimes the avoidance is premised on the proposition that the court has no jurisdiction in the circumstances. At other times, the formula employed is that the court does have jurisdiction but declines to exercise it because of its inherent discretion to prevent an abuse. *R v Hartley* 1978(2) NZLR 199 at 215 lines 20 - 25, 216-17."

It will be observed that Lesotho and the Republic of South Africa had

/...

uncomfortable political relations because of apartheid. They co-operated in the fight against crime, but avoided any formal diplomatic relations. It was not possible to have a convention or treaty in terms of which procedure for the exchange of fugitive offenders could be done.

Lesotho had the *Fugitive Offenders Act 1967* which came into force on the 1st August, 1970. This Act could not come into force in respect of the Republic of South Africa because there was no international instrument providing for the surrender of fugitive offenders. The King was not prepared to make the Republic of South Africa an exception. The treaty or agreement between Lesotho and the Republic of South Africa on reciprocal surrender of fugitive offenders was only entered into on the 20th June, 1995. It was only published in the Government Gazette No.121 of December 1996. The *Fugitive Offenders Act 1967* (as amended) was only to take effect on the 29th January, 1997, which was a date mutually agreed by both Lesotho and the Republic of South Africa in terms of Article 28 of *Extradition Treaty of 1995*.

Perhaps in 1967 there were great expectations that formal relations would be

/...

established between the Kingdom of Lesotho and the Republic of South Africa. The *Fugitive Offenders Act 1967* was enacted by Lesotho but it was never brought into effect as between Lesotho and the Republic of South Africa before January 1997. This was because Lesotho and the Republic of South Africa never entered into an extradition treaty as Lesotho had expected. Consequently it had remained in the statute book only in respect of South Africa up to 29th January, 1997. In 1994 no attempt had been made to formalize the existing co-operation in the field of crime. This being the case, this court would be acting in a manner contrary to the spirit of the Rule of Law, good governance and common sense if it were to allow criminal elements to benefit from embarrassment that *apartheid* created for Lesotho and South Africa. This court can only decline jurisdiction in this matter if it has no discretion in this matter.

It could not be said as in the case of Swaziland and the Republic of South Africa that courts could legitimately decline jurisdiction in a case where fugitive offenders have been brought illegally into Lesotho where there are definite laws governing this aspect. Consequently in *Ebrahim's* case at page 557 it could be

said:

“This is a perfectly permissible approach particularly in the case of neighbouring states who seek to regulate such matters through proper agreements such as the agreement between South Africa and the Kingdom of Swaziland contained in Proclamation R292 of 1968.”

Courts have to use their discretion in a fair and balanced way. The ends of justice and the interest of the community at large should be taken into account in this case. The rights of the accused and the maintenance rule of law should be taken together. In *S v Buys En Andere* 1994(1) SACR 539 the Orange Free State Provincial Division refused to assume jurisdiction where the accused had been arrested by the Bophuthatswana police and handed to the South African police with his consent contrary to the *Extradition Act 67* and the relevant Convention. What the Court was enforcing in *S v Buys En Andere* was the rule of law. I therefore agree with what was done in that case.

The courts in South Africa do not feel they should permit international delinquency. See *S v Mahala* 1992(2) SACR 305 at page 311 where Zietsman JP said:-

/...

“A fundamental principle is that a state cannot perform an act of Sovereignty in another state. To do so constitutes international delinquency and is a violation of international law. The principle that a litigant must come to court with clean hands applies also to the state and the state is a litigant where a criminal prosecution is instituted. If a State acting through its authorised officials, unlawfully seizes and abducts a person within the territory to another state the court will refuse to exercise jurisdiction over that person even where he is subsequently arrested within the court's jurisdiction and tried for a crime committed within the court's jurisdiction.”

I entirely concur that this should be the case in Lesotho, save that this is a discretionary matter for the court. In a proper and fitting case a court might find itself obliged to try an offender. The principle that a litigant should not come to court with dirty hands is subject to the power of the court to condone some delinquencies in a fitting case. The case of *S v Beahan* 1992(1) SA CR307 and *S v Buys En Andere* 1994(1) SACR 539 show how courts exercising their discretion reached opposite conclusions on the police exchanging prisoner over international borders.

It will be observed in this case that the accused claims he was coming back to Lesotho when he was seized. The accused was lawfully residing in Lesotho. He had entered South Africa illegally. He had no permit to reside there. He claims he

/...

had bribed a South African border policeman to allow him into South Africa. That being the case, accused had entered South Africa by criminal means. Cases that we have discussed above do not quite fit the case before me. I recognise Sergeant Ramakeoana has been untruthful and that courts do not normally condone such behaviour especially when condonation has not been asked for. Yet, criminal cases should be distinguished from civil cases. In matters of crime the Crown is not an ordinary litigant. I have already said there is an element of necessity here as political realities created a situation in which an abnormal international situation existed that made the fight against crime impossible as between the two States.

The facts as substantiated before the court seem to exclude State participation. Yet common sense negates what has been placed before court. Alternatively the South African police either alone or in collaboration with the Lesotho police facilitated the abduction of applicant so that he could be brought to Lesotho where he was alleged to have committed a crime. On arrival in Lesotho, the accused was arrested and charged with the crime of murder. The case of *S v Ebrahim (supra)* does not cover the case of the accused because *Ebrahim* had committed a political offence and was a refugee in neighbouring state. Similarly the case of

/...

*S v Buys En Andere* also does not assist the accused because in that case the police had avoided following a statute that they were obliged to follow. In Lesotho in 1994 there was no law regulating the question of fugitive offenders. As I have already stated, the police and the law enforcing authorities co-operated informally in the exchange of fugitive offenders where there was no legal regulation of cross-border crimes in place.

Mr. *Phoofolo* was entitled to argue that the Crown could not be heard to deny that accused was arrested in Bloemfontein because they had said so in their opposing bail affidavit. In *S v Nomzaza* 1996(2) SACR 14 the head-note contains the following:

"There can be no doubt that a bail application amounts to judicial proceedings. The evidence of an accused in a bail application can, if it is otherwise admissible, be admitted against the accused at his subsequent trial...."

What applies to the accused as a litigant also applies in full force to the Crown.

The Crown cannot easily therefore wriggle out of their statement that accused was arrested in Bloemfontein. The question is whether what the Crown said at the bail

/...



application was in fact evidence. It might not be evidence because I do not have the full facts. I can only say there is good reason to hold the Crown to this statement insofar as it states that the police were not innocent bystanders as they would have us believe. *S v Nomzaza* is in Afrikaans consequently I have not had the full benefit of Vivier and Van Heerden JJA judgments. Reference to what was said at the bail application was put in cross-examination, no other details are available. I therefore cannot say if it can be conclusive evidence. For purposes of this case, it is sufficient that the Crown volunteered the information that accused was arrested in Bloemfontein.

In the past all the courts confined themselves to was whether the accused was arrested within the court's jurisdiction. In *Ex Parte Elliott* [1949]1 All ER 373 the emphasis was only on the fact that Courts of a State have jurisdiction to try an accused person irrespective of whether the State has authorized his abduction from a neighbouring State.

While I agree that *S v Ebrahim* correctly buttresses the rule of law by discouraging lawlessness on the part of the police and State authorities, it seems

/...

to me that is not the end of the matter. There remains the problem whether if the police encourage civilians to abduct an accused person the courts will exercise its jurisdiction to try the accused so long as courts do not come to know of the part the police played. I cannot answer this question definitively except to say courts do not like to be deceived. Courts have up to now turned a blind eye to the irregular bringing of fugitive offenders back to its jurisdiction. I have already said there was necessity as South Africa and Lesotho had left this area grey because of political constraints they operated under. Courts have to say such days are over because this area is now regulated by law and the *Fugitive Offenders Act* of 1967 is now in force as between Lesotho and the Republic of South Africa. Therefore in future they cannot in good conscience allow what was happening in the past this to continue after 29th January, 1997.

On the evidence before me, it is alleged the accused was abducted by civilians from South Africa. If this is accepted, the court would normally assume jurisdiction in this case. Common sense, and the surrounding facts, however, make it difficult to accept that the police were as indifferent as they appear on the face of what is on record. Even if I am wrong in this conclusion as I have no direct evidence, I hold

/...

that there is a strong inference from surrounding facts that there was co-operation between the Lesotho police and the South African police to have the accused seized from South Africa to come and answer for his alleged crime in Lesotho. When accused got to Lesotho, he was arrested, charged and brought to trial.

I have already said that in 1994 there was no reciprocal treaty or convention between Lesotho and the Republic of South Africa. Therefore there was no formal procedure for exchanging fugitive offenders. Consequently the *Lesotho Fugitive Offenders Act No.38* of 1967 had remained on the Lesotho Statute book but could not be brought into operation as between Lesotho and South Africa and the corresponding *South African Extradition Act No.67* of 1962 could similarly not be applied to Lesotho fugitive offenders at the time. This court therefore finds as a matter of necessity it is obliged in its discretion to assume jurisdiction where the police on both sides co-operated in matters of apprehension of offenders across borders for ordinary crimes. Had there been legislation on the matter, this court might have been obliged to refuse to exercise its jurisdiction as the Eastern Cape Provincial Division did in the case of *S v Wellem* 1993(2) SACR 18 where police exchanged a prisoner over a border contrary to the *South African Extradition Act*

/...

1962 which they were obliged to follow.

The trial proceeded and the accused pleaded not guilty to each of the three counts of murder.

At the outset I must state we had difficulty with Chinese interpreters. The court had to request the first interpreter not to continue. Another interpreter, Mrs. Malikabiso Nkebenyane, who was highly satisfactory was found. All sides were satisfied with her. I therefore wish to record my thanks to her for a job well done. Mrs Malikabiso Nkebenyane is a Lesotho national who was sent to China to learn the Chinese national language (Mandarin). I must also thank her employers who were compelled to release her. The court had to use its powers to secure Mrs. Malikabiso Nkebenyane continued attendance in order to dispose of this case. This was necessary but regrettable.

The medical evidence was admitted by consent in terms of Section 273(1) of the *Criminal Procedure and Evidence Act* of 1981. It was briefly to the effect that Dr. Kyi Yin performed three post mortems on Xu-Jiao-Yi, Xu-Wenda and Ha-Ya-

/...

Mei. The postmortem reports were handed by consent as Exhibit A, B and C.

Xu Jiaoyi, a child had died from strangulation. Strangulation marks were present on the neck. Xu Wenda died of a gun shot wound on the forehead. There was only an entrance wound on head but no exit wound. An examination of the skull disclosed a longitudinal skull fracture and subdural haemorrhage in the skull. Ha-Ya-Mei also had a gun shot wound on the head.

The first witness that the Crown called was Police-woman Moloï No.5918. In her sworn testimony she told the court that she is stationed at Upper Thamae. She said she knows the accused. As a result of a report she received from two men, she went to Top-Top Supermarket Lekhaloaneng. It could be around 6.15 p.m. This place is at cross-roads where the road from Upper Thamae cuts across the main road from Maseru to Mafeteng. It is a double-storey building at the back of which is the residence of the late Xu Wenda. When she got there, PW1 says she found the employees of Top-Top supermarket already with policemen from the Maseru Central Charge-Office.

/...

PW1 was shown Xu Wenda's residence on the first floor. In the lounge behind the chairs towards the door leading to the kitchen, they found blood stains that seemed to have been rubbed off. PW1 with other policemen began looking around. The lounge has six doors leading to other rooms. The lounge was not locked when they got there. They found a shell cartridge of a 7-65 pistol on one of the single sofas. They took possession of it as an exhibit. On the passage between the Lounge and the kitchen they found a dead bullet on the floor. They took it for exhibit purposes. They found a bluish green cigarette lighter.

In a box for rubbish they found a dish towel that had blood, a box of cigarettes of the brand Camel. In the kitchen on the floor they found another shell of the 7-65 cartridge. On the sink in the kitchen they found yet another 7-65 shell and a bloody cloth. All these were kept as exhibits. From the kitchen they went to the store-room where the door was open already. There they found Xu Wenda lying on the floor dead. Deceased had a hole on the right temple. This was bleeding. There were scratches on the face from which blood seemed to have dried. Deceased's corpse was still clothed. Deceased's body was taken to the lounge.

/...

PW1 and the other policemen found the bed-room door locked. They broke it and found the body of a child on the bed and that of a woman on another bed. These were dead. I must point out that PW1 had previously suggested that when they found the door locked, they left everything undisturbed so that the scene of crime officers could lift finger prints.

The following day, in the morning of the 7th August, 1994, they continued investigations. This time they were working with scene of crime officers. They went to Xu Wenda's bedroom where they found the body of Ha-Ya-Mei (Xu Wenda's wife still dressed) lying on its back. Its head was wrapped in towel. On uncovering the head, they found a small deep hole near the right eye between the right eye and the cheek. There was bleeding through the nostrils and the mouth. Below the mattress they found a 7-5 magazine and three bullets. They took possession of them.

PW1 and the other policemen then proceeded to the bed where a 12-year old boy was lying. The boy's body was lying on its back, half-seated on two pillows. It had been strangled with a thin rope that was still on it. The rope was very tight.

/...

There were no visible injuries except bleeding from the mouth and nostrils.

PW1 says the servants then showed them the room in which the accused used to sleep. There they found a 7-65 magazine with 3 rounds of ammunition, and a holster of a pistol. They took possession of them. They were also shown the room where they were told Keke used to sleep. They also went to the toilet and bathroom. The things they seized were handed in as exhibits. They were marked Exhibits 1-15.

The court went on inspection *in loco* in order to see Xu Wenda's residence and Top-Top Supermarket.

Cross-examined PW1 was referred to her preparatory examination deposition. There were some slight differences in her description and where she found some exhibits. PW1 said this was the result of misunderstanding by the magistrate. PW1 said she was working with the late Warrant Officer Selebalo and Sergeant Ramakeoana on the 6th August, 1994. They had not touched the bodies. It was a mistake if she had said they removed Xu Wenda's body to the sitting room that

/...



day.

The scene of crime was guarded until the following day. Although at the preparatory examination neither she or Sergeant Baholo said the scene of crime was guarded, it had been guarded. This fact had been revealed by cross-examination.

Everything that she did was done without the benefit of the accused's explanation because accused was not there. Even after the accused had been arrested, he could not communicate with the accused because the Chinese Embassy refused to provide an interpreter. When they were going over the scene of crime, Lieketseng Molumo (Keke) was there.

The evidence of PW2 Warrant Officer Baholo confirms that there were three bodies found, that of Xu Wenda, Ha-Ya-Mei and Xu Jiao Yi. He saw these on the 6th August but could only take photographs on the 7th August, 1994. He was the scene of crime officer. He attended the scene with PW1 Policewoman Moloi, Lieutenant Selebalo, Detective Sergeant Lechesa and Detective Sergeant

/...

Ramakeoana. He photographed exhibits and the bodies of the deceased. He handed his album marked Exhibit "D".

PW1 Police-woman Moloji was recalled and she told the court that an amount of Ten Thousand Maloti or Rands (M/R10,000.00) was found on the deceased. The watch of deceased and the money were eventually handed to deceased's brother Xu Went as they were no exhibits. There was also M64.95 which was found in the baby-safe.

The Crown then called PW3 Motlalepula Takalimane who had worked for the late Xu Wenda from 1993. At the time of deceased's death, PW3 was still working for Xu Wenda.

PW3 told the court that he last saw Xu Wenda when he arrived from Bloemfontein at 12 noon or thereabout on the 6th August, 1994.

PW3 says accused opened the shop in the morning. Later they had coffee. When they finished, they asked where the boy was because they usually had

/...

coffee with him. Accused said he boy was upstairs helping his sick mother who had a bowel problem. Accused, Marethabile and PW3 worked until Keke came.

Accused used to live in the late Xu Wenda's house with the late Xu Wenda, Ha Ya Mei (Xu Wenda's wife and their son, Xu Jiao Yi. That morning none of the employees went up to Xu Wenda's residence. When a Chinese gentleman came, he was told Xu Wenda was not there and Ha Ya Mei was ill in the house.

When Xu Wenda came, accused followed him to the house upstairs. At about 12.20 (twenty minutes later) accused came back and told them to tell Xu Wenda that he had gone to Spar, across the road. They remained in the shop with Keke and Marethabile. They normally knocked off at 1 p.m. but they remained until 3 p.m. At 1 p.m. they had gone to knock at the door of Xu Wenda's residence but there was no response. They thought Xu Wenda had gone through the other exit next to where they sold gas. At 3 p.m. two Chinese gentlemen came and waited with them until 6 p.m. when they had to lock up the shop and went up to Xu Wenda's residence.

When they got to the residence of Xu Wenda with the two Chinese gentlemen, they agreed with Keke to put up there. Keke went to the kitchen. On the way to the kitchen Keke said there was blood on the mat. There was hair on the blood, nearby there was a shell and a cigarette lighter. Keke, whom they were following said there was more blood in the sink. They found another shell on the sink. Keke, who had keys, opened the store-room and she called them saying Xu Wenda was in there. PW3 saw Xu Wenda in the store-room dead. he called Kotelo, the night watchman, and Marethabile, who was at the bus stop waiting for a taxi. PW3 and Kotelo went to the Thamae Police Station to make a report.

The police saw the body of Xu Wenda and used an iron rod to open the bedroom of Xu Wenda. There the bodies of Ha Ya Mei and the boy were found. The police used an iron rod between 10 and 11 pm. The police left them with some policemen to guard the place as it was late. The following day the bodies were removed to a mortuary.

Accused was not seen from the time he left for Spar at about noon. Seven to ten days later PW3 was invited to the Charge Office to go and identify the accused.

/...

In answer to questions, PW3 told the court that he had not seen the pistol holster before. He had seen the pistol, it belonged to Xu Wenda. PW3 said he had seen Marethabile hand over the pistol to the accused the day before. PW3 says he saw accused tie it on his leg.

Although PW3 said it was the first time Xu Wenda left the gun with accused, PW3 said he had seen accused return the pistol to Xu Wenda. Xu Wenda used to put the pistol under an exercise book or tie it on the leg. The witness is not sure if he used a holster for this purpose.

After accused had been arrested PW3 was called to the Police Station. At the Police Station PW3 and Marethabile talked with deceased in a mixture of English and Sesotho. Accused was not talking to the police. PW3 said he does not know if accused will say he was invited to Lesotho from China by Xu Wenda.

The position of Keke in the shop was not clear. PW3 never saw her being paid at the end of the month. Keke had her own residence at Lithabaneng although she sometimes lived two days in a week at Xu Wenda's. Keke used to say she was Xu

/...

Wenda's lover. Keke used to come in and go at the shop at any time she chose.

There had been, according to PW3, some Chinese gentlemen wanting to see Xu Wenda between 11 and 12 p.m. Keke came later after this. The witness conceded that at the preparatory examination he only mentioned the Chinese coming at 5 p.m. If anyone used the other entrance, he would be turned away by dogs. PW3 says he forgot at the preparatory examination to mention that a Chinese gentleman came in the morning. PW3 denied the lounge was locked, he said it was always unlocked. He denied Keke took the Chinese gentleman upstairs and found the door locked.

The Crown then called PW4 Marethabile Mafethemane. She said she was still working at Top-Top supermarket and remembers the day that Xu Wenda left her with a gun when he went to Bloemfontein. He later gave it to the accused as she had been instructed. Accused had not temporarily been present when Xu Wenda left. The gun was in a leather holster. Accused stayed with Xu Wenda and his family. They had stayed together for about a year.

/...

On the 6th August, 1996, PW4 says he found accused standing next to the door in the morning and accused opened the shop for them. When PW4 was about to go to the toilet she asked where Ha Ya Mei was and accused said she was sick with a loose bowels. The child was helping her. Although they normally used the toilet upstairs, he said she should use the toilet downstairs as there were many customers. None of them went to check the sick person. At 10 a.m. when they drank tea, PW4 asked why the child had not come down, accused said he knew the tea time. A Chinese gentleman came and he wanted to see Xu Wenda's wife. he tried to go up but was turned back by dogs. That Chinese gentleman left.

At 12 noon, Xu Wenda came and passed through to his house. Accused followed him. Soon thereafter, after about 5 minutes, accused came back. he said PW4 should tell Xu Wenda when he came down that he had gone to Spar.

Keke (Lieketseng Molumo) also worked at Top-Top with them. She used to work as Xu Wenda's domestic servant when she finished that work, she went to the shop. That day Keke came late after 9 a.m. and would not go into the shop because she said accused refused to let her sleep at Xu Wenda's the previous day.

/...

Keke was restless and was not behaving as she normally did.

They went on working even after 1 p.m. when they were normally relieved. They normally closed at 3 p.m. Xu Wenda and his wife did not come down as they normally did. Realising they were not coming, they went to the residence and switched on the TV in the sitting room which was not locked. None of them went to the other rooms. Keke had been sent to knock at Xu Wenda's bed-room but there was no response. After a while they went back to the shop where they continued working until 5.30 p.m. The first Chinese gentleman came and waited with them. At about 6 p.m. a second Chinese gentleman came and waited with them.

They closed the shop and after the Chinese gentleman had said she should keep the key of where the money was. It was also agreed that Keke and Motlalepula should put up there. As PW4 was going home while she was with Kotelo the night watchman PW3 and Keke called her. After being showed blood Mofokeng the landlord was called and Keke opened the store room in which she was told Xu Wenda had been found dead. She left and came the following day.

/...



The following day PW4 and Keke were told to go outside while photographs were taken. Later three dead bodies of Xu Wenda, Ha Ya Mei and their son was loaded on the police vehicle. PW4 saw accused again a week or two later.

Cross-examined PW4 said she never discussed this case with Xu Wei Ming, the brother of the late Xu Wenda. she stated she still worked at Top-Top. PW4 stated accused's relations with Xu Wenda were those of master and servant. PW4 was not sure if they were friends, but they lived in one residence. Keke was the late Xu Wenda's girlfriend. When Xu Wenda gave her a gun Xu Wenda's wife and son were there in the shop. When Xu Wenda went away he sometimes said "Keke" should sleep there. PW4 did not know the security arrangements. Keke was a domestic worker and she also worked in the shop. She came daily though she seemed not to keep regular hours. On the 6th August, 1994, Keke did not go upstairs.

Answering further questions PW4 said Keke did not go upstairs because she said she was angry because the previous day accused did not allow her to put up there. Keke's job had been to encourage customers to buy and therefore she was

/...

there when Xu Wenda said he was going to Bloemfontein the previous day. Deceased had not asked Keke to put up at deceased's home in the presence of PW4. Keke's complaint was that accused refused to permit him to sleep there although Xu Wenda had said Keke should.

PW4 said she did not know if Keke had her own room in Xu Wenda's residence. Kotelo the nightwatchman (now deceased) did not report any commotion during the night. PW4 was on good terms with Ha Ya Mei (Xu Wenda's wife) and their son. They used to come down to the shop although they did not stay the whole day. If they were there they normally came to the shop and went. PW4 never went to check for them when they did not come down that day. PW4 said she was not sure a Chinese gentleman came that morning. PW4 denied in her presence that Chinese gentleman asked Keke to accompany him upstairs as he was afraid of dogs. If there is evidence that they went upstairs and found the door locked, PW4 denies this because it did not happen.

The bunch of keys that was in the shop ended in Keke's hands. She handed it to Keke when they closed the shop. Keke might have got the key from the book-

/...

shelf in order to open the store-room. Keke knew more about keys of the residence. At the time they watched television about 10 minutes they did not notice the blood in the sitting room or the kitchen or the cartridge shell on the chair in the sitting room either.

If PW4 said Keke went to Xu Wenda's house when there were Chinese visitors PW4 might understand, but she does not understand why it should be said accused will say Keke did not work there. PW4 would not comment if accused were to say Keke used to sleep in the sitting room when she was obliged to put up at Xu Wenda's place.

The Crown called Keke (Lieketseng Molumo) as PW5. Duly sworn like other witnesses, Keke said that she resided at Lithabaneng in 1994. She knew the accused because they worked with him at Top-Top supermarket. At Top-Top she worked both in the shop and in Xu Wenda's residence. The wife of Xu Wenda wanted her to be with her all the time. She used sometimes to stay with them in the house after working hours. PW5 says she had her own room in Xu Wenda's house upstairs. Accused also had his own room there. PW5 (Keke) started

/...

working there in 1992 while accused came to live there in 1993.

Accused was something like a manager. If they wanted anything in the shop, they used to ask the accused for it.

On the 5th August, 1994, when Xu Wenda went to Bloemfontein, she asked PW4 (Keke) to put up with his family as he normally did when he was going far away. Ha Ya Mei (Xu Wenda's wife) was sickly and had an eye problem that is why she wanted PW5 to be with her. This would be during or after working hours. The child also wanted to play with PW5. Keke PW5 would go to her place when Xu Wenda came back. Before Xu Wenda left for Bloemfontein, he left his fire-arm in a leg-holster with PW4 Marethabile.

PW5 told the court they worked together with Xu Wenda's wife until 6 p.m. As they were about to close and PW5 (Keke) was preparing to go to Xu Wenda's residence where she intended to put up, accused pushed her out. Xu Wenda's son tried to pull her into the shop. The child even bit the hand of accused. Accused pushed Keke out. PW4 who was in the process of going home advised Keke to go

/...

home because accused might injure him. When Keke said she had no money PW4 Marethabile lent her the money. The following day accused gave M100.00 and asked for her forgiveness.

The following day Keke came back to work. Ha Ya Mei (Xu Wenda's wife) and the child had not come down. Keke did not go in because of accused's behaviour the previous day. Keke says she did not go to Xu Wenda's residence because she was scared of the accused. When Marethabile PW4 urged her to get into the shop, Keke left for Lerato's saloon about 30 paces from Top-Top supermarket in another building. After Keke had been there 10 minutes accused put M100.00 in her breast pocket saying Keke should forgive her. She at first refused the money but later took it. This was at about 11 p.m. After this Keke got into a mini-bus and went to town and bought with the money.

Keke says she came back a bit after 12 noon. After she got down from the taxi accused called her from the opposite side of the road saying they should go to town with her. Keke said accused will find her at the shop. Keke says she did not go straight to the shop but went to Lerato's saloon. She says she had gone to show

/...

Lerato what she had bought. When she got there, Lerato told her she had heard a gun report. She took this report to PW4 Marethabile who denied hearing such a report and asked Keke to call Lerato. When Lerato had been called they talked about this.

Keke says after this she went to the shop but worked in the gas area not in the shop. After sometime PW4 Marethabile asked why accused was not coming back from Spar. Keke told Marethabile that accused had gone to town not the Spar because Keke said she had seen accused get into a bus. The occupants of Xu Wenda's house never showed up.

At 3 p.m. a young man wanted to change what he had bought. Marethabile PW4 said Keke should go to the courtyard outside and shout at Xu Wenda. Xu Wenda's car was there but Xu Wenda did not come down when Keke called him. Marethabile was normally relieved at 1 p.m. so that she could knock off but this did not happen. She worked until 6 p.m.

In the morning hours, one of Xu Wenda's friends had come looking for him. he

/...

talked to accused, he wanted to go up to Xu Wenda's residence and did in fact try and do so, but the dogs turned him back.

At 3 p.m. Keke had opened the lounge and called Xu Wenda but there was no response. Keke said she even went to the boy (Xu Jiao Yi) Basotho playmates, but she could not find him. Keke also went to Thabong to look for Xu Wenda but no one knew where Xu Wenda was. At 6 p.m. there was a Chinese gentleman who lived at Thabong. Thabong was about 300 metres from Top-Top supermarket. There was also present at Top-Top another Chinese gentleman who lived at Borokhoaneng about a kilometre from Top-Top supermarket at 6 p.m. They were waiting for Xu Wenda at the shop. At that time these Chinese gentlemen advised Marethabile PW4 to close the shop. It was agreed that PW3 Motlalepula and Keke should put up at Xu Wenda's residence.

It was when Keke was going to cook something for Motlalepula that she noticed blood behind the sofa. It had been cleaned but strands of hair were put on it. She also noticed a trail of blood leading to the kitchen. When she got to the kitchen she noticed a dish cloth having a lot of blood. She had passed Xu Wenda's greenish

/...

cigarette lighter next to the store-room. As Xu Wenda was scared of mice she became suspicious. She took the key of the store-room on a small shelf for keeping keys. She opened the store-room and noticed Xu Wenda in there sleeping on his back. There was blood on his nostrils and his hands were thrown back above the head. The Chinese gentleman said Keke should not touch him as he was dead.

Marethabile PW4, and Kotelo the nightwatchman were called by PW3 Motlalepula. PW3 and the late Kotelo were told to go and report this to the police. The police came and Keke was asked to get Xu Wenda's friends to come and help. Keke slept at Marethabile's. On Sunday 7th Keke and others waited outside while the police were doing their work. Eventually they took the corpses of Xu Wenda, Ha Ya Mei and their son Yoyo outside and took them away.

Accused had last been seen by Keke when he went to the bus stop. Keke saw him again at the police station after a week or two. Keke says she and accused were friends. Their relations have not changed. They sometimes talked during this trial.

/...



Cross-examined Keke showed that her association with Xu Wenda began in 1990. Xu Wenda's wife came to Lesotho in 1992. The love affair between Keke and Xu Wenda began in 1990 and continued until Xu Wenda died. Xu Wenda's wife knew of this love affair but she remained friendly to her. She was even given a room in the house despite this fact. Keke had told Marethabile PW4 that she had a room at Xu Wenda's residence. She cleaned the house of Ha Ya Mei (Xu Wenda's wife) and then went to work in the shop. Keke was paid for both jobs.

Keke was referred to what she said about a Chinese gentleman at the preparatory examination which was not the same as what she had said before this court. She denied she was tailoring her evidence before this court to coincide with the evidence of Marethabile PW4.

Keke insisted she was an employee when it was said accused would deny this. Keke insisted she had a room in Xu Wenda's residence. Her changing clothes were locked in there by the police when Xu Wenda died. Keke stated that Ha Ya Mei (Xu Wenda's wife) told her she knew of her love affair with her husband. If accused insisted that even if Xu Wenda's wife knew of the love affair she would

/...

have been obliged to divorce Xu Wenda (according to Chinese custom) Keke still insists she knew of her love affair with her husband.

Keke in answer to questions told the court that although accused used to be left in charge, she used to sleep there when Xu Wenda was not there even though it was not always. Keke was not sure if Xu Wenda had told the accused that Keke would sleep there on that occasion. Even when Xu Wenda was there Keke slept there when Xu Wenda had asked her to sleep there. Keke would baby-sit when Xu Wenda and his wife had gone to Lesotho Sun to gamble. Sometimes even when they were going to play the Chinese game that took the whole night Keke would baby-sit. The Xu Wendas would ask her to put up even when they had taken Keke with them to friends. At other times Keke would put up there when Xu Wenda was absent at the request of Ha Ya Mei (Xu Wenda's wife). There were times when Xu Wenda and his wife would not invite her to put up there when Xu Wenda was going away.

It was at the time Keke was taking flasks upstairs that accused violently stopped her to go. This caused the child to scream. Keke conceded that at the

/...

preparatory examination that she had said she was taking jerseys and not flasks when accused stopped her from coming in. Keke said even Ha Ya Mei (the mother) cried when she was stopped from putting up. She denied it was because she wanted to save money by sleeping there. Keke conceded that accused might have been doing his duty by not allowing her to sleep there.

Answering further questions Keke agreed that he spent the 4th and the 5th August doing hair extensions at Lerato's saloon. Keke denied she asked for M50.00 from accused in order to buy a hair clip. Accused had promised to pay for Keke's hairdressing. On Thursday Keke said she never went into the shop at all. On Friday she was only in the shop a little before Xu Wenda left for Bloemfontein. Keke was surprised when accused said she was not answerable to him, and that Keke went in and out as she pleased. Keke said she was answerable to the accused.

Keke in answer to question said she had finished doing her hair on Friday. If accused said Keke and Lerato said they wanted to go with accused wherever she was going, Keke could not agree. Keke said accused would be wrong to say he did

/...

not wait for the taxi, in fact he waited for it. By the time he got into the taxi, Keke had crossed the street.

Keke still answering questions said she had been told of a gun report from upstairs but no one went to check. If Marethabile PW4 did not refer to the gun report, Keke was of the view she had forgotten.

Keke said she was confused about when the Chinese came. She said the Preparatory Examination was not correct when it said they went to look for deceased at 3 p.m. It was only she who went to knock. She could not remember if they watched television.

The Crown then called PW6 Lerato Mokeke who was from the saloon in the next building. She confirmed accused gave Keke M100.00 by putting it in Keke's chest. Keke threw it on the floor and accused put it back and then went to town.

An hour after Keke had gone to town, Lerato heard a gun report. She asked Marethabile PW4 the source of the gun report. Marethabile said she did not know.

/...

Lerato said he had heard as if it came from Top-Top building. Before she asked Marethabile accused had passed and asked them to go to town and he got into a taxi and left. It was Keke who had first carried Lerato's allegation that she had heard a gun report. Marethabile asked Keke to call her. Marethabile told Lerato she had heard no gun report, Lerato must be mentally unbalanced. Lerato went back to her saloon, she never saw accused again until she saw him again at the Magistrate's court.

Asked questions, Lerato said some people who were welding heard the gun report. She and they asked each other if it was really a gun report they heard, but they were in agreement that it was. She then told friends about it. She asked Keke to find out for her. When accused passed, Lerato was with Keke. Keke had complained about the way accused had expelled her and stopped her from sleeping at Xu Wenda's on instructions.

Lerato said what she was saying to the court is true. She conceded that she had met the others and they had reminded each other of the events that occurred. Although PW4 Marethabile did not say so, she had called her to come and say

/...

something about the gun report.

The Crown's next witness was Sergeant Ramakeoana PW7. He said on the 7th August, 1997, he had loaded the three bodies of the deceased and conveyed them to the mortuary. Accused was not there at the time.

On the 11th August, 1994 he got a report from someone that accused was coming from South Africa and that accused was on his way to Lesotho. The message was from a person who seemed to be Chinese from the sound of his voice and speech. They had been looking for accused since the 7th August, 1994. Sergeant Ramakeoana had no knowledge if the South African police were involved in the handing over of the accused.

Sergeant Ramakeoana searched the accused at the Maseru border as soon as he came into his hands. On accused he found a 7.65 mm pistol, serial number 1662992 and seven rounds of ammunition in magazine. He found Xu Wenda's passport, Xu Wenda's Identify card and accused's passport. Xu Wenda's passport was marked Exhibit "E". Xu Wenda's identity card was marked Exhibit "F" and

accused's passport was marked Exhibit "G". In it there was an official Lesotho Government Certificate authorising accused to remain in Lesotho until 17th December 1994. the pistol was marked Exhibit 16.

Answering questions Sergeant Ramakeoana PW7 said accused gave an explanation that he did not write and what he found in his notebook. It was the gun and Xu Wenda's passport that was relevant. He had seized these as exhibits. Accused did not sign for them. Sergeant Ramakeoana says he interviewed the accused with the aid of a Chinese interpreter. Sergeant Ramakeoana kept everything that was said in his head.

Sergeant Ramakeoana answering further questions said he did not know if accused was arrested in Bloemfontein by black policemen. He does not know what happened in Bloemfontein and that accused was searched. If three South African policemen brought accused to the CID office in the Maseru police station, he would deny that. Accused had come into his hands, unaccompanied. Sergeant Ramakeoana denied accused was kidnapped by agents of the Lesotho police in South Africa. If Crown Counsel Masingoaneng Motanyane said accused was

arrested in Bloemfontein after evading the police for some time Sergeant Ramakeoane did not know. he insisted accused was arrested in the manner he described. Accused came into his hands with a loaded fire-arm unaccompanied. Sergeant Ramakeoana waited for the accused for about an hour. The licence of the fire-arm shows this particular firearm belonged to Xu Wenda.

The Crown's last witness PW8 was Lieutenant Colonel Telukhunoana a fire-arms' examiner. Duly sworn, he handed an affidavit, a copy of which both Crown Counsel and Defence Counsel already had in thier possession. the affidavit marked Exhibit "H" showed he was a fire-arms examiner attached to F<sup>o</sup>r<sup>e</sup>n<sup>s</sup>i<sup>c</sup> Ballistics section of the Police Technical Services Department of the Royal Lesotho Mounted Police. On the 15th August, 1994, Sergeant Lechesa had handed a dead bullet a 7-65 mm and 3 fired cartridge cases. On the 16th August, he handed to him a 7-65 mm pistol serial number 1662992 which was in good working condition.

He fired cartridges for test purposes and on examination, he found that the dead bullet was too damaged to bear that comparison. The 3 fired cartridge cases that had been handed to him had been fired from the 7-65 mm pistol that had been

/...



handed to him.

Lieutenant Telukhunoana produced a photograph that showed an identical mark made by an ejection of the firearm on one of the cartridges. I queried that each cartridge should have had its own photograph. He told me he had only brought one photograph Exhibit "I" for demonstration purposes. This court told him that in future, this court wants photographs so that it can be persuaded by physical evidence of photographs not just what the witness says. This is now the standard practice in fire-arm examination. This evidence was not disputed by both sides.

The court went again for an inspection in loco. It was shown a spot 5 metres from the house of Xu Wenda where PW6 Lerato was standing. PW6 was recalled for this purpose. A demonstration was made by Colonel Telukhunoana PW8 with disarmed ammunition and a gun report from Xu Wenda's sitting room could be heard clearly where PW6 was standing although windows and doors were closed when the pistol was fired from Xu Wenda's house. Lieutenant Telukhunoana PW8 who made the demonstration said a proper bullet would have been much louder because its pressure would be good.

/...

Another demonstration was made from the lounge in which a disarmed ammunition was fired in order to test whether a person in the Top-Top Supermarket could hear. Doors and windows were closed. The sound that was made was very low. It was as if two planks had collided. It was clear that a person in the Supermarket could not have heard a report of the fire-arm.

Cross examined PW6 Lerato said the shoemaker we had seen at the inspection in *loco* was with them when the report of the fire-arm was heard. She was not quite sure it was him or the welder who confirmed the fire-arm report. PW6 Lerato eventually concluded it was the welder who said what they heard was a gun report. PW8 Lieutenant Colonel Telukhunoana was recalled and cross-examined by Mr. *Phoofolo*. Asked out music and other disturbances such as traffic on the road, he said he would need more information. Perhaps if it was quiet a person in the shop might hear a gun report from the sitting room.

The Crown then closed its case.

The accused Shao Ming Sheng gave evidence after affirming that he would

/...

speak the truth. he told the court that he comes from Shanghai, China.

Until the 6th August 1994 accused said he lived with the three deceased at Lekhaloaneng. He worked in Xu Wenda's Supermarket with PW3 Motlalepula and PW4 Marethabile. Lieketseng (Keke) PW5 was not an employee. Ha Ya Mei (Xu Wenda's wife) was not particularly friendly to Keke because they did not speak the same language. Their personal relations were those of mere acquaintances. Keke did not have a room in the house. She had slept at Xu Wenda's residence several times when there were Chinese people putting up there. She did not sleep there when Xu Wenda was not there. Xu Wenda did not give her any salary.

Accused said he first became acquainted with Xu Wenda when he brought him from Moshoeshoe I airport. Accused had come to Lesotho because someone in China had told him that business in South Africa and Lesotho was good. Accused had come with many Chinese in the aeroplane. In China Ta Hua Company had recruited them promising to take them to South Africa through Wang Yi Ming and Lo Wei Yi. These people were Xu Wenda's friends. From Moshoeshoe I airport accused was taken to Xu Wenda's residence at Lekhaloaneng. They were living

/...

in the rooms above while Xu Wenda was living in the rooms below.

They were taken to Lesotho because they had no permits to enter South Africa. They were supposed to help us get permits to South Africa. They stayed to Lekhaloaneng for a month, then they were taken to Mafeteng. They stayed there for some time. From Mafeteng accused was taken to Maseru with two other Chinese gentlemen. Accused stayed with these two and usually went to Lekhaloaneng to see Xu Wenda.

Because there was a report that Xu Wenda wasn't safe at Lekhaloaneng, accused came there to work for Xu Wenda. That was in March 1993. Accused's responsibilities were those of manager, he was only helping. He was asked to act as supervisor in the shop. He was not quite a manager. Marethabile PW4 was the only employee at the time. Accused's responsibility was on the business not on the workers. There was no one responsible for the keys because they were put on the shelf.

Accused told the court that his relations with Xu Wenda's family were normal,

...

but he disliked their son because he was very spoilt. Everybody disliked this boy. When Xu Wenda was away, accused looked after the family.

There are two routes to Xu Wenda's residence, it was through Top-Top supermarket and through the gate. There were two dogs, which were either kept under leash or let loose.

On the 5th August, 1994, Xu Wenda left without making any arrangements with the accused. Accused did not see Xu Wenda before he left. PW4 Marethabile just gave him a gun without saying a word. Accused took it and put it next to the cash register on the shelf. Although PW3 Motlalepula said he had not seen the holster accused said he had shown the holster to Motlalepula. When the shop closed, accused took the gun and the cash-box upstairs. Accused put the gun on the bed and slept. In the morning accused put the gun on the shoe-shelf. The gun was under the pillow while accused was sleeping.

Xu Wenda came a little after 12 noon, on Saturday. Every time Xu Wenda went away he gave the gun to the accused. When he returned accused would just

/...

tell him it is on the shelf in the sitting room.

Accused said he had heard Keke PW5 say that he had refused to allow her to sleep over. Xu Wenda's son asked Keke to sleep over. Accused told the son that he would not permit it. Xu Wenda's son asked the mother to speak to accused, but the mother said to him, "if uncle does not agree Keke could not sleep there". Accused pushed Keke outside, accused said he only touched her and they closed the door.

The three of them had gone upstairs. Accused asked where Xu Wenda had gone from Ha Ya Mei (Xu Wenda's wife). Ha Ya Mei said Xu Wenda had received an urgent telephone from some Chinese people in Bloemfontein. They all slept until morning when accused went downstairs to open the shop. Ha Ya Mei was in her room, accused did not know what she was doing. Her son came out and said his mother was not feeling well. He said she had a running stomach. Accused had not checked on her.

There was always a night watchman who always sat in front of the shop and

/...

sometimes goes around to see if everything was in order. He begins work at 6 p.m. and leaves at 7 a.m. in the morning. He leaves before he opens the shop.

Accused did go upstairs before Xu Wenda arrived when he was going to the toilet. He even went at times to go and get clothes that they were selling. Workers did not use the toilet at the residence.

The case was adjourned for about five days before accused continued his evidence-in-chief.

Accused continuing with his evidence said originally they used the toilet downstairs in one of the rooms while workers used a toilet that was outside. When Xu Wenda's family got the rooms upstairs, the workers used the toilet that was used by Xu Wenda's family. When tenants were found for the house below, workers went back to the toilet outside. Accused confirmed that he had said PW4 Marethabile should go to the toilet and come back quickly. He never said she should not use the toilet upstairs. Marethabile had to come back quickly because there were many customers.

/...

PW5 Keke used to go upstairs to prepare food whether Xu Wenda was there or not. That day Keke did not go upstairs.

The gun would be put on the shoe shelf in the sitting room so that if Xu Wenda had come in the night, he would get it there in the morning. In the night accused kept it in accused's room. Accused would put it on the shelf in the morning because he did not know whether Xu Wenda ad come back during the night. Accused had on the 6th August, 1994, put the gun on the shoe shelf as usual before going to open the shop. Xu Wenda used to put the gun on the shelf next to the till. Sometimes he did this whether he was there or not. Accused would find it there if Xu Wenda had left.

Accused denied he gave Keke PW5 M100.00 so that he could not tell Xu Wenda he had been rough with her. Accused says he gave her M50.00 to buy a hair pin. Accused says he put the money in Keke's pocket while she was doing her hair. Accused says no one told about the gun report before he left.

Accused says he got into the taxi opposite the shop. Accused says Keke

/...



asked him if he could go with him when he was already in the taxi. Accused denied she had told Marethabile PW4 that she had gone to Spar.

After leaving Xu Wenda upstairs accused said he took a cup of tea and told Marethabile that Xu Wenda will soon be coming downstairs. Accused said he did this because it was time for them to go home and he was about to leave the shop. Accused denied staring at PW4 Marethabile.

When Keke came, after he had opened the shop, accused asked her to give him a hair pin. Accused asked her to go and buy the hair pin and Keke left. Accused continued to be in the shop. After a while Marethabile PW4 asked to go to the toilet. Accused allowed her but said she should come back quickly because they were very busy because Xu Wenda's wife was sick.

After a little while, a Chinese gentleman came looking for Xu Wenda. Accused told him Xu Wenda was not there. He stayed a little while and left.

Xu Wenda came after this Chinese gentleman had left and went upstairs.

/...

Accused followed and told Xu Wenda that the gun was on the shoe shelf. Accused then proceeded to his room changed shoes and went back to the shop, stood next to the till and had a cup of tea. Before accused went to the shop, he only told Xu Wenda that the gun was on the shelf and that he wants to go to South Africa. Xu Wenda did not say anything because he knew accused would be going to South Africa.

Accused went to the taxi rank, called Keke and she was about to come when the taxi started moving. Accused left and in town changed to another taxi that was going to the border. From the border he took a taxi to Johannesburg. When he got to Johannesburg he looked for some Chinese people but did not find them. Accused then went to look for these Chinese people in Bloemfontein, accused still did not find them.

While accused was in Bloemfontein bus stop on his way to Lesotho, before he could board a taxi to Lesotho, three African gentlemen came. They took him to a room which was not at the bus stop. They did not understand each other. They put him in a car and took him to the Maseru Central Police Station in Lesotho. Two

/...

policemen took him to the CID office. The passport of Xu Wenda was not found on him.

In order to cross into south Africa, accused said he had put on M50.00 inside his passport which the South African police took it and allowed him into South Africa. A visa would have cost him M100.00.

At the CID office there was no communication. Eventually a Chinese gentleman was obtained to interpret and tell him the police wanted him to go to the court. At the court they said he had killed people. Nobody had told him before that. He had been asking the police, using Chinese. When accused talked to Keke PW5 and Marethabile PW4 he used English and Chinese, there was always a dictionary available. The dictionary is still in the shop. Accused did not take it to Johannesburg and Bloemfontein.

Accused said he did not hear the investigating officer say he found a pistol on him. He said the investigating officers allegation is not true. No pistol or ammunition were found on him. It is not true that he was arrested at the border

while he was walking into Lesotho. After being arrested in Bloemfontein two Chinese people came and looked at him and walked away. The people who arrested him in Bloemfontein searched him, found cigarettes, his passport and money.

Accused denied killing Ha Ya Mei (Xu Wenda's wife), Xu Jiao Yi (the boy) and (Xu Wenda. accused said he does not know if 7 rounds of ammunition of a 7-65 pistol and a holster were found in his room by the police. When the gun had been given to him it had 7 bullets. There were other magazines on the shoe shelf. Accused said he would like this murder solved. When Xu Wenda left, they were like brothers. They had not had any quarrel.

Cross-examined, accuse said in Shanghai he had been a factory worker, a mechanic who repaired factory machinery. Accused said he brought two thousand dollars with him to Lesotho. Half of this money had been spent. That money is still in American dollars. He had not told his Counsel about this money. It had been in his suitcase.

Answering questions accused said his real destination, when he left China, was to be South Africa. He was told he would get there through Lesotho. Accused was told through having a company in Lesotho he would have a work permit. Accused then said he used to bribe his way to South Africa in order to meet people who could help him. Although there is only one visa to South Africa dated 28/8/93, he went many times to South Africa by putting money in the passport. That is how he went to Johannesburg on the 6th August, 1994.

When he first came to Lesotho by plane, they just stamped his passport at the airport. No questions were asked. When he left China, Wang Yu Ming and Lui Wei Yi had said they would get him a visa to South Africa. For this service accused paid them \$4500 American dollars. He was given Ta Hua Company papers in Shanghai. It is the business of Ta Hua to bring people from Shanghai to Lesotho for reward. Accused paid his own passage from Shanghai to Lesotho. The \$4500 American dollars was for arranging to get a work permit in Lesotho to enable him to get to South Africa, or to get him a South African visa. Accused does not know how Ta Hua Company people dealt with officials but all he can say is that his passport was stamped whenever it had to and he was allowed to pass.

/...

Answering questions accused said at the time he left Shanghai, he was not aware Xu Wenda was part of the scheme. After his arrival in Lesotho, he learned that Xu Wenda had connections with Ta Hua Company. He discovered this when he saw a licence of Ta Hua Company in Xu Wenda's shop. The licence was framed and put inside a shelf under the till. It had the name and address of Ta Hua Company. Its address was Maseru Lesotho. When accused left Lekhaloaneng, Wung Yu Ming and Lui Wei Yi were living in South Africa. Accused had been in Lesotho for more than year.

These people had not secured a visa and a work permit. They said in South Africa to get a work permit was a big problem. Accused was therefore told to wait in Maseru. They were saying South African regulations had become strict. Accused had paid for a service which was not being delivered, so accused crossed the border to go and look for them. He did not know their address except that they were in Johannesburg or Bloemfontein. Xu Wenda's passport was not found on him, but accused knew Xu Wenda had a South Africa visa which enabled him to get in and out of South Africa.

The court noticed a hotel receipt or counterfoil that showed that Xu Wenda was at a Hotel in Johannesburg between the 6th and the 9th August, 1994. The court asked accused if he knew whether someone used Xu Wenda's identity in Johannesburg between the 6th and 9th August, 1994, because Xu Wenda died on the 6th August, 1994. Accused said he did not know.

In answer to the questions, accused said it was Liu Wei Ming and Xu Wenda who said accused should go and help Xu Wenda while accused was waiting for a work permit. Accused was still getting 3 months' resident permits in Lesotho. He was only helping Xu Wenda but was not working. He was not paid, he was only given food. Accused was taking care of everything in the shop but he was not a manager. Accused says he was asking Xu Wenda all the time why he was not in turn helping him. He was asking Wang Yi Ming and Lui We Ying.

In answer to questions, accused said stopping Keke from sleeping at Xu Wenda's had nothing to do with the shop. Accused denied he had ever said he disliked the boy. What he said was that everybody would dislike the boy. His personal dislike of the boy was his business. Although it was his duty was to look

/...

after Xu Wenda's family, on the 5th and 6th August accused kept to his room.

When asked questions about checking on Xu Wenda's family, accused said it was not his business. He used this answer several times at different places that the court had to warn him that such answer does not help the accused's case. Accused then answered questions of this kind in a more helpful manner. Accused did not check on Xu Wenda's wife and child until he boarded a taxi. Accused never checked on Xu Wenda's sick wife because a bed-room has to be respected. He normally never asked questions through the door when she was sick. Accused added that he would not even take her to hospital because of his language problem.

The boy normally went down to the shop after he had opened but not very early in the morning. He did not come downstairs to the shop until he left. It did not look normal when the boy did not come down. That day the mother asked him to stay with her although his parents never asked him to do anything. Accused said he saw the boy in the sitting room before he went downstairs.

/...



Accused did not allow Keke to put up there because when Xu Wenda was not there only the three of them are normally in the house. The witness said it was a mistake in cross-examination to say that Keke was not allowed to put up at Xu Wenda's residence because Xu Wenda had not told him Keke would put up there. Accused was then asked if Keke ever put up there. Accused said he did not understand the question. The question as repeated four times but accused still said he did not understand. Then accused replied that Yes, Keke used to put up there when Xu Wenda had asked her. Accused said Keke never remained with the child when Xu Wenda and his wife had gone out. They never went to play drafts somewhere else because there were a lot of Chinese who were staying or visiting them.

*Accused in answer to questions said he stopped going out with Xu Wenda because the children broke windows despite the presence of the watchman.*

Accused said he gave Keke M50.00 despite the fact that a hair-pin costs less than R1.00. Keke had a love affair with Xu Wenda therefore Keke used to go to Top-Top Lekhaloaneng for no particular reason. Xu Wenda's wife did not know,

/...

otherwise she would not have allowed her there.

Accused denied he ever said he was going to spar. Accused said he told Marethabile PW4 that she was going to town. The witness said he told his counsel that the correct thing was that he had told Marethabile PW4 that he was going to town. Accused said he went to Johannesburg and stayed with friends while he was looking for Wang Yui Ming in Gambling casinos and discos in Johannesburg. He left Johannesburg after the 10th.

In answer to further questions when Marethabile gave accused the gun, it was in a holster like the one in court. Accused said he followed accused when he came back because he wanted to go to South Africa and to change shoes. Xu Wenda had known before Saturday that accused would go to south Africa. He left Xu Wenda seated on a sofa after telling him the gun was on the shelf. Xu Wenda had come at about 12 p.m. the dogs are big but tame.

In answer to questions, accused said the people who arrested him in Bloemfontein took him to a room with two Chinese. It is also correct to say these

/...

people called two Chinese who looked at him and left.

In answer to questions in re-examination accused said what happened in Xu Wenda's house was not his business. Accused then said Xu Wenda never told him when Keke was going to sleep there. Accused said after he, Xu Wenda's wife and son had prepared food and eaten before they slept they watched television.

Accused closed his case.

It had been the court that had noticed that there was a receipt or counterfoil that disclosed that Xu Wenda had been to Karos Hotel between the 6th and 9th August, 1997. This counter-foil had been in Xu Wenda's passport all the time. This piece of paper did not seem to be of any importance until the court asked questions about it. I therefore felt PW7 Sergeant Ramakeoana should be recalled to hand it in.

After accused had closed his case, PW7 Sergeant Ramakeoana was called by the court to hand in the Karos Hotel slip or counter-foil that had all the time been

/...

in Xu Wenda's passport all the time. It as marked Exhibit "E1", it showed Xu Wenda slept at Karos Hotel between the 6th and 9th August, 1994. On it was written in longhand "Bloemfontein".

Cross-examined by accused's Counsel, Sergeant Ramakeoana PW7 said it had meaning to him. Asked by the court Sergeant Makeoana said he did not realise this counterfoil or slip had importance. Sergeant Makeoana said he had never asked accused about it, nor had he followed it up with the hotel. He did not realise its possible significance nor did he put it in the exhibit register, although it had been in Xu Wenda's passport all the time.

The case was adjourned in order to give both Counsel time to prepare argument.

They were given more than two weeks. Mr. *Lenono* for the Crown prepared written argument while the defence was pressed for time and could not do so. Mr. *Phoofolo* promised to submit written argument for the defence later.

/...

The Crown emphasises the following points:

- (a) That on Friday August 5th, 1994 Xu Wenda left his 7.65 mm pistol in the care of the accused for the purpose of the latter to protect the business and residence of the former during the former's absence.
- b) That the said pistol was thus left contained in a leg holster - Exhibit 13 and loaded with ammunition in a magazine.
- c) That at the close of business on that day accused barred PW5 from sleeping at the residences of the deceased persons.
- d) That from the moment of closure of business till the following morning of the 6th the accused and Xu Wenda's wife and son had been the only people in the residents of Xu Wenda family.
- e) That between the time the workers (PW3 and PW4) arrived and assumed duty at 8.00 a.m. on the 6th August 1994 and the time Xu Wenda arrived back from his trip to Bloemfontein neither the deceased Xu Wenda's wife nor her son were seen at all by the workers.
- f) That during the period in (e) above none of the workers went upstairs to the residence, even to answer a call of nature, since they were barred from going there by the accused.
- g) No stranger to the business or residence went up to the residence before Xu Wenda's arrival.
- h) That when deceased Xu Wenda arrived at about 12.05 pm on the 6th August 1994, accused, who was then inside the shop, followed him upstairs to the residence.
- i) That it was about this time when PW6 heard the sound of gun report issuing from the direction of Xu Wenda's residence.
- j) That about 5-10 minutes after this report accused returned into the shop, announced to the workers to tell the deceased Xu that he had gone to SPA Supermarket, just across the road, and promptly boarded a taxi that was proceeding to town.

/....

- k) That accused straightaway headed for the Lesotho/RSA border post at Maseru bridge, bribed the South African Police to gain entry into South Africa and headed for Johannesburg the same day, where he stayed for some four to five days."

From all these facts, the court is asked to infer the accused's guilt.

In this case I have to determine issues of credibility on several pieces of evidence. These facts standing in isolation whatever the court might find do not lead to any definite conclusion. What I have to decide is whether they form a chain, and even if they do, I have to decide whether all the links are firm enough and point in the direction that the Crown is urging on the court. Do they prove beyond reasonable doubt that the accused is guilty of the crime of murder?

This case as Mr. *Lenono* has correctly stated, revolves on circumstantial evidence. There is no eye witness. *H.J. May* in *South African Cases and Statutes on Evidence* (4th Edition) at page 2 quotes from *Wille Circumstantial Evidence* the following passage:-

"Indirect or circumstantial evidence means evidence afforded not by direct testimony of an eyewitness to the fact to be proved but the bearing upon that fact of other subsidiary facts which are relied upon as inconsistent with

/....

any result other than the truth of the principal fact.”

In short, in this case the court is being invited to draw the conclusion that accused killed the three members of Xu Wenda's family from surrounding facts.

Where proof has to be beyond reasonable doubt, it is by not always easy to prove a fact through inferences drawn from other surrounding facts. In *Rex v Ramanu* 1952(1) SA 398, Centlivres CJ said at page 399 CD:

“In my opinion a doubt may be reasonable even if it is not considerable...

For purposes of this case I may assume that a mere trifling doubt, though reasonable, is irrelevant but the requirement of a considerable doubt suggests a doubt must be of such a magnitude as to induce the jury to give the accused the benefit of a doubt.”

It is precisely for this reason that Landsdown and Campbell in Volume V of South

/....

*African Criminal Law and Procedure* at page 909 say:

"What amounts to proof beyond a reasonable doubt is incapable of precise definition, and absolute certainty as is conceivable in exact sciences is not to be expected in matters of fact."

In the case before me since I have to work with circumstantial evidence I have to observe two principal requirements:-

- (1) The inference sought to be draw must be consistent with all proved facts. If it is not the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct."  
See *Rex v Blom* 1939 AD 188 at 202-3.

As Zulman AJA has cautioned us in the case of *S v Reddy* 1996(2) SACR 1 at page 8:-

"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piecemeal basis and subject each individual piece of evidence to a consideration of whether it excludes a reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality."

/....



The accused by law has to be given the benefit of a reasonable doubt when it arises. This is not just a rule of law, it is a matter of common sense. In this case we rely on evidence which is the product of the minds of witnesses about events that happened about three years ago. Time dims memories and even without forgetfulness, what witnesses see or hear is subject to error. What compounds the court's problem is that witnesses themselves could compound the error of one witness by being influenced by what that one witness said he saw or heard immediately after the occurrence of the events that are the subject of a criminal trial. This is because witnesses are never insulated from each other at the time of investigation. Indeed even during the hearing of a case witnesses can exchange views about what happened. There is also the fact that witnesses for one reason or another lie. In the light of the foregoing therefore the court has to be careful of the evidence before it in order not to convict the accused on suspicion.

The accused was given Xu Wenda's pistol by Marethabile PW4. Accused admits this. PW8 Colonel Telukhunoana says all the cartridge shells that were found at Xu Wenda's residence were fired from that firearm. No one is in a position

/....

to deny that Colonel Telukhunoana made a microscopic examination of the test cartridge shells fired from Xu Wenda's pistol and compared them with the cartridge shells found in Xu Wenda's residence. The court was critical of the manner the evidence was presented to the court. The accused does not deny (or at any rate is not in a position to deny) that the evidence of Colonel Telukhunoana is true.

Xu Wenda and his wife Ha Ya Mei were both shot in their house. This fact is common cause, or if it is not, accused is not in a position to deny it. There is no real dispute that they could have been shot with Xu Wenda's pistol in the house. Accused's evidence implies that if they were shot with this pistol, it must have been someone else because he had left the pistol on the shoe shelf where he normally left it for Xu Wenda to collect after Xu Wenda had been away.

PW3 Motlalepula, PW4 Marethabile and Keke PW5 say they last saw Ha Ya Mei (Xu Wenda's wife) and Xu Wenda's son (Xu Jiao Yi) the day before they died and that accused was the person who went with them to their residence. Accused confirms that the three witnesses could not have met Xu Wenda's wife and son the following day because they never came down to the shop and none of the

/....

witnesses ever went upstairs to Xu Wenda's residence while accused was there.

Accused is the only one who claims he met Xu Wenda's son in the morning and that from Xu Wenda's son he got a report that Xu Wenda's wife was ill with a running stomach. This message was passed on by the accused to PW3 and PW4 after he had opened the shop when they did not see Xu Wenda's boy at tea time. In short even accused himself told the court he last saw Xu Wenda's wife at bed-time, he never saw her again in the morning or at any other time.

Xu Wenda is the last of the deceased to be seen by the accused. He came at about 12 noon and was seen by PW3 and PW4 who saw accused follow him upstairs. Accused says he followed Xu Wenda to Xu Wenda's residence (upstairs). Accused told the court that he told Xu Wenda that Xu Wenda would find the pistol on the shoe shelf, and that he was going to South Africa as previously agreed. Accused says he left deceased resting on the sofa and soon thereafter left for South Africa. PW3 and PW4 say Xu Wenda never came down to the shop although accused had said he would. Accused confirms he had said Xu Wenda had said so as it was about time for PW4 to go home.

PW6 Lerato told the court that a short time before she had seen accused come from the direction of Top-Top supermarket , board a taxi near where she was working, she had heard a report of a gun from Top-Top Supermarket. Accused confirmed that Lerato PW6 saw him board the bus. Accused himself says at that time Lerato PW6 and Keke were together and they talked from a distance as he had or was boarding a taxi towards town on his way to South Africa.

It is common cause that Lerato never talked to the accused from that distance about the report of a gun as PW6 Lerato was with PW5 Keke at her saloon and accused had boarded the taxi. Consequently all accused could say was that Lerato PW6 might have heard what she heard. I take this to mean whatever Lerato claims she heard has no significance to him because Lerato never asked him about it. Lerato says he talked about what she heard to Keke PW5. Keke took this report of PW4 Marethabile. This fact Keke confirms. PW4 Marethabile had ordered that PW6 Lerato be called as she had not heard the gun report. PW6 says Marethabile told Keke and Lerato that there was no gun report in the Supermarket, consequently Lerato must be mad (or words to that effect).

The court went for an inspection in loco and caused a demonstration made in which a fire-arm was fired from the sitting room of Xu Wenda's residence with doors and windows closed. As the sitting room was 5 metres from the Lerato's saloon the sound was clearly audible as a gun report despite the fact that the ammunition used should have been less audible than one which still had a bullet. Another test firing showed that a gun report might not have been heard clearly in the shop, because Lerato's saloon was about 30 paces from Top-Top Supermarket and there is the main highway nearby where there is a lot of traffic. The firing of a blank cartridge had taken place from the sitting room with doors closed and could not be identified in the supermarket as a report of a gun.

It is interesting that PW4 Marethabile does not refer to the incident of the report that PW6 Lerato heard. She was not asked about it although this was on the preparatory examination record which the Crown and the defence had. Marethabile also did not refer to the accused's prevention of Keke PW5 from sleeping at Xu Wenda's residence. If accused had not confirmed it, there could have been room to doubt it. It does seem Marethabile did not mention everything that happened in her presence.

Mr. *Phoofolo's* cross-examination of PW3, PW4 and PW5 revealed that some of these witnesses had not said some things at the preparatory examination. For an example, an impression developed that a Chinese gentleman did not come in the morning wanting to see Xu Wenda. When accused gave evidence, he confirmed the fact that a Chinese gentleman did in fact come. The only dispute between the accused and Crown witnesses is whether when he wanted to see Xu Wenda's wife he was turned back by dogs or not. Accused denies this man ever attempted to go up to Xu Wenda's residence and says in any event the dogs were tame. Again in cross-examination, Crown witnesses were confused about the closing time of 1 p.m., but accused confirmed that at about 12 noon, PW4<sup>a</sup> Marethabile was about to go off-duty. In other words, Crown witnesses were shaken on points which turned out to be of no real significance most of the time.

Keke PW5 (about her sleeping at Xu Wenda's often) was initially challenged by the accused, but towards the end of cross-examination accused conceded that this was so and that Xu Wenda never consulted accused about this. Indeed accused ended by saying the reason he forbade Keke PW5 from sleeping there (on the Friday of the day before the discovery of Xu Wenda's family's death) was not

/....

that Xu Wenda had consulted accused. One wonders why Counsel persisted in the allegation and why accused initially said so.

In accused's favour I am prepared to accept there might be other reasons. After all it is common cause that Keke PW5 did virtually as she pleased because of her love affair with owner of the place Xu Wenda. Furthermore Keke was Xu Wenda's domestic servant, and sales-lady (tout), something accused is ambiguous about at places. It is not disputed that accused had paid for Keke's Hair-dressing that took two days at the saloon of Lerato PW6. Keke's friendship to accused might cause its own irritations. I will therefore not infer that (the refusal of Keke's permission to sleep at Xu Wenda's) was part of a scheme devised by the accused in order to kill Xu Wenda's family. Indeed accused might have wished to be alone with Xu Wenda's family for many reasons. I can only observe that accused's false evidence about Keke's close working relations as domestic servant and her practice of sleeping at Xu Wenda's often led the Crown to an inference that Keke was prevented from sleeping at Xu Wenda's residence because accused already had a sinister motive.

In *Rex v Taelo Kalaile* 1982-84 LLR 369 at page 375 in a case revolving on circumstantial evidence Kheola J (as he then was) had this to say:-

"The question is what inference is to be drawn from a false statement by the accused? It has been held in a number of cases that such a false statement is not proof of guilt, but it may show disbelief in his own innocence and throw light on his credibility."

A court should be careful not to attach too much importance to minor lies, because that is not fair. Nevertheless each lie should be seen within the context of surrounding facts.

What is in issue here is why accused immediately left Lesotho at the point (he himself admits) which is when the deceased were seen alive for the last time a little before accused's departure.

PW4 Marethabile has said in her evidence that accused had told her to tell Xu Wenda when he came down that accused had gone to the Spar. Accused in his evidence told the court that he never said he was going to the Spar, what he said is that Xu Wenda should be told he was going to town, at the time he came down.

/....



It will be observed that in cross-examination Mr. *Phoofolo* had said accused will concede that he had said he was going to Spar because he did not find it necessary to tell PW4 and the others where he was going. I think accused was not telling the truth when he said he had told Xu Wenda where he was going. I believe PW4 Marethabile because on the point that accused had said he was going to Spar, PW4 is corroborated by PW3 Motlalepula.

While it was not the business of Marethabile PW4 and Motlalepula PW3 to know the movements of accused, I do not see the reason why accused should have told them that he was going to Spar which is less than 200 metres away. This is particularly so when accused had followed Xu Wenda to his residence and was seen to return alone within twenty minutes. Within a short time accused was to board a taxi on his way to Johannesburg. Accused was subsequently found in South Africa five days later while Xu Wenda was never again seen alive. Marethabile PW4 and Motlalepula PW3 had last seen Xu Wenda go up with accused. Accused left Xu Wenda in the house and when PW4 and others closed the shop, about seven hours later, they found Xu Wenda dead and his body hidden in a store-room. Accused had to pretend that Xu Wenda was coming so that he

/....

could be able to flee the country because he had already shot Xu Wenda.

If Xu Wenda was part of Ta Hua Company as accused said, it seems strange that accused in his evidence or under cross-examination did not suggest that he called Xu Wenda to account for getting accused to Lesotho and leaving him stranded in Lesotho for over a year with unfulfilled promises. Accused said he asked Ta Hua Company to deliver the visa to South Africa or work permit to Lesotho, but nowhere does he specifically say he took the late Xu Wenda to task about this failure of Ta Hua Company to deliver although Xu Wenda was part of Ta Hua Company.

Accused told the court he expected answers from Wang Yui Ming and Lui Wei Yi who were just a part of Ta Hua Company like the late Xu Wenda. I become even more puzzled when Ta Hua Company's address was Maseru and its framed certificate of incorporation was in Xu Wenda's Top-Top Supermarket. Accused struck me as intelligent, I therefore failed to agree that he did not blame Xu Wenda for his problems. I do not therefore accept that all was well between him and Xu Wenda.

/....

What again makes me uneasy about the accused is his tendency to pretend to have been unable to communicate with people at a very basic level in English and Sesotho. Having watched him in court and having heard what Motlalepula PW3, Marethabile PW4 and Keke PW5 said, I am satisfied that accused could communicate with people in a mixture of English and Sesotho. There is no doubt his communication skills were poor, but accused could get by. That is why he was able to get to Johannesburg and Bloemfontein. In court I was able to communicate with him when he was willing to co-operate when an interpreter had to be dismissed. I do not believe he could not make head or tail of why he was arrested and that he only came to know this before the magistrate. Accused "lied" unnecessarily sometimes.

Accused said immediately after 12 noon, not long after he had been with Xu Wenda, he went to South Africa. I accept that accused went to Johannesburg and Bloemfontein to look for Wang Yi Ming and Lui Wei Yi as accused says he did after leaving Xu Wenda upstairs. It is difficult to conclude that accused was looking for them merely to ask them when they will deliver on their agreement to get him to South Africa so that he could reside and make money in that land of opportunity.

/....

Accused must have been very angry for he had been taken for a ride by Ta Hua Company which included Wang Yi Ming, Lui Wei Yi and the late Xu Wenda.

All these bits and pieces of evidence lead me to the conclusion that accused had not told the whole truth because from surrounding facts, I infer that by this time accused had definitely shot Xu Wenda and dragged him into the store room where he was later found. This is the only inference to draw from surrounding facts.

I believe Lerato PW6 when she says that she heard a gun report from the neighbouring house in which Top-Top Supermarket is situated at about 12 noon or a little thereafter. The gun report was from Xu Wenda's lounge which is nearer to the saloon than Top-Top Supermarket. I was particularly impressed with her demeanour and truthfulness which I observed. She was unusually frank with the court, she was not even ashamed to admit that she and other witnesses reminded each other about some aspects of the case. I felt Lerato was not trying to lie or be smart at the expense of the court. Lerato has been consistent about hearing the gun report in her evidence at the preparatory examination and before me. She was not shaken on this point, she did not pretend to have a perfect memory. She was

prepared to doubt herself at places.

I cautioned myself about the evidence of Lerato because of the possibility of being influenced by other witnesses. Keke PW5 confirms that Lerato PW6 did draw her attention to the gun report she had heard shortly before Keke came. The fact that it was not elicited from Marethabile PW4 that she discussed the gun report with Lerato does not make me doubt Lerato's evidence because Marethabile has not given evidence about some things that happened.

How the accused was arrested is not very important in my view. I do not believe PW7 Ramakeoana on how accused was arrested. He not only lied but looked like it when he gave his evidence. Accused must have been accompanied by some people when he was delivered to him. Accused could not have been having Xu Wenda's pistol on him. If accused still had the pistol on him, it must have been put back on him and he was so guarded that there could not have been any danger to those who must have brought him to Lesotho. PW7 if he was the investigator, he must have been a very indifferent one. Sergeant Ramakeoana has been sent to appear as an investigator when he probably played a much smaller

/....

part than he would have us believe.

The question of how the pistol, which is the murder weapon, came into the hands of the police is an important one. The fact that the police chose to lie on this vital issue created serious difficulties. A person who lies might be deemed to have given no evidence at all. See Hoffmann and Zeffertt *The South African Law of Evidence* 4th Edition at page 601 where the learned authors say:-

"If a litigant gives completely false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had given no evidence at all... It is possible that an innocent person may put up a false story..."

I feel very strongly about a lie especially where it concerns a murder weapon. This is particularly so because in *Teper v Regina* [1952] AC 480 at 489 Normand LJ cautioning against manufactured evidence especially in cases dependent on circumstantial evidence said:-

"Circumstantial evidence...must always be narrowly examined if only because evidence of this kind may be manufactured to cast suspicion on another."

/....

I have already stated policemen always concealed how they got fugitive offenders into their hands. Concealment is dishonesty. I have inferred that PW7 Sergeant Ramakeoana lied to hide how accused came into the hands of the police in Lesotho. I have not believed the accused when he said he left Xu Wenda's pistol behind. I have already inferred that accused had it in his possession while he was in the Republic of South Africa until he was seized by three men. I only do not believe that accused was still a free-man when he came into the hands of the Lesotho police. I can only say I have no credible evidence of how the gun came to be in the possession of the police. I am nevertheless not in a position to hold that the accused was set-up or that there was a malicious conspiracy to cause an innocent man to be arrested on manufactured evidence. Other links in the chain of circumstantial evidence definitely show that there is no possibility of a conspiracy against the accused.

Sergeant Ramakeoana was only there to say he arrested accused. He does not seem to have even noticed that Xu Wenda's identity was used after Xu Wenda's death although a counterfoil or receipt to that effect was in the passport of Xu Wenda. It is things such as these that persuade me that the police did not

/....

cook this aspect of the case. If it had occurred to them, they might have done something about this counterfoil of Karos Hotel. This negligence goes to show that there was no conspiracy. Sergeant Ramakeoana was there only to hide how accused was brought back to Lesotho. This conduct had in the past been tolerated when there was no law governing the question of fugitive offenders between Lesotho and South Africa. Sergeant Ramakeoana expected to get away with lies about the manner accused came into the hands of the police as he would have done in the past. Unfortunatley for him, he was not allowed to get away with it.

If Xu Wenda's passport and identity card were found by the Lesotho police on the accused, they must like the pistol have been put back by those who must have previously searched him. I do not have to decide this point in order to determine the merits of this case. Sufficeth to say that the accused and Xu Wenda have considerable resemblance. There is some slight difference in their noses, but a person who does not look at their photographs with care and merely scans them might mistake Xu Wenda and accused for the same person. Although Mr. *Phoofolo* for the accused emphasised the differences, Mr. *Phoofolo* to concede that to those who do not know the Chinese very well, they seem alike. It is on this basis that

/....



accused might have used Xu Wenda's identity during the 3 days he was or might have been at Karos Hotel.

Although accused says that he bribed his way into South Africa by putting M50.00 in his passport, I doubt his story. He could easily have used Xu Wenda's passport which had a South African visa because of that resemblance to those who do not know the Chinese very well and who did not scrutinise features with care. Although I do not have to decide this, I suggest that he might have used Xu Wenda's passport for some time if he had not been arrested or seized by the people who took him to Lesotho.

Once I accept that accused killed Xu Wenda and was looking for Wang Yi Ming and Lui Wei Yi, (as he says he was doing) the possibility that accused was armed with Xu Wenda's pistol is not just speculation. Indeed one can only ask himself what would have happened to Wang Yi Ming and Lui Wei Yi had accused found them in the mood he must have been.

Although the accused had an inscrutable expression, he was clearly not

/....

convincing in what he said and the manner he said it. He gave the impression that Keke PW5 did not often sleep at Xu Wenda's home, but later had to concede she did. He also said Keke was not allowed by him to put up at Xu Wenda's because Xu Wenda had not told him in advance that Keke would put up there. Later accused denied he said this. He also denied or played down the fact that Keke was a domestic servant and that she used to look after and play with Xu Wenda's son. It is clear that Xu Wenda's son would not have tried to insist that Keke should put up there if this was not what she often did.

Accused's explanation of what happened on that fateful Friday is vague. When he is asked what he reasonably might have done as a neighbour if Xu Wenda's wife was ill, he said over and over again that it was not his business. To expect a boy like Xu Wenda's son to have remained with the mother through-out the morning seems unlikely if the boy was as spoilt and as bad as accused would have us believe. Even a very good and active boy might not have kept to the mother's room throughout. The improbable or anything is possible with children, but why should accused follow Xu Wenda upstairs and a gun report is heard immediately thereafter? Soon thereafter accused immediately left for South Africa. What was

he running away from? All these facts point to the fact that Xu Wenda was killed so that he should not discover the death of his family and do something about it. I am of the view that accused must have shot Ha Ya Mei (Xu Wenda's wife) and strangled Xu Jiao Yi (Xu Wenda's son) by the time Xu Wenda arrived. If I am wrong he is the only one who knows and has chosen to hide this.

I am unable to accept that some other person found Xu Wenda's gun and shot both Xu Wenda and his wife with the gun that had been in accused's possession. While there was this gate near the area where gas was being sold, through which someone else might have come in and out, I am of the view that such a person would not have known Xu Wenda's gun would be there for him to use. This is especially so because Xu Wenda was already in the house. If indeed the gun was always put on the shoe-shelf there was no need for the accused to tell Xu Wenda where it was when he came in. Indeed there is evidence that the gun was put near the till when Xu Wenda was there. If indeed it was for guarding property and also money, one would expect it not to have been left upstairs far from the supermarket where a robbery was most likely. In short accused's story does not persuade.

I have already said I do not believe the accused's story. Even where I disbelieved Crown witnesses such as PW7 Sergeant Ramakeoana I could not believe the accused's version except on the point that he did not hand himself to the Lesotho police. Apart from this, I have rejected accused's evidence as false.

Although accused bears no onus to prove his innocence he must nevertheless given an explanation that might be reasonably true. There is sometimes a tendency to disbelieve the accused as if he bears an onus to prove his innocence. Consequently Schutz AJA (as he then was) in *Harebatho Lehloenya and Others* 1980(1) LLR 30 at page 40 assessing evidence on appeal said:-

"On the whole the defence witnesses give the impression of much greater frankness, in not minimising their roles.... In the light of those conclusions I am of the view that the defence may well be true and it cannot be said that the crown has proved its case beyond reasonable doubt."

This is not true of the defence in the case before me. Accused's conduct throughout was not consistent with innocence. I am saying this well aware that by coincidence the seemingly improbable can sometimes be true.

As this case on the side of the Crown revolves entirely on circumstantial evidence, I have come to the conclusion that viewing all facts and circumstances surrounding this case in their totality, the only inference to draw is that the accused killed all the three deceased persons. I noted that the firearm and Xu Wenda's passport were not found on the accused in the way PW.7 Sergeant Ramakeoana stated. I am however of the view that this lie does not taint the entire case for the Crown. In making this finding, I am conscious of the danger of error this court might fall into namely that:-

"It sometimes happens that a trier of fact is so pleased at having thought of a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot be legitimately inferred."—*Hoffmann and Zeffertt South African Law of Evidence* 4th Edition at page 589

Accused could be given the benefit of the doubt if a possibility of a conspiracy against him might be seen to be possible.

Mr. *Phoofolo* had promised to send me his Heads of Argument after he had addressed the court. He delayed and I received his heads of Argument after I had finished my judgment. I am obliged to take them into account even at the risk of

/....

some repetition.

The police hid how they got possession of the accused and exhibits that must have been in the possession of the accused because of the normally unacceptable manner in which they obtained the accused from South Africa. This was at the tail end of the case and in my view that does not affect the guilt or innocence of the accused.

To quote from Paul JA in *Marcus Leketanyane v Rex* 1956 HCTLR 10 at page 11 with reference to what I and my two Assessors have found:

"Where the Crown case is based on circumstantial evidence the onus is upon the Crown:

- (1) To prove beyond reasonable doubt each of the circumstances relied upon; and
- (2) To satisfy the court that from these circumstances the inference of the guilt of the accused is inevitable.

"In our view both these burdens were satisfactorily discharged in this case."

In *Tseliso Lempe v Rex* C of A (CRI) No.7 of 1996 (unreported) at page 73 Steyn P had balanced the Crown case which was *prima facie* powerful with the accused's case and concluded:

/....

“At the same time it is difficult on a mere reading of the defence evidence to find it incredible or unreliable.”

In this case, having heard the accused seen his demeanour, observed him answer questions and at the end gone over my notes of the evidence, I find the accused's evidence incredible and unreliable. I formed a definite decision that accused was not telling the truth when he said he had not killed Xu Wenda and his family.

I have not emphasised for purposes of determining the merits what PW4 Marethabile said about the accused staring at her, causing her to ask accused why. Such observations are equivocal because being pensive and looking at another human being is a normal thing. Giving Keke PW5 M100.00 which is a lot of money and asking her to go and buy herself something became suspect, probably after the event. Could it have been to ask for forgiveness for her roughness to Keke the previous day? Whatever the reason, this kept Keke away from the kitchen while accused was there. I do not believe accused when he said he wanted Keke PW5 R50.00 to buy a pin worth less than M1.00. He could not have given Keke M50.00 for that purpose. If he did, one would expect accused, who was short of money because he was not working, to collect the change. Accused himself admits that

/....

none of the employees went upstairs that morning while he was there.

Accused is the only one who can tell us how and why he bound up Xu Jiao Yi (Xu Wenda's son) in the manner he did. He chose not to tell us. There are no grounds for believing strangling him was an accident. Similarly shooting Ha Ya Mei (Xu Wenda's wife) on the head could not be accidental. I have already said accused shot Xu Wenda. Having determined the *actus reus* it remains to determine the accused's intention.

In order to convict an accused of murder, it must be proved that he subjectively intended to kill his victim. Intention to kill is not always expressed. Even when a person says he wants to kill another, that person may not necessarily wish to kill that person even if he subsequently kills him. Everything done or expressed is material from which intention may be inferred. To put this in the words of Snyman *Criminal Law* at page 154 intention is determined from "knowledge of the surrounding circumstances and the will he must employ to achieve his goal". No man does not know that if he shoots another on the head that person will die. Similarly if such a person strangles a child, the child will die.

/....



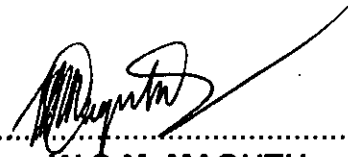
I am of the view that on the evidence before me, accused applied his will to bringing about the death of the three deceased. See *Rex v Sigwahla* 1967 (4) SA 566 at pages 569 and 570 where Holmes JA said *dolus directus* is "where the will is directed to encompassing the death of the deceased". I am therefore of the view that the crown has proved that accused had the *dolus directus* to kill the three deceased persons.

We will never know for certain why accused chose to kill Xu Wenda and his entire family, except what can be inferred from surrounding circumstances. Indeed the motives of the accused in respect to each of the deceased are irrelevant. Sufficeth to say the surrounding circumstances point towards the anger, frustration and a smouldering resentment that was caused by accused's position in Lesotho and that Ta Hua Company seem to be at the root of this extermination of Xu Wenda and his family. Accused's attack must have been *ad hominem* in respect of Xu Wenda. It is therefore not surprising that accused did not even take the M10,000-00 that was in Xu Wenda's pockets at the time of Xu Wenda's death. He wanted Xu Wenda dead, he did not want Xu Wenda's money.

Stand up accused. I find you guilty of murdering Xu Wenda, Ha Ya Mei and Xu

Jiao Yi.

My Assessors agree.



W.C.M. MAQUTU  
JUDGE

For the Crown : Mr. A.M. Lenono  
For accused : Mr. E.H. Phoofolo