CASE NO.: CC 40/94

THE STATE versus RODERICK MORKEL

O'LINN, J

1996/04/03

CRIMINAL PROCEDURE

1. The defence tactic, particularly where an accused is represented by experienced counsel, not to give a plea explanation and to tell the Court that the defence case will be put to the state witnesses, "when and if necessary", criticised.

2. The approach in R v De Villiers, 1944 AD SALR, 4 93 at 508, per Davis A.J.A. on circumstantial evidence, applied.

CASE NO. CC 40/94

IN THE HIGH COURT OF NAMIBIA

In the matter- between

THE STATE

versus

RODERICK MORKEL CORAM:

O'LINN, J.

Heard on: 1994.03.10, 1994.09.13, 1995.05.09

+ 10,

1995.11.08 - 10, 1995.12.06 - 08, 1996.02.12,

1996.03.27 + 28, 1996.04.03

Delivered on: 1996.04.03

JUDGMENT

O'LINN, J.: The main charge against the accused is that he, a 37 year old male of Namibian nationality, committed the crime of murder in that on or about 1st June 1993 and at or near Khomasdal in the district of Windhoek the accused unlawfully and intentionally killed Gerhardus Jacobus van Wyk, a male person.

The alternative charge against the accused is that he wrongfully, unlawfully and by the negligent use of a firearm injured Gerhardus Jacobus van Wyk or exposed the life or limb of the said Van Wyk to danger.

In the State's summary of substantial facts attached to the

indictment in terms of section 144(3) (a) of the Criminal

Procedure Act 51 of 1977 the State further alleged and I quote:

> "On Tuesday 1st June 1993 at approximately 23:00 the deceased and other people were out the house of the accused in Khomasdal. Accused arrived there and called the deceased into one of the bedrooms. There the accused grabbed the deceased by the shirt and an argument ensued between them about money which the deceased owed the accused. The accused shot the deceased with a firearm. The deceased ran out of the room and accused left the house. The deceased was taken to the hospital where he died shortly afterwards as a result of a gunshot wound through the abdomen. The accused pleased not guilty to both the main and the alternative charge."

The accused was represented throughout the trial by experienced counsel. At first Mr Botes appeared, instructed by an attorney. In the course of the trial the instructing attorneys withdrew because insufficient funds were provided. Thereafter Mr Dicks was instructed by the Legal Aid Board to appear for the accused. Ms Lategan appeared for the State throughout the trial.

The accused pleaded not guilty to the charges and Mr Botes, on behalf of the accused, gave the following as his explanation of plea:

> "The accused's pleas of not guilty on both charges are in accordance with my instructions. My Lord, the accused places all the elements of each and every crime in dispute and without derogating from the generality of the plea the accused specifically denies that he shot the deceased on the evening in question. The rest of the defence will be put to the State witnesses when, and if necessary."

It is of some importance at the outset however to elaborate on how the defence was developed in the course of the trial. It is significant that the plea was a blank denial. There was not the slightest indication of the defence of self-defence or of accident. There was no indication whatsoever of whether or not the accused was even present in the room of the house where the deceased was shot, notwithstanding the fact that accused was

the lessee and occupier of that house and as such in control of that house.

The tactic of the defence at that stage was clearly not to co-operate in defining the real issues in dispute and to put the rest of defence to the State witnesses, "when and if necessary". This tactic gives rise to the suspicion that the defence did not want to bind it to a certain line of defence but would decide on the defence or even develop the defence in the course of the trial as defects in the State's case emerges and as it becomes clear who of the contemplated State witnesses in fact appear to testify.

It must be kept in mind that the accused, when confronted by the police approximately two weeks after the incident, had made use of his prerogative to remain silent and said that he prefers to make his statement in court. When he however first appeared in the magistrate's court on a charge of murder for the purpose of pleading in the section 119 proceedings he pleaded not guilty but again declined to disclose any particulars of his defence.

Even when Dr Liebenberg, who conducted the post-mortem examination on the deceased, was cross-examined by Mr Botes he did not put to Dr Liebenberg what his instructions were as to the precise manner in which the shot that hit the deceased, was fired.

Dr Liebenberg in evidence-in-chief had already said that it would have been impossible for the deceased to have fired the shot if he held the handgun in his right hand. When asked by the State counsel about the possibilities if the deceased had the handgun in his left hand, Dr Liebenberg said, "Once again it is extremely difficult, not impossible but not at all comfortable."

Dr Liebenberg then demonstrated on a model by forcibly pushing the model's hand backwards into a position from which a shot could have been fired and the doctor reiterated, "I will just

repeat, it is very uncomfortable, yes." To this evidence Mr Botes directed the following cross-examination and I quote from the record, page 13, line

> "Q: Dr Liebenberg, you just now showed us that it is possible that a person who is for one reason or another holding the gun or the firearm in his left hand and force be supplied on that hand, as you have done yourself on the Court Orderly, that that wound could have been inflicted."
>
> A: "Yes."
>
> Q: "So let's take it from there. Therefore if, for one reason or another, the deceased took out a firearm with his left hand, the person who was standing in front of him took the hand and, here, to just get the firearm away from pointing in his direction with force, you will say it's possible that that wound could have been inflicted in that manner?"
>
> A: "Yes."

Even at this stage the defence did not indicate unequivocally that the case of the accused was that the deceased at the time held the handgun in his left hand, pointed the pistol at the accused and then forced the hand of the deceased upwards and away from him into the position to the left of the deceased's left flank from where the shot went off which penetrated the deceased's chest at the lateral left thorax and exited at the lateral left flank. It is noteworthy that Mr Botes at this stage restricted himself to force being applied <u>to the hand</u> of the deceased.

However an opening was now left in the State's case which could be latched on by the defence, should the defence have no other option in the light of further developments in the case.

The main development apparently awaited was whether Alfredo Slinger would testify, who, to the knowledge of the accused was the only person in the room when the deceased was shot, apart from the accused and the deceased and who, as the accused later testified, he assumed had seen what had happened.

Without the evidence of Slinger, a persistence in a blank denial would have sufficed because then not only could the deceased have shot himself but Slinger could have shot the deceased with the accused not even present in the room.

The following events are significant.

At the conclusion of the evidence of the second State witness, Helmuth Dyers, Ms Lategan on behalf of the State asked for a postponement on the ground that two relevant State witnesses had failed to attend court notwithstanding that subpoenas had been served on them in Walvis Bay. These witnesses were Alfredo Slinger and Stephen Humphries. Ms Lategan called Sergeant Minnies. Sergeant Minnies testified that when he served the subpoena on Slinger, Slinger refused to sign the receipt of the subpoena as requested and said to him that "people in Walvis Bay said to him that they will burn down their house and all that kind of things." Sergeant Minnies further testified, "My Lord, he was very honest with me because he then said that maybe his mother would suffer if he comes to court." The Court indicated that it was prepared to issue warrants of arrest for the defaulting State witnesses on the assumption that there is no objection from the defence. Mr Botes then indicated that he opposed the application for postponement. Mr Botes, inter alia, contended that Slinger could not take the case further because according to information in a State file made available to him Slinger, "was asleep until the time that the shot was fired." The Court rejected the objection of Mr Botes and granted warrants of arrest for Slinger and others and postponed the hearing to an agreed date, being 13th and 14th September 1995. Mr Botes's allegation that with the information available to him Slinger, "was asleep until the time that the shot was fired", was a misrepresentation of the information contained in the police docket.

The witnesses did turn up to testify on the adjourned dates of trial without the need to execute the warrant of arrest. When Slinger testified on 9th May 1995, he was asked by the Court to explain why he was not present in Court on 10/03/94 to testify. He said, "Because I was afraid of him." He further explained that he was afraid of the accused, that he will be hurt if he testified against him in court. When asked on what he based the belief he said, "Because all of them say he was the one who shoot for Gerrie and then he will also shoot me." On further examination by Ms Lategan about who had threatened him he said,

"It's his friends who are in Walvis Bay." He said he knew them only on their nicknames and one of them, one "Slice" even threatened him the weekend before he came to testify. When asked why he went to Cape Town instead of coming to court he said, "A lot of his friends warned me and threatened me." He also explained that his mother had persuaded him to return to Namibia and to testify in the trial. When asked whether he was still afraid of the accused and the people of Walvis Bay he answered in the affirmative. He said he did not feel safe in Walvis Bay but it would not be good to stay at another place because his parents are staying in Walvis Bay. Mr Botes did not contest the allegations of intimidation at all.

On resumption of the trial on 7/11/95 after adjournment from 10/5/95 the Court was informed that the attorneys and counsel of record withdrawn. Accused then applied for a postponement to make further arrangements for legal representation. Before this application was disposed of the

State recorded a further complaint of intimidation. Ms Lategan called Stephen Humphries, already referred to supra, who testified that a friend of the accused, one Clydie Noble, on or about 4th to 5th of April shot twice at him with a handgun whilst Noble was sitting in a vehicle next to the accused. He believed the attack related to his expected evidence in the trial against the accused because when he fled Noble still said, "You will see, you are also testifying against my 'bra'", which means "my friend". According to the witness, Noble accused him of having insulted his mother but that accusation, according to Humphries, was a total lie. In cross-examination by the accused, with the assistance of the Court, Humphries admitted that the accused himself had never personally threatened him.

On resumption of the trial on 8/11/95 accused was now represented by Mr Dicks, on instructions of the Legal Aid Board. Accused testified to the effect that Noble fired at Humphries with a gas pistol. This was never put to Humphries by the accused when Humphries testified. According to the accused he actually attempted to mediate between the accused and Clyde

Noble. He admitted that Noble knew that Humphries was a State witness but denied the State's contention that he, the accused, used other people such as Noble to intimidate the witnesses. Humphries, on recall, insisted that Noble had used a handgun firing real bullets and not a gas pistol. Mr Dicks was allowed to further cross-examine Humphries. When he put to Humphries that he, Humphries, and Noble had a long-standing argument

Humphries replied, "We don't speak because he is a gangster." *This* Court did not give a decision or make any order on the State's complaint primarily because the Court was told that the matter was *being investigated* by the Walvis Bay Police and there was an urgent need, in view of all the delays and postponements, to *proceed* with the merits of the case. However in retrospect and considering all the *evidence*, it appears a strange coincidence that the accused was present when one of his friends, called a gangster by Humphries, was in the company of this friend when the friend suddenly shot at a known State witness shortly before that witness was expected to testify against the accused. Yes, it was admitted by Humphries that there was an attempted intervention by the accused but it is possible in all the circumstances that the intervention was a mere purported intervention and that the accused after being severely *warned* by the Court at an early stage of the *trial* not to interfere or intimidate State witnesses, would have been careful not to be seen as directly interfering or intimidating.

The accused obviously also knew that *Slinger* was a younc *person, probably* about **20** years of age, and very vulnerable These incidents of intimidation must *also* be seen agains the background of a very grave and continuing crimin; activity of dealing in drugs such as Mandrax and Cannal conducted by the accused as the leader and with persons **1:** Dyers, Plaatjies and Slinger involved 'with the *accused accomplices.* It seems quite clear that the tentacles this illegal business extended at least to Walvis Bay w

the accused had several associates and accomplices. The main illegal activity in Windhoek seems to have been conducted from the premises at Erf 2672, J James

Street in Khomasdal, a residence leased, occupied and controlled by the accused at the time of the incident and where he was resident at the time of the incident. It was in the room of this residence that the deceased was fatally shot during the evening on 1st June 1993. When Slinger was recalled at the end of the trial and unexpectedly asked by the Court, "Why didn't you want to testify if according to you he killed your friend?" Slinger replied without hesitation, "Firstly, Your Honour, I mean I was also afraid of him." The accused was out on bail at all the relevant stages during the trial. I have no doubt that Slinger was afraid of the accused at all relevant times and that the accused and his friends capitalised on this fear throughout the trial. I am also convinced that particularly Slinger was intimidated by the friends of the accused from the beginning with a view to either prevent him from testifying or, in the alternative to deter him from incriminating the accused should he testify. The only reason why he was intimidated was obviously because they expected him to speak the truth and knew that the truth was against the accused.

At the end of the day however Slinger did testify. The main consequence of him testifying were however that:

(a) The accused was now irrevocably placed in the room at the time of the shooting and was undeniably involved in an argument about money owed to him by the deceased when the shot went off. The accused at least could not any longer plead ignorance of the incident or remain silent;

3. The possibility that Slinger had shot the deceased fell away and now there remained only two possibilities, namely that the accused had shot the deceased or that the deceased had shot himself;

4. However, the possibility that the deceased had removed the handgun from the room after the shot was fired was completely eliminated. This is also because according to Dr Liebenberg's post-mortem report the wound of the deceased was such that he would have probably collapsed within 15 minutes. The only possibility that remained however was that either the accused removed that handgun from the room or one of his friends and accomplices in the house did so, whether on his or her own initiative or on behalf of and at the request or on the instruction of the accused.

It is now apposite to deal in more detail with the evidence of Slinger. According to Slinger he, on that day, telephoned the accused and asked whether he could stay over at the house of the accused and the accused agreed. After his arrival he used Mandrax with dagga (Cannabis) which he bought at the house. At the time there were a number of other people at the house including Stephen Humphries, Rene Plaatjies, Rodney Shanigan, Douglas McClune and the deceased. These persons also used Mandrax with dagga.

Although he found the deceased at the house that day the deceased was not staying there at the time although he was aware that the deceased had stayed there previously. After he and Rodney had finished preparing some food for those present and had given them some food, they watched a film with the name "PS, I love you" but after watching it for some time he had a bath and went to a bedroom and slept on a mattress on the floor.

Whilst he was dozing, he heard the voice of the accused and the deceased engaged in an argument in the room.

According to Slinger, the accused wanted to know when he would get his money and the deceased promised "the following day." Accused however said that the deceased has been taking him for a "cunt" for a long time and he wanted his money. The deceased reiterated that he would get the money from Stephen Humphries, also known as "Toelie" the next day and would then pay the money owed to the accused.

According to Slinger, the deceased was standing in the corner of the room and the accused was confronting him, standing in front of the deceased with his back towards Slinger who was lying on his left side on the mattress looking in the direction of the deceased and the accused. The accused had in the course of their aforesaid argument grabbed the deceased's shirt with his one hand broadly in the area below the collar. Slinger did'not know whether the accused used his left or his right hand. The accused during this time and by means of this hold repeatedly pushed and/or bumped the deceased's upper body against the cupboard and as a result the sound or noise was that of a person being bumped against a wooden cupboard.

Then suddenly Slinger heard the noise of a shot from a firearm, but he did not see any firearm. The report of the shot came from the direction of the position of the accused and the deceased.

Slinger then jumped up and ran out into the passage and the lounge. He was crying and the people in the lounge stopped him. He noticed the deceased following him out of the room but saw the deceased running past him then stopping at the outside of the front door where he asked that someone must help him. However then he started running around the corner and eventually collapsed in front of an outbuilding in the yard where the deceased attempted to solicit assistance before he collapsed. From there the deceased was carried into the kitchen through the back door and there placed on a mattress by some of those present.

Slinger noticed that the deceased was bleeding from his side and that when he leaned against the glass panels of the front door, blood spots were visible on these panels. The deceased was later carried into the kitchen from the outbuilding where he sought help and was placed on a mattress in the kitchen.

After seeing the deceased lying in the kitchen, quiet and with his eyes closed, Slinger went across the street to another house where there was a telephone and

where he obtained leave to use the telephone to summon an ambulance. He phoned and requested an ambulance and the person on the receiving end promised to send an ambulance. The ambulance arrived and the deceased was loaded onto the ambulance in the presence of Slinger and others.

Slinger left the premises later that night. At no stage however did he see the accused again in or outside that house after he left the accused behind in the room where the shot was fired.

On questions by Ms Lategan Slinger affirmed that the deceased told him what was the nature of the money owed by the deceased to the accused but the defence objected to such evidence as hearsay and the Court upheld the objection. Slinger however testified that he knew that the people staying at the house were selling Mandrax and dagga for the accused. The accused himself supplied some buyers with the Mandrax and dagga and they paid over the money to him. He himself at times sold some Mandrax and dagga to persons in the yard of the house, when he was requested by others staying in the house to do so.

According to Slinger, the money owed by the deceased to the accused was for the sale of Mandrax and dagga on behalf of the accused because he knew that the deceased was also selling Mandrax and dagga for the accused.

When Ms Lategan asked Slinger what was the attitude of the accused and the deceased towards each other as manifested in that room at the time of the incident he said: "The deceased plead and say he will give him the money the following day", but the deceased, "does not want to understand anything."

In cross-examination by Mr Botes, Mr Botes suggested that the deceased could have become aggressive because he had also taken Mandrax and dagga that day.

Although Slinger conceded that a person's mood can change as a result of the intake of these drugs and that the effect differs from person to person, when asked by the Court whether he saw

the deceased become aggressive at any stage that day, Slinger replied: " No, he was not such a type of person."

A suggestion that the accused instructed counsel that Gerrie had once assaulted a person with a knife was put to Slinger, but Slinger denied knowledge of such an incident. This suggestion was never again raised in the course of the trial, not even by the accused in his evidence.

Mr Slinger in cross-examination admitted that he obviously doesn't know what was said before he awoke from his slumber but that he can recall what was said "from that point when they were in the corner." He did not know whether the deceased had asked the accused's permission for Humphries, (Toelie) to sleep in the house that night.

The case of the defence as put to Slinger was briefly as
follows:

That night the deceased asked the accused for permission for Toelie to sleep. Accused asked the deceased how he indeed could ask him for sleeping place for another friend of his "without him repaying the money that he owes the accused." Accused was not satisfied with the promises made and was indeed angry. He indeed took the deceased in front of the chest high up (does not say with which hand) and once or twice pushed him against the cupboard in the corner." The accused inferred that the deceased must have seen that the accused was not satisfied. The deceased then just said: "Nou maar vat so" in Afrikaans. (i.e. "now then take this"). Slinger denied that he ever heard such words uttered by the deceased.

It was put to Slinger, "Certainly you as you already testified that there was a lot of words spoken which you cannot even remember correctly, or recall correctly, is that so, Mr Slinger?" It must be noted that Slinger up to that stage had never admitted that there were a lot of words spoken which he could not remember correctly, or recall correctly. Slinger

however firmly replied: "There could be but that moment I woke up as I give my statement, it's what happened." (My emphasis added).

Slinger denied that he ever heard the deceased using such words, but conceded that it could have been said but that he didn't hear it.

The deceased, according to the accused, at that stage "drew a firearm from his clothing, somewhere here at his side with his left hand; the accused did not realise at that stage or even afterward whether it was a pistol or a revolver, he just saw that it was a firearm; the accused then because he realised it was a firearm, grabbed with both his hands the arm, the front part of the arm, of the left arm of the deceased, just to get the firearm away from him; and he just tried to push it away; it happened very quickly and then the shot rang out." (My emphasis).

Slinger conceded that it may have happened like that but he didn't know.

Mr Botes however put it to Slinger that he would have seen it if the accused who is right-handed, had pulled out a pistol with his right hand as could be expected from a right-handed person according to Mr Botes, and pulled the trigger. Slinger agreed to this proposition. It was also put by Mr Botes that if the deceased took out the pistol with his left hand, it would also have been obscured from sight from the position where Slinger was lying at the time. Slinger also agreed to this proposition.

It will be seen that up to this stage Mr Botes had not actually demonstrated to the witness and to the Court how the pushing away was done. He contended himself with a very vague gesture of pushing away, however accompanied with a firm statement that the accused had grabbed the deceased with both his hands on the "front part of the left arm" and attempted to push the forearm holding the firearm away from him.

There was certainly nothing at all of the later developed defence that the accused grabbed the left wrist of the deceased with his left hand, grabbed the deceased's elbow with his right hand and forced the deceased's elbow to the left and up to the level of the deceased's left ear so that the point of the firearm was pointing downwards towards the deceased's left flank.

Only in re-examination when Ms Lategan reopened the issue of the grabbing of the deceased's forearm did Mr Botes intervene and attempted to correct his previous statements and demonstration during cross-examination by saying, "May I just clarify. Your Worship I have showed here and here, so it's here, the front part the arm, the hands, so I just don't want that, only on the arm." Here the Court formed the impression that the grabbing was not only on the front part of the arm, but actually on the left hand as suggested by Mr Botes when cross-examining Dr Liebenberg.

When the Court attempted to clarify the position further, Mr Botes stated that the accused with one hand held the deceased's upper arm just above the elbow. Unfortunately for Mr Botes and the defence the statement by Mr Botes in his main cross-examination was unequivocal insofar as it stated that the accused had grabbed the deceased with both hands on the front part of the deceased's left arm.

Slinger in response said that he did not see such a movement.

There was also no sign yet of the very specific defence allegation developed when the accused testified, that the deceased actually lifted his shirt, which was not tucked into his trousers, with his right hand and then pulled out the firearm from the inside of his trousers where it had been kept at a point in the middle front of the trousers without the help of a holster. It seems that the allegation that the deceased had actually used his right hand to pick up his shirt was developed to counter the uncontested and overwhelming State evidence that deceased was right-handed and the State argument

based on that fact that it was extremely unlikely that the deceased would have pulled out a pistol with his left hand. Similarly, the allegation that the pistol was in the centre of the front of the trousers, was developed to meet the argument that the handle of the pistol would probably have been placed inside the trousers in a manner where the butt would have pointed to the right so that it would be easily accessible to the deceased's right hand and if it was placed inside the trousers at the side of the deceased's body it would have been much more awkward and uncomfortable for the deceased to have grabbed the butt of the firearm with his left hand to shoot the accused.

I must remark at this stage that when Mr Botes pertinently put it that the pistol was taken from the side of the body of the deceased the Court got the impression that the side that he pointed to was the right-hand side of the body of the deceased. However this was not clarified on the record and the Court may err in this respect. What is beyond all doubt that the allegation was that the pistol was taken from the side of the body and not from the centre front of the body.

I pause here to comment that the words "vat so", take this in English, could not be equated with a mere threat to shoot but rather as words manifesting the deliberate act of actually shooting or on the verge of shooting. The question then arises immediately why did the deceased not shoot the accused? Why would there have been time for the accused to react by grabbing the wrist of the deceased and why would the shot only go off after the accused had grabbed the forearm and/or elbow of the deceased and had forced it into the most awkward position pointing at the left flank of the deceased. One must assume for the purpose of this argument that the accused was not at all prepared for such an action by the deceased, an 18 year old boy with whom he never had any problems before. In the case of a driver of a motor vehicle faced with a sudden emergency, the accepted reaction time would have been 1 - 2 seconds. It follows that in a sudden emergency, which according to the accused was created by the deceased, the reaction time of the

accused would not been less than in the case of the driver of a motor vehicle facing a sudden emergency, more so because the accused, according to his own averments, was already in a state of anger at the time.

Mr Botes put it to Slinger that the accused after the shot went off, was totally confused "for a few seconds. " Slinger was unable to comment on this proposition. I pause here to remark however that when the accused later testified, he claimed that he was confused for the rest of that night and also the next day. Whenever he was asked why he had not followed a certain course of action, which one would have expected of an innocent person, the only or at least one of the excuses were the he "was confused."

Mr Botes also put it that a confused state reigned in the house after the shot and Slinger readily agreed.

Mr Botes put to Slinger: "After awhile he (i.e. the accused) also stood up and went outside." Slinger said that he knew nothing about this. It was put to Slinger that when accused saw that the deceased had gone to the back of the house, apparently to look for help, he then realised the deceased had been hit. He then went to his bedroom, unlocked the door with a key he had and telephoned an ambulance." Slinger said that he does not know about this.

The accused's allegation that he called an ambulance from his room stands alone and is uncorroborated, whereas the fact that Slinger phoned for an ambulance and got a positive answer is uncontested and corroborated. It is also strange that the accused would phone an ambulance but avoid coming near his fatally wounded so-called friend.

When Dyers testified Botes wanted to create the impression

that the accused followed the deceased outside the house, was present with other people outside the house to lend a helping hand wherever possible and re-entered the house on several occasions. That the accused re-entered the house was also put to Slinger. However when the accused was asked later at the inspection in loco to point out his movements he indicated that he neither left the house, nor re-entered it at any stage before he left for his mother's house that night.

Now it serves some purpose to consider why the accused at the inspection in loco now completely repudiated what was put before, namely that he on more than one occasion went in and out of the house.

A plausible explanation appears to be the following. At the inspection in loco Mr Slinger when he was pointing out the movements of the deceased, how he followed to the outside and how other people in the house followed the deceased outside, Slinger said that the people from the house following the deceased said "Spike (i.e. the accused) shot Gerrie." At that moment the Court said in the presence of the accused and his legal representative that although this appears to be hearsay it would depend on whether or not the accused was also outside at the time so that he could have heard this allegation and if that is so, he would have been expected to react to such an allegation if he had not shot Gerrie and if he was innocent. It may be, and I make no final or definite finding on that, that it is then when the accused decided it is safer to say chat he never left the

house after the shooting incident, up to and until he left the house to go to his mother's house. Be that as it may, here is another serious discrepancy which demonstrates how easily the accused switched from the one statement of fact to the other, depending on what seems appropriate for the particular occasion or crisis which arose.

Mr Botes put it that when the accused came out of his bedroom, people in the house asked him for a mattress, apparently for the body of the injured deceased to be placed on this mattress. Slinger could not comment.

Mr Botes then put it to Slinger that when the accused later saw the arrival of the ambulance and the deceased being loaded into the ambulance, that "he then went into his room, he collected his jacket and he then proceeded to his mother's house." Slinger replied: "It could happen because I don't know what happened to him."

Mr Botes was even more emphatic and unequivocal in a further statement put to Slinger as part of the case of the accused and I quote: "After the deceased was loaded into the ambulance, the ambulance left, then he again went into his house and it was only then that he put on his jacket because he wanted to leave the premises to go to his mother." (See record p. 45, lines 25 - 29). (My emphasis).

It must be noted that the issue of 'when and where the deceased put on a jacket or a coat gained in significance when Rene Plaatjies testified that when the accused arrived

at the house that evening he could see that accused had a pistol stuck in front on the inside of his trousers. On behalf of the defence it was put to him, and later confirmed by the accused in his evidence, that the accused never had a firearm, that when he came into the house he wore a leather jacket and when he left later that evening he still wore his leather jacket. However at the inspection in loco the accused at first said that he went to his room after the arrival of the ambulance, he "again put on his jacket" before he left. When the Court queried this statement he then said that he made a

mistake and that he still had on his jacket and he only left. When recalled after the inspection in loco the accused failed pathetically to explain the mistake or the slip of the tongue or his contradictions regarding the jacket.

When accused testified on the merits he said that he arrived that night with a Katutura taxi. He wore a black jean, a white polo neck T-shirt and a black leather jacket with a zip in front. Inside the lounge he found Herkies, Toelie, Rodney, Rene and Gerrie. Herkies was the nickname of Helmuth Dyers.

He asked Rene Plaatjies, Renny "How's it?" and then Rene said "Okay." Then Gerrie the deceased stood up and said, "Spike, I want to speak to you." He thought that Gerrie wanted to speak to him about the money he owed him. They walked down a passage and entered a' room and then the accused said: "Speak." Then Gerrie said he was looking for a sleeping place for Toelie, which was a nickname for

Stephen Humphries. He then said to Gerrie: **"I** think you come to pay me - give my money back."

Accused then grabbed the deceased in front of his chest, near but below the collar, bumped him against a wardrobe and said: "Don't take me for a cunt."

The accused demonstrated how he grabbed the deceased with both hands and bumped him repeatedly against the cupboard.

I interpose to point out that accused now alleged that he grabbed with both hands, previously the clear impression was with one hand. Now the banging was repeatedly, not once or twice as put by Mr Botes in cross-examining Slinger.

It was probably appreciated that one or at most two bumps would not be convincing as reasons for the deceased, an 18 year old, to shoot his superior, the 37 year accused.

However, let's proceed. According to the accused the deceased then said: "Spike, if it is like that, take that." (Mr Dicks corrected the interpreter by saying the word was "this", not that. That is "take this", not "take that." The deceased put his hands down and lifted his shirt with his right hand. The accused then demonstrated that the shirt was lifted more to the right-hand part of the lower body. This was the first time that we heard that the

deceased "put his hands down", but' still it was not explained from where he was putting his hands down. Now also the accused put in the mouth of the deceased more words than before, namely "Spike, if it is like that", preceding the words "take this." The case as put to Slinger was also that the act of pulling out the firearm was accompanied by the words "vat so", in English "take this." Now however two further stages followed on the words "take this", namely the lowering of the deceased's hands from somewhere and the lifting of the deceased's shirt with his right hand and only then was a firearm pulled out.

Mr Dicks at this stage put it to the accused: "Did he take the shirt with his right hand in the middle or to the one side of his waist and the accused now answered: "In the middle." The question was partly leading. The accused now also demonstrated that the shirt was picked up in the middle of his waist and pulled upwards and with his left hand he took out a firearm. The accused then grabbed the deceased's left arm and demonstrated how it was done. Mr Dicks put the following description on record: "He took the deceased's left wrist with his left hand, with his right hand he grabbed the deceased's left elbow and in an upward motion he pushed the elbow approximately level with the ear of the deceased and the deceased's left hand ended up below his left armpit."

The accused now also ventured the following explanation: "The deceased was shorter than me and it was easy and I pushed him."

The accused said in the process the shot went off and he "jumped back." His counsel Mr Dicks then said: "I fell back" and the accused repeated after his counsel: "I fell back." On a question by the Court the accused now said: "I fell back on the ground."

They then ran out in the order of Slinger first, Gerrie the deceased second and then the accused third.

According to the accused he saw the deceased going out the front door, then to the outbuilding where he solicited help. He then noticed that the deceased's upper body was bent and that he was injured. The accused went to his own bedroom in the house and phoned an ambulance. When he emerged from the room people asked him for a mattress and he gave them permission to take one out of the third bedroom.

He did not see the deceased lying in the kitchen before he was eventually removed to the hospital by ambulance.

When asked by the Court why he did not go to the deceased he said: "My Lord, that time I was confused and I never hear, it was the first time to hear a shot like that." The Court then said: "But so much the more, one would expect that you would, if there was a possible accident, that you would be curious to see whether the man was actually hit and how he was hit." The accused replied: "My Lord, I don't want to see the man on that stage because he was my friend."

The question that must immediately be' posed is: "Is this absurd answer that of an honest and innocent person or does it reflect a guilty mind?"

According to the accused he left the house to tell his mother about the incident as soon as he saw the deceased being loaded into an ambulance. Later that night his friends and associates including Rodney, Douglas and Rene, visited him at his mother's house and informed him that Gerrie had died. They then walked back together to his house, that is there the incident took place.

At home he went to his room and there waited until 06:00 to 07:00 for the police to arrive. He could not sleep because he was unhappy. Rene, Rodney, Douglas and Bennie were in the house with him.

Asked by the Court whether he told these friends and associates what had happened he said "no." Asked "why" he said: "The deceased Gerrie was my best friend and on that time I don't want to say anything or talk anything. I was just staying in my room and sleeping, lying in my room. " The Court then said, and I quote from page 383, lines 29 to 384, line 7:

> "But I must tell you, Mr Morkel, that one would have expected that on that occasion when you were there with your friends you would have told them the obvious thing, namely if that is what happened, that the deceased suddenly pulled a pistol and when you tried to wrest it from him or push it away an accident happened, a shot went off and he shot himself. Now I put it to you that that seems to be what one would normally have expected of a person in your position. What do you say to that, Mr Morkel?"

The accused replied: "My Lord, on that stage I was in a kind of a situation but I can't explain to the Court how it was."

The accused admitted that although he was told one or two days after the incident that Sergeant Minnies was looking for him, the first time he went to the police was on 15th June, that is about 15 days after the incident. He also said that he stayed mostly at the house of his mother during this period. It must be mentioned here that according to uncontested evidence of Plaatjies, the girlfriend of the accused and the accused's child remained at that house but the accused did not remain.

When he, the accused, arrived at the police station he was interviewed by Terblanche, another policeman and asked where the firearm was with which the deceased was shot. His answer was: "Gerrie's got the gun, he know about the gun" and "he must know where it is because I don't have a gun." Again the answer was absurd and evasive because Gerrie was dead and could not say what happened to the gun after his death. Only the accused could say that because the accused was the last person to leave the room where Gerrie was shot and it was not, and could not be seriously contended that the wounded Gerrie or Slinger had taken the firearm out of the room where the shot was fired.

When asked about the questions by Terblanche and Minnies about what happened to the firearm with which the deceased was shot the accused gave a sequence of evasive answers before he acknowledged that he was asked what happened to such firearm and had said that he did not know.

At another stage he denied that he said that the deceased had a pistol and even motivated this answer as follows: "My Lord, I say I didn't have a pistol and I never say that the deceased have got a pistol because I said I will not make any statement."

The only sensible reason why the accused on the night after the incident left early, and after returning again left between 06:00 and 07:00 and why he did not go to the police earlier was because he did not want to be confronted before the firearm was disposed of and a plausible story could be concocted. Once his friends, particularly Plaatjies, agreed to tell the police the concocted story he could afford to wait to see whether the lie was swallowed by the police.

It was noticeable that although in the accused's evidence-in-chief several allegations made by the State witnesses Slinger, Helmuth Dyers and Rene Plaatjies were placed in dispute but at no stage did the accused repeat what was put to Slinger by Mr Botes regarding the jacket and when and where the accused had put on the jacket. It appears that the defence at the stage when the accused testified, no longer wished to testify that the accused went into his room to collect or at least did collect his jacket from the room before he left for his mother's house or that he "only then put on his jacket", because it was common cause that there was no opportunity for discarding his jacket between arrival and the shooting incident. If the accused arrived at the house already dressed in black jacket, 'jeans and polo shirt there was no purpose in going to his room to collect his jacket before he left unless of course there was evidence or

an explanation that after the shooting he first went into his room to take off his jacket and then in turn to put it on again before the left the house for his mother's house. There was no such explanation. No wonder that at the inspection in loco the accused first stated that he went into the room to again put on his jacket, then explains it was a mistake and that in fact he did not put on any jacket in that room but merely left with a jacket that he had on from the beginning. He could not explain to the Court how the mistake or slip of the tongue came about.

When cross-examining Dyers who had testified that the accused had gone into his room once or twice after the shooting and then came out dressed in a coat, (in Afrikaans Dyers referred to a "jas", which is the equivalent of coat and which is not a jacket). Mr Botes then referred to Dyers allegation about a coat, but notwithstanding that Dyers had twice explained that accused put on a coat, Mr Botes misrepresented his evidence by saying that he had said the accused put on a jacket. The interpreter then mistakenly translated the question to the witness using the Afrikaans term "jas" and when the witness said yes - she gave as accused's answer - "That's correct, My Lord", which referred to his answer that it is correct that it was a "jas" but which on the record it now appeared as if the witness agreed that it was a "jacket", which he never did. The fact that thereafter the witness used the term "jacket" is obviously not because he conceded that the accused put on a jacket and not a coat, but merely because he began to assume that the correct term for the term "jas" in Afrikaans is "jacket" in

English.

In further written submissions by Mr Dicks at the invitation of the Court about this aspect of the record, Mr Dicks submitted that there was some confusion. As a result of this submission the Court reluctantly recalled Dyers to ask him what is it that he told the Court. It was quite clear from his answers that according to him he told the Court throughout that the accused had put on a "jas", the correct translation of which is "coat". He was also asked but what in fact did he see the accused put on that night after he'd gone to his room and came out again. He unhesitatingly stated that he put on a coat, in Afrikaans a "jas".

The only reasonable inference from the aforegoing evidence is that the accused did put on either a jacket or an overcoat in that room after the shooting incident and that his last attempted denial is a blatant lie.

In the light of the aforesaid contradictions and lies, read together with the evidence of Dyers and Plaatjies and considering the motive of the accused for the lies and contradictions, as well as the probabilities, I accept the evidence of Dyers that accused put on a coat after the shooting and before he left the house and the evidence of Plaatjies that accused had not arrived at the house that night clad in a black leather jacket.

The reason for putting on a coat and the accused's unconvincing effort to deny it, is indicative of a guilty

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mind relating to the coat. In the absence of an explanation by the accused the only reason for this lie which springs to mind is that the accused put on a coat to conceal the taking out of the house of the firearm with which the deceased was shot. This fits in with the probability that the accused was the person who removed the firearm from the room where the deceased was shot. The possibility that one of the associates or friends removed it, whether on their own initiative as suggested by Mr Dicks, or on behalf of the accused is a possibility, but in the particular circumstances not a reasonable one. It was the accused who knew precisely what happened in the room because he was a participant and witness and the last person to leave the room. He had not only the best opportunity, but the motive to do so because he obviously knew the implication of the discovery by the police of the exhibit. On one of the questions by the Court he for instance admitted that he knew that the police could find fingerprints on a firearm should they retrieve it. His assertion that he did not see whether the weapon fell down on the floor from the hand of the deceased, never went back to the room after the shot and never made any enquiry about the whereabouts of the firearm, can only be explained by the fact that he knew that the firearm was not left in the room or removed by any other person because he removed it himself. His total inability to give a plausible explanation for this failure supports this inference. (See e.g. the record p. 622, line 13 to 624, line 8) . The fact that he left the house as soon as the deceased was removed by ambulance and again gave an absurd explanation for his hurried departure, further

supports the inference.

The accused explained in cross-examination that he had no time to discuss the incident with his friends and colleagues before he left. When it was put to him by the Court that the time was his own he could use it as he liked, he replied: "My Lord, on that stage I feel I must go to my mother's house." When asked why he did not tell his friends and associates when he returned later that night, he said: "Yes, I was confused at the time." When asked why he didn't tell the police he said he did not trust them. When he was asked why he did not tell his friends the morning after the incident he said: "Because I was still confused and I just trust my mother and I just told my mother." Ms Lategan then said, "Do you want to say that you did not trust your friends to tell them what happened there", he replied: "Yes." The Court then asked the accused, "But why would you not be able to tell the truth to your friends who were with you in the house and who must have been worried about what happened to the deceased, why could you not tell them the truth?" The accused replied: "Because we didn't talk about that, My Lord." When told that that was not the point and the question repeated, "why didn't you tell them what happened," he said: "Because I want to talk to my mother." When asked by Ms Lategan: "Did your friends in fact ask you what happened there in the room between you and the deceased?" he replied: "After the incident on that day I don't know what's happened but I know' that I didn't tell them what happened."

Now of course one of the reasons for not telling them was because, just as in the case of the firearm about which he made no enquiries, he knew full well what happened and he knew that they knew.

An important further indicator that the accused was the person and had shot the deceased and not vice versa, was that the accused followed the deceased out of the room, without knowing whether the deceased who according to him, wanted to shoot him, was wounded or still armed. The accused when confronted with this problem, again failed to give any comprehensible answer.

Against this totally unsatisfactory, improbable and prima facie dishonest explanations of the accused, the other big dispute between the State witness Plaatjies and the accused must be considered.

Plaatjies testified that when he notified the accused later in the evening that Gerrie had died and wanted to know what is now going to happen, the accused told him that they should not tell the police that the deceased was shot in the house or by him. They should tell the police that the deceased came running from the street to the front door and that they found him there already wounded.

Plaatjies in fact the next day made such a statement to the police, but on the same day on the' way to the police station, retracted the statement and told them that his first statement was a lie because he feared for his life.

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Plaatjies then told the police the truth, namely that the deceased was shot in a bedroom of the house.

These averments by Plaatjies are corroborated by the fact that although the deceased had a fatal wound, with the exit lower than the entrance wound and that there must have been substantial bleeding, no bloodstains were found in the house. No empty shell was found in the house and obviously not the bullet that exited the body of the deceased in that room. Nothing was found, notwithstanding a thorough search in the house. It is probable that any indication of a shooting inside the room was carefully removed so that the next morning when the police arrived they would not find the slightest indication that the deceased had been shot in the room of the house. That would have been in line with the concocted story that the deceased was shot elsewhere and came running to the front door of the house already wounded.

Plaatjies was also a young man of 24 years of age. The accused, 37 years old, tall and athletically built, clearly was a leader and dominant personality in the group of smugglers. Plaatjies and the others were not in the room where the shooting took place and could only have heard what happened there from either Slinger or the accused himself, or both. It is highly improbable that Plaatjies or anyone of the others would have taken the initiative to tell the police the false story. The accused was primarily the interested party. It was for him to give an explanation and to decide on tactics.

When I compare the Plaatjies' version with the stories told by the accused, then I have no hesitation in accepting the evidence of Plaatjies on this point as true and that of the accused as false.

However the allegation by Plaatjies that he saw when the accused arrived that evening, the butt of a revolver or pistol protruding from the top of the belt of the accused, deserves more caution. Plaatjies only mentioned this in his second written statement to the police. He was not very convincing when cross-examined by Mr Dicks as to the reason or reasons for not mentioning this aspect before in his first written statement.

Mr Dicks was also relatively effective to show that the accused arrived after darkness had set in and not at about 18:00 when there was still light from the sun. He also made some other points such as that the main gate of the yard was open and that the dogs could therefore move in and out into the street.

However, it is clear that the light inside the house would have given some illumination outside the front door if the accused arrived later than the estimate of Plaatjies.

At the inspection in loco it was also seen that a high streetlight was situated near the entrance to the small entrance gate and that its light w6uld certainly have sufficiently illuminated the area from the street to the front door of the house for Plaatjies to have been able to see the butt of a revolver or pistol protruding from the trousers of the accused when he entered the yard on his way to the front door, provided the said streetlight was functioning properly at the time. Although the accused at the inspection in loco alleged that the light used to flicker and go off at the time of the incident, there was no evidence that the light did not function at the time when he entered the yard.

One would have expected that the accused would have mentioned such an important fact in his first written statement to the

police and that if he did so, the policeman taking down the statement would not easily have failed to write down such an important allegation.

Against this criticism is the fact that the original allegation by the accused that he wore a leather jacket that zipped close and that Plaatjies would therefore not have been able to see the butt of a pistol or a revolver protruding, even if he had one. This evidence by the accused was contradicted by the accused and his legal advisers as already analysed and discussed supra.

I have also shown in the discussion supra that the accused must have removed the firearm after the shooting. He would only have removed it if he had brought it there. If he brought the pistol or revolver with him then he could have had it readily accessible for quick use, probably stuck on the inside of the trousers with the butt either covered by his shirt or protruding.

The accused could not have obtained the firearm from anyplace inside the house after his arrival and before the shooting, because there was a continuing movement after the accused's arrival at the house in the course of which the accused took the deceased from the lounge into the bedroom where the shot was fired.

Whether or not the accused or the deceased had the firearm, the probability is that it was stuck on the inside of the trousers with the butt protruding above the trousers.

It is probable in the circumstances that Plaatjies saw the butt of a revolver or pistol protruding. It is however not necessary for the purpose of the judgment to find positively that that was proved beyond reasonable doubt, because it can be inferred beyond reasonable doubt from all the evidence, the probabilities, the inconsistencies, contradictions and proved lies by the accused that the accused is the person who brought the weapon into the house and who again took it out after shooting the deceased.

Plaatjies also testified in favour of the accused where he alleged that the accused was under the influence of liquor when he arrived. The accused denied this. But on the evidence as a whole he was in a belligerent which could have had as one of its causes that he was under the influence of liquor.

The accused in his evidence admitted that he and his friends were selling dagga and Mandrax but denied emphatically that the deceased was also selling Mandrax and dagga on his behalf. He averred that the deceased owed him this money for a long time as a result of a loan. He could not say when he had granted the loan. He said Gerrie always had money, but he could not say why, if that is so, Gerrie did not pay him.

Not only did Slinger give unchallenged evidence that Gerrie, the deceased, also sold Mandrax and dagga on behalf of the accused, but the defence witness R Galant in cross-examination stated unequivocally that the deceased traded in dagga and Mandrax before he passed away and did so together with the accused, Rene, Herkies and Plaatjies and that this smuggling took place at the house of the accused where the incident took place. When Ms Lategan in cross-examination asked him whether he "would be surprised to hear that the accused told the Court under oath that the deceased didn't smuggle", he replied: "It will surprise me."

By the time the accused testified the evidence from Dyers, Slinger and Plaatjies were overwhelming that the house where the incident took place was a centre in Windhoek from which the accused and they, dealt in Mandrax and dagga. Although the defence from the beginning objected to this evidence, the Court overruled the objections and held that the evidence was relevant and admissible.

The evidence related to the setting i'n which the alleged murder took place, it explained to some extent the relationship between the accused, the witnesses and the

deceased, threw light on the motive for shooting the deceased, helped to explain why there was a conspiracy to mislead the police and who initiated the plan. The Court was satisfied that the evidence about illegal trading in Mandrax and dagga where the deceased was shot referred to illegal conduct continuing at the time of the incident and not necessarily to conduct on other occasions. The relevance is not in order to show that the accused is a person of bad disposition and must therefore be guilty of the crime charged; when the accused testified it became common cause that the accused and others smuggled Mandrax and dagga. Accused even could not truthfully explain why the aforementioned persons were staying at his house. Defence counsel, after arguing that the evidence was inadmissible, nevertheless gave as an explanation for the disappearance of the pistol the type of person who were in the house, suggesting their involvement in illegal activities. Surely if it was relevant for the defence to show that the argument between the accused and deceased was about a loan unpaid, then it was relevant for the State to show that it was about money not paid over to the accused for selling drugs on his behalf.

It is not necessary to elaborate further on the issue of admissibility. For the purpose of deciding why the deceased was shot, the fact is that like the other occupants, the deceased also sold Mandrax and dagga on behalf of the accused and that the deceased owed the accused money not for a loan but for withholding monies received from Mandrax and dagga. The evidence of the accused that the deceased never sold Mandrax and dagga is against the evidence also of the defence witness. The evidence of the accused on this point was vague and unconvincing. His protestation that the deceased, an 18 year old youth, was his best friend, was ludicrous. He never assisted his friend after he was shot. He did not go near him or follow him to the hospital. He did not assist the police to find the weapon or otherwise, to establish the truth about the death of his friend. When accused assaulted the deceased in anger, he did not conduct himself as a friend, but rather acted like a drug lord imposing discipline on his inferiors.

The accused in general fared hopelessly in cross-examination and on questions put by the Court.

After saying that he had an argument with the deceased about the money he was asked: "And what did the deceased argue on his side back to you, what did he say back to you about the money?" Accused replied: "He didn't say anything. All what he say is 'take this' and what I saw it was a revolver." So again the impression is left, the words "take this" and then the revolver was there. Not now a lowering of arms from somewhere, where the deceased is busy with something, then a picking up of his shirt with the right hand and then a grabbing of a firearm.

According to the one version by the accused, when they entered the room, he said: "How's it - hoe is dit." And the deceased now said: "Praat nou klaar!" which in English is "finish speaking!" That the deceased would have almost

ordered the accused - "finish speaking!" is totally-improbable and clearly a fabrication.

At this stage there was another significant slip of the tongue by the accused. Although he initially said that things happened so fast that he could never see whether the firearm was a pistol or a revolver, he now slipped twice in succession when he said: "My Lord, he said take that and the time when I saw the firearm, the revolver...." "All that he say is take this and what I saw it was a revolver. " (See record p. 441).

It must be remembered that the accused admitted when recalled by the Court that he knew the difference between a pistol and a revolver. (See record pp. 621, line 31 to 622, line 12) .

A few other aspects of the evidence of Dyers and the defence stand on that, need be mentioned. According to Dyers, he was one of the persons who sold Mandrax and dagga for the accused.

On the evening of 1/6/93 the accused entered the lounge where he and others were watching TV and where the deceased was also present. The accused entered, grabbed the deceased in front of the chest and took him along the passage to a bedroom at the end of the passage on the right-hand side. About 3 - 5 minutes later a shot rang but and the deceased came running out of the room and went outside the house. About 3 - 4 minutes later the accused followed and entered the lounge where Dyers and Stephen Humphries, known by the nickname of Toelie, were at the time. The accused said to Humphries "give me my money." Humphries said: "What money?" The accused did not answer. Dyers then said to the accused that Toelie does not owe him any money or anything.

Mr Botes cross-examined Dyers and put it to him that it was actually the deceased who asked to talk to the accused when the accused first came into the house. He denied that the accused had grabbed the deceased in front of the chest or that he had pushed or dragged the deceased into the aforesaid bedroom.

Mr Botes repeatedly put to Dyers that the deceased had gone outside the house and re-entered several times and never saw Dyers and Humphries in the lounge. He actually asserted they were not there and he spoke to any of them about money.

Dyers insisted that he and Humphries were in the lounge when the accused spoke to them about the money.

As pointed out supra in this judgment the accused later repudiated that he was in and out of the house several time before he left for his mother's house. One of the suggested reasons relied on for disputing Dyers's evidence about the conversation about the money, being that he was in and out of the house and that Dyers and Humphries were not seen in the lounge, therefore fell away.

It is noteworthy that here again the accused at the inspection in loco repudiated his whole

stand regarding the presence of Dyers and Humphries in the lounge after the shooting and this appears from paragraph **10** of Exhibit J which is a record of the inspection. Paragraph **10** reads:

> "The accused then went to the lounge from where he saw that the deceased was being loaded into the vehicle of the lady living across the street. The ambulance then arrived and the deceased was loaded into it. According to the accused, Helmut Dyers and one other person were in the lounge at that stage."

Dyers did not know that according to Slinger the deceased Gerrie had promised the accused that he would get the money from Humphries the next day to repay the accused. It is a strange coincidence that Dyers testifies that accused after the shooting, confronted Humphries in the lounge to ask for his money. There is no reason to believe that Dyers sucked this out of his thumb. Slinger's evidence about Gerrie's promise, was the obvious reason why the accused then demanded his money from Humphries.

Dyers stuck to his guns on this and other issues. I have no doubt that he was telling the truth on this and other issues and that the accused was again telling lies insofar as he disputed the evidence of Dyers.

The fact that the accused demanded the money from Humphries, known as Toelie, shortly after the deceased was shot shows the belligerence of the accused at* the time and his obsession with collecting his money.

The defence witnesses Galant, Abrahams and Paramore did not really assist the defence. Galant as I have shown repudiated the evidence of the accused in regard to the accused's denial that the deceased was selling Mandrax and dagga for him. Paramore's evidence that Gerrie had broken into his gambling machines some years ago, but that there was no prosecution and that one Gerhardus and one Ou Boet had reimbursed his losses within three days after the event, was no corroboration of the accused's allegation that the deceased had borrowed money from him.

Insofar as Galant was called to testify about certain conversations with Plaatjies indicating malice towards the accused, this evidence was vague, full of contradictions and a dismal failure to attack the credibility of Plaatjies.

The defence did not call any of the friends of the accused who were present at the house of the accused on the date of the incident.

What remains is to highlight some of the points made in the evidence of Dr Liebenberg who had done the post-mortem examination.

Her main findings was that the deceased had died as a result of a shot wound through the abdomen. She gave the following details:

> "A fatal shot wound: Entrance lateral left thorax, a 8cm central round wound, with powder blackening up to 15mm around the central wound, with a wide collar of bruising. From here a shot wound tract
> goes downward to the right, through the 9th rib left lateral, grazing the left lower lobe edge, through the left diaphragm, shattering the spleen and rupturing the left renal vein, in and out of posterior wall of the stomach, lacerating the duodenum and through the abdominal wall of the right hypochondrium. Exit: 10mm round wound lateral right flank, with omentum prolapsing.
>
> The vertical distance between the entrance and exit wound was 14 0mm."

Now Dr Liebenberg elaborated on her evidence on her report in her viva voce evidence and there are a few aspects that need to be briefly referred to.

She stated that:

> "The asymmetrical form showed that the muscle was not at a 90° angle towards the skin, it was held aslant and the widest part of the powder blackening, that means the part upward from the central wounds, shows towards the body of the gun. Towards the body of the firearm the stock and barrel would be closest to the widest part of powder blackening. So in relation to the wound in this body and according to the schematic sketch I've drawn up, if I may show on myself, the angle of the weapon in relation to the body would have been downwards."

She later explained the shot shattered the 9th rib on the left, so some amount of deflection could have happened but put together with the entrance wound shape and figuration she concluded that the tract was downwards from the start.

In her opinion the firing of a shot from a position demonstrated to her, at that stage when she originally gave evidence, it would have been extremely difficult, not impossible, but not at all comfortable if the deceased was the person holding the firearm and if he held it in his left hand. Then as far as holding it in his right hand she said that that is so uncomfortable that this happening was negligible. She also said that the deceased, in view of the bleeding of the spleen which was ruptured would have fainted within 10 to 15 minutes.

Now when Dr Liebenberg was recalled she further elaborated on her previous evidence and at this stage she now had a proper demonstration of the accused's case of how the wound was self-inflicted actually by the deceased.

It's not necessary to go into all the questions and answers. The fact remains that in sum she was of the opinion that although inconvenient or very difficult, it was reasonably possible that the wound could have been inflicted as demonstrated on behalf of the accused.

She said that the difference in height between the entrance wound and the exit wound was 14 cms and that there was definitely, the pistol or the revolver must have been held at an angle at the moment that the shot was fired. However apart from that fact she could not say to what extent the direction would have been deflected because of the fracture of the rib by the bullet and concluded that what could however be said is that at the moment of firing it was held at a slant, with other words at some angle pointing downwards. She also said that from her inspection of the exit wound the weapon used must have been anything from an 8mm to a 9mm and that in her opinion, when the

bullet exited the body of the deceased, it still had quite a lot of power and it was a forceful exit. One would therefore have expected that* the bullet would have exited in the room where the deceased was shot and should have been found there but, according to the police, the next morning everything was clean and nothing of this nature was found.

She was also asked about the characteristic of a person who is right-handed or left-handed and she explained that phenomenon as follows and I quote: "Apparently I don't know if it's genetically inherited but it has to do with a specific structure and function of the brain lobes where in a left-handed person the right hemisphere dominates over the left hemisphere in that specific aspect whereas in right-handed people it's the other way around."

Now the argument was raised and considered whether if the pistol was in the centre of the body of the deceased and the deceased tried to grab it with his left hand, whether that would have been awkward or possible or reasonably possible. On cross-examination by Mr Dicks and his demonstration of how deftly he could do such a movement himself she conceded that it may be that it is not that difficult. The Court's impression however is that even to have done that, to take out a pistol in the centre of your body with your left hand when the butt points to the right would be an awkward movement and you would actually have had to twist your wrist to take a pistol in that position. Then of course it must be remembered that, as I've shown in the analysis of the evidence, that this position of the pistol in the centre of the body was an afterthought and totally inconsistent with the original allegation by Mr Botes on behalf of the accused.

Then a few remarks can be made lastly about Slinger's evidence. Because of the intimidation with which I have dealt in the judgment the thought came up whether Slinger was not so scared of the accused that although he saw a weapon he did not want to tell the Court that because he did not wish to be the cause of

the accused being incriminated and perhaps convicted. However, on proper consideration I have come to the conclusion that there is no good reason to really doubt the evidence of Slinger that in fact he did not see a firearm, either in the hands of the deceased, or in the hands of the accused. Here again it appears to be common cause, also confirmed at the inspection in loco, that the accused at the time of the shooting was actually crowding the deceased and was very near to the body of the deceased. He was not standing at arm's length. That was at least the assertion of Slinger. Now it is also common cause that the accused is a substantially larger person than the deceased with a relatively athletic build whereas the deceased was described by Dr Liebenberg as an adolescent boy, 18 years of age, 1.72m high and 51kg weight. He must have been dwarfed by the accused who was, according to the doctor's measurement here in court, 1.86m.

Mr Dicks argued throughout that it was possible for Slinger not having seen the weapon, even if it was a fairly heavy calibre because you do find heavy calibres which are not really big in size and he produced to the Court for the Court's inspection a .38 special with a rather short barrel. Now this type of weapon is also well-known to the Court and I have no hesitation in agreeing with Mr Dicks that a firearm of that type is not necessarily very large and it would be not impossible for a person to hold that weapon in his hand without much of it protruding. Now if the accused for instance had the weapon and he took it out of his belt in a sudden movement and pushed it against the body of the deceased, close to him, with his hand holding the weapon in front of his chest, the witness Slinger would not necessarily have seen it.

It is obvious however that if the deceased had the pistol and if his pistol hand was forced to the side and upwards so that his elbow is to the left and at the same height as his ear, then it becomes rather unlikely that Slinger would not have seen that if there was such a movement. What possibly happened here is that the pistol was pushed by the accused more or less against the

body of the deceased and that the deceased then made an evasive action and with that attempted movement of the body the barrel was moved into a position posterior on his left flank whilst slightly downwards when the shot was fired by the accused. Now the fact that the shot could have been fired in the way presented by the accused and that that may be reasonably possible taken in isolation, the question is whether in the light of all the facts and circumstances, that was a 'reasonably possible conclusion of what had happened.

I have no doubt whatsoever that with certain qualifications which appears from my analysis, the evidence of the State witnesses in substance must be accepted and that of the accused rejected insofar as it differs from that of the State witnesses.

In this conclusion I must stress again that almost every aspect of the accused's conduct after the shooting, was not consistent with that of an innocent person but rather that of a guilty mind.

I must also refer to a well-known decision relating to circumstantial evidence. I must point out that this whole case does not depend solely on circumstantial evidence but on credible and very meaningful other facts. But it is so that as to the final consideration of whether or not the accused shot the deceased some circumstantial evidence is part of the totality of evidence and the test for such evidence should therefore be considered, even if the whole of the evidence does not consist of circumstantial evidence. I refer here to a passage quoted in the Appellate Division in R v De Villiers, 1944 AD SALR at 493, at 508 where the learned judges of appeal, per Davis, A.J.A., quoted from Best, On Evidence (5th ed. 298) with approval, and this passage reads as follows:

> "Not to speak of greater number; even two articles of circumstantial evidence - though each taken by itself weigh but as a feather - join them together, you will find them pressing on the delinquent with the weight of a millstone..... It is of the utmost importance to bear in mind that, where a number of independent circumstances point to the same the probability of the justness of that conclusion is not the sum of the simple probabilities of those circumstances, but is the compound result of them."

Now when I therefore consider this approach and consider what the Court found as acceptable evidence and what the Court found to be false evidence by the accused, I have no doubt that the only reasonable inference is that the accused on that particular night shot the deceased.

Unfortunately the accused did not explain why he shot the deceased because the defence tactic was one of all or nothing. Theoretically it may be that the accused wanted to threaten the deceased, wanted to scare him and that a shot went off accidentally, but in the light of the accused's evidence, the defence here before Court, I cannot regard that possibility as a reasonable possibility and decide in favour of the accused on that basis.

On the finding that the accused did shoot the deceased and without any other explanation, I am constrained to also find that the shooting was intentional, in that the accused must at least have foreseen and did foresee the reasonable possibility of death resulting from such a shot wound and either reconciled himself to this possibility or continued, reckless as to whether the deceased would die or not.

Consequently, Mr Morkel, you are found guilty on the main charge of Murder.

O'LINN, JUDGE

CASE NO. CC

IN THE HIGH COURT OF NAMIBIA

THE STATE

RODERICK MORKEL

CORAM: O'LINN, J.

Heard on: 1994.03.10, 1994.09.13, 1995.05.09 + 10, 1995.11.08 - 10, 1995.12.06 - 08, 1996.02.12, 1996.03.27 + 28, 1996.04.03 Delivered on: 1996.04.03

SENTENCE

O'LINN, J.: Mr Morkel, it is now time to impose an appropriate sentence on you for the crime you have committed. When imposing sentence the Court must consider the aims of retribution, deterrence and rehabilitation. The Court must also be merciful when mercy is justified. Some judges have stated that mercy and not a sledgehammer is a concomitant of the function of imposing sentence. At the same time the same judges have made it clear from time to time that mercy does not imply maudlin sympathy. The Court normally goes about the task of sentencing by considering the personal circumstances of the accused, the nature and gravity of the crime he or she has committed and the interest of society.

There are a few remarks I need to make at this point in time in the history of Namibia and that is that the interest of society, particularly the victims of crime and the potential victims, need new emphasis so that at least it is balanced with the interest of the accused and/or convicted persons. To put it another way, the fundamental rights of the law-abiding citizen need new emphasis and must at least be balanced with that of the accused and convicted persons . We know that the Namibian Constitution does not allow a murderer to be sentenced to death. The fundamental rights, even of every murderer, however grave

his or her crime, are protected by our Constitution. It is also claimed from time to time in the Courts of Law that a convicted person still retains his absolute right to dignity, whatever his or her crime. But the law-abiding citizens and victims of crime certainly also have a fundamental right to life, to dignity, to peace and tranquility and to the security of person and property.

When a person is convicted, for instance, of the crime of murder, that person has destroyed all the aforementioned fundamental rights of the victim and has done so without a fair trial, without any respect for the life and dignity of the victim and without mercy. All organs of Government, including the Courts, are duty-bound by Article 5 of the Namibian Constitution to protect the fundamental rights of all persons. The law-abiding citizens are certainly at least as important a part of society as are accused persons or convicted persons. The question is, how can the Court protect the law-abiding citizens and the victims of crime in

these times of escalating crime? It seems that the only weapon available to the Courts is to mete out punishment which has the potential of deterring the convicted person and like-minded persons from committing such crimes in future and when necessary, to permanently remove them from society. Society must also feel that a convicted person will be given a sentence which is of such a nature that such person will also feel some of the pain inflicted on the victim. The aim of retribution remains important if the Courts wish to avoid vigilante justice and eventual anarchy. Furthermore, if the aims of retribution and deterrence are not given the necessary weight, society will lose confidence in the system of justice and that is not in the interest of any person and any democracy. To give considerable weight to the aim of retribution, does not lower the Court to the status of the criminal, as is often claimed, because the Court on behalf of society, imposes its sentence only in the course of a fair trial. This is the complete antithesis of the conduct of the criminal. Obviously the aim of rehabilitation remains an important consideration when imposing sentence.

I now return to consider firstly the personal circumstances of the accused placed before the Court.

The accused, according to his counsel, is now 40 years of age and he was 37 years at the time of the murder. He was born in South Africa and after studying at various places he attained the qualification of what was known as standard nine. The accused's mother was a teacher for the best part of her life. The accused is therefore not a person without education and is not a person who had an extremely bad start in life. The accused also did various jobs from time to time but did not complete his apprenticeship studies as a fitter and turner and decided to become a fisherman so that he could earn much more money. He also at some time in his life did jobs such as a painter for a short period of time. The accused is still unmarried but he claims to have three children with two separate mothers. Two of the boys are living with the one mother and the_ other daughter with another mother. It is said that the accused had to the best of his ability at times maintained to some extent some of these children. The accused's mother died at the end of 1995 and apparently his father is still alive and living in Cape Town.

This is the picture of his personal circumstances painted on his behalf by his counsel and on his instructions. What must also be taken into consideration and which is of much greater importance is that the accused is not a first offender. The accused was convicted in Bellville in the Cape in 1987 of the possession of a dangerous weapon. In that case it was a knife and he was sentenced then to R60 or 30 days imprisonment. But then, only the following year and that is on 19th August, 1988 he was convicted of a serious housebreaking with the intention to steal and theft where he broke into a premises and stole cash and other goods to the value of $2 342. On that occasion he was sentenced to 4 years imprisonment of which 18 months were suspended for 5 years on condition that he is not again found guilty of the

crime of housebreaking with intent to steal and theft.

At the time when the accused shot and killed the young man by the name of Gerhardus Jacobus van Wyk, the accused was engaged in other illegal activities, namely the leader of a group of persons who were engaged in buying and selling Mandrax, cannabis (that is dagga) or mixtures of that. And as the Court found in the course of the judgment on conviction these activities included areas such as Walvis Bay and not only Windhoek. The Court found that the accused had shot the deceased with either a pistol or a revolver. This pistol or revolver was never found and as the Court found the accused must have removed and hidden the murder weapon. The fact that he used a firearm and the fact that his own evidence and that of the State was that he did not have a licence for any firearm, shows that at the time of this murder, in addition to being involved in illegal drug dealing, he was again carrying a dangerous weapon and in this case a revolver or a pistol.

The personal circumstances of the accused do not justify a merciful approach towards the accused. The accused, up to this moment, has shown no remorse, no contrition whatever for the deed he had done. The accused made use from the beginning of his fundamental right to remain silent. At no stage did he co-operate with the police, at no stage was he open with this Court. Even at the time of plea the Court was informed by his counsel that his defence would appear from time to time as may be necessary and would appear from cross-examination. According to the evidence accepted by the Court the accused, after the commission of the crime, removed himself from the scene, he removed the murder weapon and he conspired with his friends to mislead the police to defeat the ends of justice by telling them a false story, namely that the deceased had arrived at his, the accused's house, already wounded elsewhere. And it was significant that some further attempts must have been made to fit in with this attempt to mislead the police and to defeat the ends of justice. There was actually no blood marks or any other indication of the shooting found in the house, although the deceased had a very severe gunshot wound which entered his body on the one side and exited on the other side. So the probability is that there was a concerted effort to also destroy

all signs of the crime to fit in with the fabricated story that the deceased had arrived at that house already mortally wounded.

It must be clear from these circumstances that there is nothing there justifying a finding that there are mitigating circumstances. As a matter of fact, these other factors are all or mostly of an aggravating nature. The fact that a 4 year sentence did not deter the accused from committing crime, the fact that a partly suspended sentence did not assist him to rehabilitate himself, are important factors counting against the accused.

I must now look at the crime committed. The facts of that crime appear more fully from the judgment on conviction and it is unnecessary to repeat all of them. It seems, however, that when the deceased was shot, the deceased was a youngster of 18 years of age. The accused, as is obvious, is a much taller person, well-built. The deceased at the time of the shooting pleaded with the accused to allow him to repay him an amount of money claimed by the accused but the accused did not want to listen. He was angry and proceeded with an assault on this young man which culminated in the shooting. If the accused had any reason to be angry, as he might have had, it would have sufficed if he assaulted the deceased by giving him a few blows with an open hand. I am not saying that would have been .justified but it could be understood. Instead, this pleading and frail young man was deprived of his right to life with a deadly weapon, either a pistol or a revolver.

When I look at the nature of the crime there is one important factor in favour of the accused. Mr Dicks for the accused argued that this crime of murder was not premeditated. With that is meant not that the killing was not intentional at the time of the shooting, but that there was no previous planning. That is always a very important factor to consider when considering the gravity of the particular crime. This is not a case where the accused went out on a mission to rob or rape and was prepared to kill, if necessary. The position appears to be that although the accused carried an unlicensed dangerous weapon with him, he must

have been angry and his assaults on the spur of the moment culminated in shooting.

Unfortunately the Court was not assisted by any openness from the side of the accused in the sense that he failed to tell the Court that, for instance, he never intended or planned to shoot the person and that it happened on the spur of the moment. But it seems that there are no factors whatsoever to detract from the probability that the shooting of the deceased was on the spur of the moment and not premeditated in the sense of prior planning, prior and advanced consideration. The crime is nevertheless a brutal and cowardly one. The accused snuffed out the life of this young person who was probably involved with him in the illegal activity of drug dealing.

It is therefore clear to this Court that it would fail in its duty, it would fail in its need to attempt by its sentence to deter the accused, to make the accused also feel some of the pain, not all the pain, but some of the pain suffered by the victim, should the Court not impose a heavy sentence. The consideration of rehabilitation does not justify any big or great deduction in a sentence that a Court would otherwise have imposed and this is because the accused is not a first offender, he is not a very youthful person, he is not a juvenile and he had a very good opportunity to consider his future lifestyle when he was in prison and part of his sentence was suspended. If that did not help him in the period 1988 to 1990, I do not see how, for instance, a partly suspended sentence would be justified. If I did not find or if I could not find that this particular murder was not premeditated in the sense I have explained, then I would have had no hesitation to impose on the accused the sentence of life imprisonment. However, mainly as a result of the fact that it has not been

shown that the crime was premeditated, I have decided that it will be appropriate in this particular case not to impose life imprisonment but nevertheless a long fixed term of imprisonment.

O'LINN, JUDGE

In the result I sentence you to twenty (20) years imprisonment.

ON BEHALF OF .THE STATE:	ADV A LATEGAN
ON BEHALF OF THE ACCUSED:	ADV L C BOTES
(1994.03.10 - 1995.10.06)	
Instructed by:	Theunissen, Van Wyk & Partners
ON BEHALF OF THE ACCUSED:	
(1995.11.08 - 1996.05.14)	ADV G DICKS
Instructed by:	
	Legal Aid Directorate