

- A Procedure Decree applied and that by reason of the respondent's admitted non-compliance with it, the action was not maintainable. The appeal is allowed with costs, the ruling of the learned magistrate is set aside, and I hold that by reason of the non-compliance the suit was wrongly instituted and is not maintainable and must be dismissed with costs.

B In this case the applicant filed or produced no notice served on the third respondent, Moshi Municipal Council in compliance with section 97 of Act Number 8 of 1982. Mr Mrema and Mr Ng'maryo stated nothing on compliance with section 97 of Act Number 8 of 1982 in their submission, which means section 97 was not complied with before filing the suit and the application therefrom.

D Under the circumstances the preliminary objection raised by Professor Msanga on the non-compliance with section 97 of Act 8 of 1982 has merit and it is accordingly upheld.

E In view of the above the application is not sustainable because the main suit is incompetent for non-compliance with section 97 of Act 8 of 1982, a month's notice not having been served on the third respondent before instituting the suit. For that reason the application is dismissed with costs.

F

REPUBLIC v. KERSTIN CAMERON

G

HIGH COURT OF TANZANIA
AT ARUSHA

H

(Rutakangwa, J.)

CRIMINAL SESSION CASE No. 51 OF 2000

I *Evidence – Expert evidence – When expert evidence may be contradicted by levy witnesses.*

Evidence – Expert evidence – Standards of accuracy and objectivity required – Role an expert should assume.

Evidence – Burden of proof – Weaknesses of defence case – Effect of weaknesses of defence case on the burden of proof – Weaknesses of defence case not a basis for conviction.

Evidence – Circumstantial evidence – Circumstances under which conviction can be sustained by circumstantial evidence – Principles applicable in grounding a conviction on circumstantial evidence.

Evidence – Expert evidence – Utility of expert evidence.

Evidence – Character evidence – Character evidence prejudicial to the character of the deceased – Whether the evidence is admissible when the death or its cause is in issue.

The accused was charged with murder contrary to section 196 of the Penal Code. It was alleged that she shot her husband in their bedroom. The main line of defence was that the deceased committed suicide. The prosecution called 15 witnesses including a ballistic expert. The prosecution case was mainly based on circumstantial evidence.

Held: (i) The accused can only be convicted of an offence on the basis of the strength of the prosecution case and not on the basis of the weakness of the defence case;

(ii) When an accused is charged with an offence his or her guilt is not established or proved if the explanation he or she offers is one which is reasonable and might possibly be true even if the Court is not convinced that it is in fact true;

(iii) To ground a conviction on circumstantial evidence, the following principles apply:

- (a) that evidence must be incapable of more than one interpretation;
- (b) the facts from which an inference of guilt or adverse to the accused is sought to be drawn, must be proved beyond reasonable doubt and must clearly be connected with the facts from which the inference is to be drawn or inferred;

- A (c) in murder cases, evidence should be cogent and compelling as to convince a jury, judge or Court that upon no rational hypothesis other than murder can the facts be accounted for;
- B (iv) More weight ought to be given or attached to the evidence given of peoples' acts than their alleged words which are easily mistaken or misinterpreted;
- (v) The duty of an expert is to furnish the Court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Court to form its own independent judgment by the application of these criteria to the facts proven in evidence;
- C (vi) Since the evidence of an expert is likely to carry more weight than that of an ordinary witness, higher standards of accuracy and objectivity are required from him.
- D An expert should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise and should never assume the role of an advocate;
- (vii) When facts in question upon which an expert testified are dependent upon ordinary human powers at perception, an expert may be contradicted by lay witnesses;
- E (viii) Special skill is not confined to knowledge acquired academically but includes also skill acquired by practical experience;
- F (ix) There is no rule of law which bars the reception of the evidence prejudicial to the character of the deceased when his death or its cause is in issue.

Accused acquitted

Cases referred to:

- G (1) *August Mahyo v. Republic* [1993] T.L.R. 117
- (2) *Elizabeth Shomari v. Republic* CAT Criminal Appeal Number 64 of 1990 (unreported)
- H (3) *R v. Sabudin Merali and Umedali Merali*, Uganda High Court Criminal Appeal Number 220 of 1963 (unreported)
- (4) *Hassan Fadhili v. Republic* [1994] T.L.R. 89
- I (5) *Ally Bakari and Pili Bakari v. Republic* [1992] T.L.R. 10

- (6) *Michael Anufrejk v. Republic* (1955) 39 Criminal Appeal R. 1
- (7) *Mswahili Mlagala v. Republic* [1977] LRT n. 25
- (8) *Davie v. Edinburgh Magistrates* [1953] Sc. 43
- (9) *Daubert v. Marrel Dow Pharmaceuticals Inc.* 509 US 579 (1993)
- (10) *United States of America v. Roy Van Wyk* US District Court for the District of New Jersey, Cr 99-2717, (2000)
- (11) *Gatheru s/o Njagwara v. Republic* (1954) 21 E.A.C.A. 384
- (12) *CD de Souza v. B.R. Sharma* [1953] K.L.R.
- (13) *Autospin (Oil Seeds) Ltd. v. Beehive Spinning* [1955] RPC 683
- (14) *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd* [1993] 2 Lloyd's Rep. 68
- (15) *Joy v. Phillips Mills Co. Ltd* [1916] 1 K.B. 849

Statutory provisions referred to:

- (1) Evidence Act section 34B
- (2) Criminal Procedure Act 1985 section 291(1)

Mrs. Sumari and *Mr Maisara* for the Republic

Messrs Mawalla, Bomani, Mirambo and *Mawalla Jr.* for the accused

JUDGMENT

(Dated 11 May 2001)

Rutakangwa, J.: The accused Kerstin w/o Clifton Cameron, stands charged with the offence of murder contrary to section 196 of the Penal Code Chapter 16, Volume 1 of the Laws of Tanzania. The indictment is to the effect that on or about the 4 July 1998 at Njiro area within the Municipality (District) and Region of Arusha she murdered one Clifton Donald Cameron. She did deny the charge at the commencement of trial.

A To prove the case against the accused, the prosecution led by
Mrs A Sumari, learned Principal State Attorney assisted by Mr Y
Masara, learned State Attorney, called fifteen (15) witnesses. Of
B these witnesses one was a ballistic expert and another was a forensic
science expert. The prosecution also relied on statements tendered
in evidence under section 34B of the Evidence Act 1967 (the Evidence
C Act) and section 291(1) of the Criminal Procedure Act, 1985 (the
Civil Procedure Act 1985) of people who could not testify either
because they are dead, or their current whereabouts are unknown
and/or their attendance could not be procured without undue delay.
A number of Exhibits, both documentary and real objects were also
tendered in evidence. The defence being led by learned Senior Counsel
D Mr J Mawalla and Mr M Bomani and assisted by learned Counsel
Mr W. Mirambo and Mr N Mawalla, did call six witnesses, one of
whom was the Accused and another was a forensic science expert,
to prove the innocence of the Accused. The defence contention has
all along been that the deceased committed suicide.

E I must confess outright that the facts upon which the prosecution
case is based do not admit of easy abridgement. However, leaving
the details aside at this juncture the prosecution case can be conveniently
F summarized as follows. Clifton Donald (Don) Cameron (or Cliff or
the deceased hereinafter) was the second child born to PW12 Donald
"Don" Ross Cameron and PW13 Lynette Margaret Cameron of Drury,
New Zealand. He was born in or about 1958. He was the elder brother
G of PW14 Lachlin D. Cameron. Cliff was described by his family
and some of his friends to have been an honest, adventurous and
hard working man, who enjoyed his recreation time and as such drank
regularly but moderately, especially a whisky, owned and loved guns
and was an independent spirit. He also had a strong aversion to people
H who committed suicide.

I True to these dispositions of his, Cliff decided in the late 1980s
to leave his father, mother, relations and motherland to travel abroad.
He first went to the United States of America (the US) where he

trained and qualified as a pilot. On obtaining his flying licence he
found his way into Arusha, Tanzania.

During the course of his stay in Tanzania he set up his own business.
These were an air charter company known as Fleet Air Ltd, a farm,
known as Longati Farm Ltd and a gold mining company, Black Labor
Mining Company. Fleet Air was based in Arusha, the 2100-acre farm
was in Maasailand (Simanjiro district) and the mining company was
based in Geita District, Mwanza region. He also had a wide circle
of friends and acquaintances both in the business and social communities.
C These included Mr and Mrs. Danny McCallum, PW9 Beresford John
Bale of Snake Park, PW6 Francesco Pierre Ninna, PW7 Dr Allan
Joyce, DW3 Evans Hill, DW4 Ekko Costerhuis and DW5 Gary Hoops.
But the most important was Kerstin d/o Gerald Loessen who had
just divorced her first husband Raoul Ramoni.

After the collapse of his first marriage, Cliff began to cohabit
with Kerstin who is the accused in this case. During the course of
this cohabitation they begot their first child (a son) together and
named him Tell, in December 1993. They eventually got married in
June, 1994. But this marriage did not have the full blessings of Cliff's
parents. PW12 had specifically advised both of them against the
said marriage. This was because PW12 had found out on one occasion
that when Kerstin "got upset she really went over the top". Following
their marriage they were blessed with a second son, Lachlin, in March,
1997.

It is said that marriage is not a perpetual honeymoon. Mr and
Mrs Cliff Cameron's marriage proved to be no exception to this
conventional wisdom. Their marriage was described by PW12, PW14
and PW9 to have been a very "bumpy" or an "unhappy" one. Even
PW14 who had never been to Tanzania and seen Cliff and Kerstin
together testified that he could "see this on videos sent" to them in
New Zealand.

As stated above one of the very close friends to the Cliff Cameron
was the family of Mr and Mrs Dan McCallum.

A The wife of Dan McCallum is the 49 year old PW8 Joanna McCallum. These were very intimate families. The deceased would spend a lot of his time at the McCallum's home. In the process Cliff and PW8 Joanna, "luckily" (as PW8 put it unequivocally), struck an amorous relationship. This began towards the end of 1996. People got wind of this relationship and began to accuse Cliff and PW8 of being intimate. The rumour mill fast spread it until it-reached both Danny McCallum and Kerstin. When asked by both her husband and the accused, PW8 dismissed the rumour and, as she admitted in her evidence, she did actually lie to both of them, who believed her until Cliff died.

D In January 1998 because of a quarrel over this relationship, Cliff deserted his wife and children and went to live alone at Ngaramtoni, Arumeru. Though voluntarily separated Cliff would intermittently visit his family and even spend nights there enjoying his full conjugal rights with Kerstin. All the same the relationship with PW8 continued to bloom and the two even planned to marry. In February 1998 PW8 left Arusha for England. In June 1998 Cliff left Arusha for Austria on a business trip. Of the four or so days Cliff spent in Europe three were spent in England (sixth to ninth) with PW8. Upon his return, Cliff told PW9 that:

Should McCallum divorce his wife he should marry her.

This was a week or so before his death.

G It was the prosecution case that the financial position of Cliff's businesses was not that rosy. Although he was full of optimism about the future of his businesses (per PW12 and PW14) before his death he was facing cash flow problems. This forced him to borrow money from his family and friends. The known ones were his father PW12 (USD 230 000 but interest free), his father-in-law (USD 204 000), DW5 Gary Hoops (USD 150 000 at a rate of interest of 10% which by the time of his death had accumulated to USD 250 000), PW9 (amount unspecified), and one Robothem from whom he had wet leased a Cessna 206 aircraft for his air charter company (amount unspecified).

When pressure on his cash flow mounted (per PW12) he had to make arrangements with his father to negotiate a loan of USD 500 000 for him in New Zealand. He also requested his father to guarantee the loan. This was in June 1998. PW12 testified that he was successful but by the time Cliff met his death the money was yet to be sent to him. Neither is it evident if he (Cliff) had been informed of this. Cliff had to urgently look for this long term loan as his 1998 farm harvest was going to be poor and he had committed himself to buying an aircraft for USD 80 000.

According to the prosecution the 4 July 1998 was a normal day for Cliff. At about 5:00pm he had radio-called PW9 informing him that he would be joining him at Snake Park, a few kilometers out of Arusha town, to watch a rugby match which was due to start at 6:30pm. According to PW9, Cliff was "in a jovial mood" when the two talked over the radio call, because South Africa was playing England. All the same Cliff never joined him for unknown reasons. Instead he ended up at the Mezza Lunna, at about the same time, where his wife (accused) was putting up an art gallery which was due for opening. Cliff was pleased with the accomplishment of his wife and they ended up having drinks together. Thereafter he left for the Outpost Bar where he was later joined by the accused and had drinks.

The accused subsequently left with Tell for home. Later that night the deceased, who was still out of the Outpost, decided to go to the accused's home to have supper. He arrived there at about 9:00pm with a full bottle of whisky. The two had supper together and while consuming the whisky they discussed various issues. Then the accused was the first to go to the bedroom to bed down. The deceased followed her later. While the two were alone and together in the bedroom, Cliff met his death from a gunshot wound. It was around mid-night.

Following the death of Cliff in her house, the Accused drove to the Discovery Club in search of friends to help her. The club is in the area where PW1 number E 6627 Police Constable Moses, PW3 number C9992 Corporal Mohamed and Corporal Richard were on patrol duties. They saw the accused fly past them driving like the proverbial bat. The

A car then braked abruptly at and drew up outside the Club. The accused jumped out of it quickly and entered the Club. All this perturbed the three police officers. Out of curiosity they decided to go at the Club and find out what was wrong.

B The officers found the accused with one white man who was subsequently identified as one David Schaefer, outside the Club. The two were talking in English. As the good officers could not make out what the accused was telling Schaefer in English, they decided to ask the latter, who appeared to be conversant with Kiswahili, what had befallen the lady (the accused). The only thing he told them was that "there was a big problem" at her home. He never elaborated. According to these officers the accused was in a state of shock but not in panic. When Schaefer was pressed by the officers to tell them the nature of that "big problem" he could not divulge it. Instead he beseeched them to accompany them to the home of the accused at Njiro to "see" for the themselves. As the good shepherds we read about in the Holy Bible did on the day of the Nativity, the three officers abandoned their duties and hastened to Njiro to "see for themselves".

On arrival at the accused's house the gate was closed. They tooted the horn of the car. The gate was then opened by the watchman who was identified as John Robert. The car entered the premises. None of them entered the house. The officers first made a general inspection of the premises from outside. While so inspecting, through a bedroom window, they saw a white man with only an underwear on, lying across a bed but at the bottom of it. The head of that man was directed toward the eastern wall of the bedroom. His both hands were lying on his chest, but was clutching a pistol in his left hand while blood was coming out on his head. They quickly opined that the man was dead. They decided to formally report the matter and have the CID take over. PW1 left with Mr D Schaefer for the Arusha central police station. They reported the matter to the Inspector-on-Duty, Ngoromera. PW10 number 8881 PC. Tumaini took down the statement of D Schaefer which was tendered in evidence as Exhibit P12 under section 34B the Evidence Act 1967 because the current whereabouts of Schaefer,

who was only visiting the country then temporarily, are unknown. Thereafter a squad of police officers and investigators were dispatched to the scene.

These officers included PW2 Staff Sergeant Fulgence who has specialized in crime scene photographing, PW4 Assistant Inspector of Police Peter Hiiti, Inspector Ngoromero and Detective Staff Sergeant Mathias. By the time the officers arrived at the scene, the doctor of the deceased's family, PW7 Dr Allan Joyoe as well as the deceased's friends, PW6 Ninna and DW Ekko were there already. Indeed, PW7 Dr Allan had already certified Cliff to be dead.

The police officers were led to the bedroom where the body of Cliff was. Among the people who went in with them was PW7. PW2 s/sgt. Fulgence began photographing the scene, including the deceased lying on the bed gripping the pistol and in other instances without the pistol in his hand. PW2 took many photographs of the scene but only 13 came out well and these were tendered in evidence as Exhibit P1 collectively, but numbered 1 to 13 for ease of reference and proper identification. During the course of photographing the pistol was taken from the hand of the deceased twice by PW4 Assistant Inspector Hiiti.

According to PW4 when he checked the pistol, which he tendered in evidence as Exhibit P2, he found it in "a safety position". He then inspected its magazine in which he found eight (8) live bullets. In the same bedroom was recovered one spent cartridge which was later satisfactorily proved by the ballistic expert (PW11) to have been fired from the pistol, Exhibit P2. The same was tendered in evidence as Exhibit P3. While the process of photographing was going on, PW2 had to wrap up the head of the deceased to cover a fresh wound on his head so as to avoid soiling his trousers with blood. As a result pictures numbers 5, 6, 7, 8 and 9 of Exhibit P1. (or Exhibits P1 5, 6, 7, 8 and 9) were taken while the head of the deceased was so covered. After the photographing, PW1, PW3, and PW6, among others, were called into the room to remove the body to the police land rover outside and take it to Mount Meru Government Hospital. The body

- A was wrapped in the bed linen it was lying on, which together with the blanket and mattress were taken by the police. Before leaving the scene the accused gave the fire arm licence (number 697790) in respect of Exhibit P2 which was in the name of the deceased to the police officers and this was tendered in evidence as Exhibit P4. B The officers also gave blanket permission for the room to be cleaned up as they had completed their work therein. The cleaning was done that night, before the children woke up, by the late Maria Joseph with the help of other ladies. The bedroom was washed clear of all the blood therein. C

- At the hospital a postmortem examination was performed on the body of the deceased. This was carried out on the morning of 5 July 1998 by PW5 Dr Wasia Hussein Mosha of that hospital in the presence of PW7 and Detective section Sgt. Mathias PW5 opined that the cause of death was suicide by gunshot. PW5 detected only one wound on the head of deceased which was on the frontal and parietal junction. D A need then arose to suture the said wound as it was still bleeding. There were no stitches at the hospital. The body was then taken to the hospital of PW7 (Trinity Medical Diagnostic Clinic Arusha) where he personally did the job. After the suturing, the body was taken by E DW4 Ekko for washing and preservation in a cold facility before being flown to New Zealand for burial. F

- At 7:30am (local time) Kerstin rang PW14 Lachlin in New Zealand and imparted to him the terrible and sad news. She also requested PW14 to go and inform Cliff's parents. This was about 5:20pm in New Zealand. PW14 quickly drove to his parents' home to break the bad tidings. Then PW12 Don Cameron called the Accused to inquire on the circumstances leading to Cliff's death. He got her and she talked to him and PW13 Lynette (although briefly) as well. H She also talked again with PW14 they detected inconsistencies in the accused's versions given to them separately. The following day Cliff's sister got PW7 over the phone. He told her that Cliff had shot himself through the palate. The family could not stomach this. I It was anathema to them because "that was uncharacteristic of Cliff"

as he was "not a candidate for suicide." They decided to have a second opinion. As second autopsy was organized by them in Nairobi through Dr Luffner who was known to their accountant, Mr Sommerville. Dr Luffner made arrangements with Professor Aggrey Nyong'o, a pathologist at the Nairobi Hospital to conduct a visual post mortem examination, which he did. He then advised them to have a thorough and full investigation carried out soonest in New Zealand. The body of Cliff arrived in New Zealand (on 10 July 1998). It was taken straight to Walikato Hospital. C

It is the prosecution case that a third, but thorough autopsy was conducted at the said hospital by one Dr David Bruton, a specialist pathologist on 11 July 1998. The same was carried out with the consent of Kerstin. The said Dr Bruton advised them that he found the body of Cliff with two gunshot wounds on the head. One of the wounds was on the forehead which he opined was the entry wound and another was on the occipital area which he opined was the exist wound. Dr Bruton never testified. His statement made on 20 April 2000 and witnessed by Detective Craig P Johnson of New Zealand Police, Hamilton, was tendered in evidence as Exhibit P15 under section 291 of the Criminal Procedure Act 1985. Some coloured photographs, 12 in all, were taken at the time of this autopsy. These were tendered in evidence as Exhibit P16 collectively but marked A-L for easy reference. Two X-ray films of the skull were also tendered as Exhibit P17 collectively. Cliff was buried on 14 July 1998. Among those who attended the funeral apart from his wife and family members, were the accused's parents and PW8 who had flown to New Zealand from England on the express permission of the Accused. The Accused left New Zealand for Arusha on 15 July 1998 while PW8 left for England on 17 July 1998 about the same time when PW12 and PW14 left New Zealand for Arusha. Sommerville also came to Arusha. C

The purpose of the Tanzania visit by PW12 and PW14 and the accountant was to go through all the books and documents appertaining to Cliff's entire businesses in order to assess their financial standing. They also intended to "assist Kerstin and the children make decisions

A for future". They also visited the scene of the incident at least twice. The second visit was made on 12 August 1998. On this latter date they were in the company of one Peter Ward. Mr Ward is a retired New Zealand Police inspector. He had been hired by Mr Stuart Morgan, B himself a private investigator in New Zealand. Mr Morgan had been hired by Cameron family to investigate the circumstances leading to the death of Cliff in view of the inconsistencies from Tanzania on how he had died.

C On both visits they detected a bullet hole on the eastern stall of the bedroom. They also detected "blood spatter" on the western wall. By that time the Accused had already vacated the house. On 12 August 1998 pictures of the bedroom were taken showing the hole and blood D on the walls, using a video camera and an ordinary camera. These were never produced at trial.

E In January 2000, Mr Morgan requested Mr Hayden Baldwin, a retired master sergeant of Illinois State Police in the US and a forensic science expert specializing in crime scene, to examine the death of Cliff. PW15 Baldwin is now a self employed consulting and instructor in Chicago in this field. In so examining this death, PW15 was sent by private investigators from New Zealand documents and photographs F in relation to the scene of the incident, an autopsy report, Exhibit P1, 8 and 13 and Exhibit P16, videos, sketches, diagrams and police reports. After scrutinizing them all, he reached an opinion that the deceased was shot by another person while he was seated on the G western side of the bed and was then moved to the position depicted in Exhibit P1, 13, the pistol placed in his hand in order to simulate a suicide. Of all the articles he allegedly used in his forensic investigations PW15 only identified Exhibits P1, 18 and 13 and Exhibit P16. The H rest were not produced let alone being tendered in evidence.

I On 13 March 2000 PW11 Assistant Inspector of Police Enos Msangwale received Exhibit P2, P3, P4 and eight live bullets which were found in Exhibit P2 on 5 July 1998. He test fired three of the 8 bullets. On subjecting the three spent cartridges as well as Exhibit P3 to both visual and laboratory tests he was satisfied that they were

identical. He tendered the three test-fired cartridges as Exhibit P8 A collectively and the five bullets as Exhibit P7 collectively. He also photographed Exhibit P2 (the pistol) and Exhibit P8 and mounted the photographs in a folder which he tendered in evidence as Exhibit B P9. PW11 also photographed Exhibit P2 showing the positions of the firing hammer when it is both in a cocked and decocked position. Of more significance in this case is the scanned picture of the deceased C Cliff with the pistol in his left hand. All these pictures were mounted in another folder which was tendered in evidence as Exhibit P10.

On 4 April 2000 PW11 visited the scene of the incident. He was in the company of police investigators who were "re-investigating" the case on the instructions of the Director of Criminal Investigations. On this day PW2 is alleged to have taken more photographs at the D scene in the presence of PW11. The accused was also present. The prosecution case (through PW11 only) is that the accused showed them where their bed was located in the room on 5 July 98 where the deceased was seated on the bed before the fatal shot and where E the deceased fell on the bed after the fatal shot. From the directions and instructions of the accused he "reconstructed" the scene. He drew sketch plans which he subsequently mounted in another folder and he tendered in evidence as Exhibit P6. These sketches are showing. F

- (a) the bedroom where the death took place,
- (b) how Cliff was seen lying on the bed after his death,
- (c) how Cliff could have been seated on the bed prior to the gunshot G wound through his head.
- (d) how the majority of the people ought to sit on a bed prior to gunshot in such positions on their own head, and
- (e) how a deceased should be found lying on a bed as a result of self H shooting while seated on the edge of a bed.

It was the conclusion of PW11 that being guided the "posture Cliff was found lying on the bed, it could have been practically difficult I for anyone to get seated, his legs stretched on the bed and then make

A a self-shooting on his forehead." To him it was easier for such person to sit on the edge of a bed, his legs leaning on the floor and then make a self-shooting through the forehead with the left hand holding the barrel of the pistol and the thumb of the right hand pressing the trigger. He therefore concluded that the "deceased, who could not have retained control of Exhibit P2 in his hand as he struggled against death was seated on the edge of the bed "facing in antitheses to the wall while he was shot to death". He tendered his report on the examinations of the pistol, bullets and spent cartridges and inspection of the bedroom, in evidence as Exhibit P11. The opinions of PW11 and PW15 led to the arrest of the Accused who, admittedly, was alone with Cliff when the death occurred and her indictment for murder.

D The defence is radically different. According to the defence the deceased came to Tanzania in the late 1980s. His first employment was with M/S Tanzania Game Trackers Safaris Ltd based in Arusha. E By then DW3 Evans Arnold Hill was the company's General Manager and Director. The deceased was employed as a pilot. Both DW3 and Cliff shared one house together with two other senior company officials. During their stay together DW 3 noted that Cliff Exhibited impulsive tendencies and displayed the characteristics of a "split personality". F He so characterized him because Cliff, when sober, was a kind, generous and helpful person but when drunk he became violent, aggressive and hot tempered. His impulsive disposition led him easily to fight his own guests even when they were dining at home or other invitees while at parties and or even smash and break his own properties such G telephones, tea cups, etc. at his home and office. He also used to fire aimlessly at animals objects and/or in the air. He would even shoot at electric cables. Though not using the phrase "split personality" H DW 3 has been born out on this by DW2 Regina Luena (Cliff's Secretary for 10 months at fleet Air) DW4 Ekko (Cliff's friend and business creditor) and DW5 Gary Frederick Hoors. DW 5 was not a mere friend. He was an intimate family friend. He is a farmer in Simanjiro District and both Cliff and himself exchanged visits to each others I

homes regularly. Moreover, both Cliff and Kerstin were bestman and bridesmaid at the wedding of DW61.

On one of those occasions when DW 5 spent a night at Cliff's house he witnessed one such bizarre behaviour. They had their dinner. The Accused left them and went to bed. Then Cliff after drinking heavily became "suddenly angry over nothing." He then collected everything breakable in the dining and living rooms which he could lay his hands on. These included a TV set, Video recorder, an expensive Sony System, original works of art, paintings, bronze sculptors of animals, dinnerware sets, glasses, chairs, etc. and broke them. He then took the broken pieces outside and piled them together. He poured fuel on the pile, lit a fire and then went to bed leaving them burning. On 22 June 1998, DW3 and his wife were woken up by the barking of the dogs outside. He opened a window to find out what was happening. He was greeted by a voice speaking in a New Zealand accent thus:

Excuse me but Mr McCallum and Mr Cliff Cameron, send you their compliments and ask if they could borrow a bottle of whisky.

It was about 1 am. He sent them away without the whisky. However, fifteen minutes later rifle shots were heard with bullets passing close to DW3's house. In all five bullets were fired emanating from the deceased's house who by then was a neighbour of DW3 at Ngaramtoni. These were not isolated incidents. Not less than seven more such incidents of eccentric behaviour and violent conduct when drunk, on the part of Cliff have been cited by the defence. It was the defence case that Cliff was heavily overburdened with debts. Apart from the earlier mentioned ones by 4 July 1998 Cliff's farm was indebted to DW3 Ekko's seed company, Pop Viend, over TZS. 1 million in farming credit facilities ever extended by TZS. 40 million by DW4.

It was, therefore, the defence case that towards the end of his life Cliff had become, due to the pressures of life, a frustrated and totally dejected personality who had "reached a stage of despair and general inability to cope with life."

- A In answering the murder charge against her, the Accused testified that she first met Cliff in 1990 when her first marriage was breaking down. After co-habiting together from 1991 they finally got married in 1995. By then she was in possession of a commercial flying pilot licence. She had so qualified in the US with this licence she flew commercially for Fleet Air but was not involved in the handling of its affairs. In 1998 she got a severe back problem and was operated on. This put her out of the flying business for quite sometime.
- B
- C The accused further maintained in her evidence that Fleet Air was doing well during the early years of its inception but towards 1998 the business became smaller. This, she said, was due to loss of customers who went to other companies, loss of plane capacity and Cliff became more interested in the farming business. The loss of plane capacity came about following the sale, by Cliff, or one of three twin-engine aircrafts they had, in order to generate money for the farm and the crashing and burning of a smaller plane in Tunduru.
- D
- E In 1998 a second twin engine craft which was owned by an American, with whom Cliff had co-shared the company, left. As a result by July 1998, Fleet Air had one twin-engine craft, two 206 single-engine air crafts under wet lease and a small cessna 182 (4-seater) which
- F belonged to the father of the Accused. One of the last customers was Robin Hart Safaris. According to DW3 who was its Managing Director and Board, member from 1993 to 1999 when he retired, it was one of the largest hunting companies in the country. From July, 1996 to March 1997 Robin Hart Safaris paid Fleet Air USD187 517, while it paid USD. 307, 087 for the period of July, 1997 to March 1998 when they used exclusively Fleet Air, for chartering fleet air crafts. However, in February, 1998 the Board of Directors of Robin Hart Safaris decided to cut off this business relationship because
- G of safety reasons. This came to pass as on one occasion one of Robin Harts clients smelt alcohol on Cliff's breath while she was flying aeroplanes and it was becoming obvious to them that Fleet Air was not having sufficient resources to maintain its crafts and he explained
- H
- I

why. So, the Accused further testified, by the time Cliff died neither Fleet Air nor the farms were doing well.

After their separation, the accused who is a keen artist and enjoys painting decided to start an art gallery in Arusha town. She leased a room at the Mezza Luna and the Gallery was due for inauguration on Monday 6 July 1998. The opening was to be graced by her father, an artist from Namibia and David Schaefer, himself a sculptor in wildlife and bronzes who was to have Exhibited his own pieces.

On 4 July 1998 the Accused spent the day at Mezza Luna preparing for the said inauguration. During the course of the day she called Fleet Air Offices inquiring on the arrangements of collecting her father from Nairobi the following day. The call was received by DW2 Regina who put her through to the deceased. The deceased assured her that he would personally fly to Nairobi in the morning to pick up the Accused's father. He then informed her that he would briefly call at Mezza Luna later to have a look before going to meet some people with whom he had an appointment.

Cliff arrived at Mezza Luna with Schaefer at around 6:00pm. He inspected the gallery and was pleased. He offered them a whisky "to celebrate" after which he left for the Outpost where he said he was going to meet his guests. He left with Tell, leaving the Accused and Schaefer behind. He however requested the Accused to meet him at the Outpost, later. The Accused and Schaefer jointed Cliff later there. At the Outpost they found Cliff at the bar with a glass full of whisky. The guests had reportedly not yet arrived. The deceased offered them another drink. The Accused declined the offer as both Tell and herself were tired and wanted to get home soonest. The deceased, Cliff had no objection. So she left with Tell for home where she found John Robert and their housemaid Maria Joseph. Then the Accused was very specific that all the while Cliff was in a jovial mood.

At about 8:30pm Cliff called the Accused. He informed her that his guests were yet to arrive and he was not going to wait any longer.

- A He promised her to be at her home in no time. Before the Accused left the Outpost Cliff had told her that after meeting his guests he would have preferred to have something to eat at her home if that suited her. The Accused had had no objection.
- B Cliff arrived at the home of the Accused at around 9:00pm with his full bottle of whisky. He spent some time with the children while the Accused was busy in the kitchen. The deceased then took the children to bed. They then had supper together and thereafter settled on the dining table for a drink together. The Accused had two singles of whisky while Cliff was consuming the whisky continuously with water. The Accused did not drink much. She dreaded a headache the following day when she had a lot of work to do. All the same they discussed amicably many issues and in fact Cliff helped her on the accounts she was preparing for her father. At one stage Cliff suggested to her that the next day after the arrival of her father they should fly out to the farm to have a nice family day together.
- E The accused responded by telling Cliff that that would have suited her father and the children but due to her heavy schedule she would not be able to join them. Cliff then talked about buying a boat and keeping it at Mwanza where in future he would take his children for fishing. Cliff kept saying that there was never going to be a divorce between them but they only needed time to sort things out. During the course of their conversation they also talked about the mounting big telephone bills which were necessitated by calls to PW8 in England.
- G Cliff assured her that those were purely business calls for PW8 Joanna was working on plans to obtain a loan for him as the plans of his father (PW12) in New Zealand had fallen through.
- H At one time during the discussions she looked at her watch. It was about midnight. She told Cliff that she had to retire for the night. She proceeded to the bedroom leaving Cliff at the dining table. She at first went to the bathroom which was adjoining the bedroom. She brushed her teeth, removed her contact lenses and put on her glasses,
- I went to the bedroom, undressed and went to bed. Cliff joined her in the bedroom some ten minutes thereafter.

The deceased used to keep his rifle at the Accused's house for their protection. However, a few weeks back he had taken that rifle for hunting and had left Exhibit P2 instead, particularly after he had shot and injured Mr McCallum's finger. During the course of that evening, the Accused testified, Cliff had asked her if the pistol was in the cupboard where he had left it. The Accused had assured him that it was safely there as she had not touched it.

When Cliff entered the bedroom, he asked the Accused: "is that thing in its safe place?" The Accused knew he was referring to the pistol (Exhibit P2). She assured him that it was. Cliff then went into the bathroom and returned shortly later to the bedroom. He undressed and joined the Accused on the bed. He then demanded sex. She refused because she was tired. The Accused was emphatic that although they had separated they had been having sex together wherever Cliff slept at her home and that this relationship resumed as early as February 1998. (It should be recalled that this was the month PW8 left for England). When Cliff was denied sex he jumped out of bed and said:

But I don't know what I am doing here anyway.

The accused told him:

Well I don't know what you are doing here either because I didn't specifically ask you to come here tonight.

Cliff felt annoyed. He jumped on the bed and sat on top of her. He lifted up his fist as if to strike her. He then told her that she was still his wife and had every right to be there. She never resisted but assured him that if he did hit her, she certainly would not hide the bruises from her father. At that, Cliff recoiled. He got off the bed. The Accused testified that Cliff used to hit her in the past especially when drunk but would always never recall anything the following day pleading drunkenness as an excuse.

When Cliff got off the bed, the Accused rolled over onto her stomach with her head on the pillow and her hands over her head. She began to cry because the evening had been a harmonious one.

- A She had expected Cliff to pick up his clothes and leave as he was used to do in the past. Then she heard Cliff cry out "No, no, no".

This was followed by the sentence.

- B Tell my father I have tried.

- C Almost immediately a gun went off. She lifted herself up from the pillow asking him why he was shooting in the house contrary to his earlier promise after he had shot through the window in the living room. When she turned around, however, she found him lying across the bottom of the bed. She stared at him and saw blood dripping to the back of his head and then on to floor under the bed. She went off the side of the bed and went across the room. As she could not see properly she tried to get her glasses from under the bed where she always kept them on going to bed. Not knowing what to do she got dressed. Intuitively she decided to look for help. Cliff was lying on his back his eyes wide open gripping a pistol by the barrel in his left hand and there seemed to be no life in them (at this point in her testimony, the Accused began to weep bitterly). She then rushed out of the room. But on recalling that she would be coming back with people she decided to put underwear on him by pulling it up his legs as he was stark naked. She then rushed outside and reached for the car. She called John Robert and told him that Cliff had got a gun accident and that she was going to the police. She instructed him not to move from the door. She then left.

- G At first she wanted to tell Ekko. She drove to their home which is opposite Mezza Luna. Their car was there. She hooted the horn of her car. Unfortunately, there was no response as nobody came out. She then recalled that David Schaefer had told her that evening that he would be going to the Discovery Club. She then decided to go to that club. Fortunately, Schaefer was there. She told him that Cliff had shot himself and unconsciously she said that she wanted Ekko. This was heard by one Heklen Angelides. The Accused and Schaefer went outside. As she was telling Schaefer what had happened

PW1 and PW3 reached them and they all drove to her home. Hellen also went to inform Ekko.

On reaching the house she showed Ekko, Schaefer and the officers, the bedroom. The two entered the bedroom. She never accompanied them. Then Schaefer left with one of the policemen for the police station. She then called PW6 Ninna to inform what had taken place. PW6 rushed to her home. Later DW 4 Ekko and PW6 Ninna went to tell and collect PW7 Dr Allan. PW7 also went to the Accused's house. PW7 went into the bedroom to see the body and thereafter tried to calm the Accused down. Then the police investigators arrived.

The accused testified that she thought it her personal obligation to inform Cliff's relatives personally. She could not do so while she was in a state of shock and while crying. She did ring PW14 at 7:30hrs (local time here) after she had fully composed herself and was able to speak. She broke the news and requested him to inform her in-laws. She spoke later to them and they agreed that the body be flown to New Zealand for burial. On arrival in New Zealand she readily consented to another autopsy being carried out before Cliff was buried. The Accused unequivocally denied having murdered her husband and re-arranging the scene to simulate a suicide.

This is a murder case. The burden is on the prosecution to prove beyond reasonable doubt that the Accused murdered Clifton Donald Cameron. It is not upon her to prove her innocence or even that Cliff committed suicide. It is the law of our land that in cases of this nature the accused can only be convicted of the offence on the basis of the strength of the prosecution case and not on the basis of the weakness of the defence case. Even suspicions, however ingenious or strong can never be a basis of a criminal conviction or a substitute for proof beyond reasonable doubt. This is equally true even where an accused person is proved to have told lies either in Court or prior to that in connection with the facts in issue. This is because there are many circumstances which can lead an accused to tell lies even when she/he is innocent. When an accused, therefore, is charged

- A with an offence his/her guilt is not established or proved if the explanation he/she offers is one which is reasonable and might possibly be true even if the Court is not convinced that it is in fact true. This is a universally accepted principle of law which needs no authority to prop it up.
- B

Of course it has been submitted by the Republic in this case that "false", incredible or contradictory statements given by way of explanation, of disproved, became of subtractive inculpatory character. Citing *August Mahyo v. Republic* (1). I entirely agree with this submission. Nevertheless I am also aware that the important fact to glean from this holding is that the Court never held that they become proof of guilt beyond reasonable doubt. They only tend to implicate or incriminate him/her or subject him or her to suspicion and may cause cases needing corroboration be successfully used as such. That is why the same Court of Appeal rightly held in *Elizabeth Shomari v. Republic* (2) that:

- E Even if for the sake of argument the appellant had told lies, that alone could not be a basis of a conviction

In this case, therefore, the prosecution has to prove to the required standard not only that Cliff is dead, but also that he was killed by the Accused and the killing was done with malice aforethought. It is not disputed here that the death of Cliff was not a natural one. It was a violent one. The cause of death is not disputed. It was due to a gunshot wound through his head, although as aptly pointed out by the gentlemen assessors, no single witness testified to have witnessed the shooting, not even the Accused who was with him in the room. On this basis and on the totality of the evidence before me, if I reject the explanation of the Accused and ruling out an accident, I will not hesitate to hold that Cliff was murdered. Who then killed Cliff? The evidence on record does not give me many options. It points unerringly to only two individuals. Cliff was killed either by Cliff himself or by the Accused.

I

Although there is no direct evidence going to incriminate the Accused with alleged murder, the Republic has urged me to hold that it was the Accused who killed Cliff with malice aforethought.

It has relied on circumstantial evidence. Admittedly, the entire prosecution is predicated on such evidence and as it was once accurately observed by Sir Udo Udoma, C. J. in *Republic v. Sabudin Merali and Umedali Merali*, (3).

... it is no derogation to say that it was so, for it has been said that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by undersigned coincidence is capable of providing a proposition with the accuracy of mathematics.

Expressing identical sentiments over a century before in 1850, Henry D Thoreau, the American transcendentalist best known for his antimaterialist philosophy had this to say:

Some circumstantial evidence is very strong as when you find a trout in the milk.

These dicta are as true in this third millennium as they were in the second millennium and command the allegiance and respect of us all.

All the same, as aptly submitted by counsel for the defence, to ground a conviction on circumstantial evidence:

- (a) that evidence must be incapable of more than one interpretation: *Hassan Fadhil v. Republic* (4):
- (b) in a case where the evidence against the accused is wholly or exclusively circumstantial the facts from which an inferences of guilt or adverse to the Accused sought to be drawn must be proved beyond reasonable doubt and must clearly be connected with the facts from which the inference is to be drawn or inferred: *Ally Bakari and Pili Bakari v. Republic* (5) and
- (c) that evidence should be cogent and compelling as to convince a jury, judge or Court that upon no rational hypothesis other than murder

A can the facts be accounted for: *Michael Anufrejezk v. Republic* (6) and *Mswahili Mulagala v. Republic* (7).

I shall inevitably be guided by these now legendary principles of law in this case which is exclusively based on circumstantial evidence.

B The Republic has urged me to reject outright the defence story and find her guilty of the murder of Cliff on the basis of these actual and/or presumed facts which to it when taken together will constitute
C cogent and compelling circumstantial evidence incapable of other rational hypothesis than that of murder. These, counsel for the Republic have enumerated to be:

- (a) The accused's contradictory and discredited versions of events surrounding
D Cliff's death;
- (b) The "I don't know syndrome" allegedly Exhibited by the Accused in her evidence;
- (c) The bruised eye;
- (d) The position of the body of the deceased on the bed;
- (e) That the body had two wounds on the head;
- (f) The decocked pistol in the left hand of the deceased,
F
- (g) The presence and absence of blood spatter on more parts only of the deceased body.
- (h) The absence of gunpowder residue on the deceased's right hand
- (i) The lack of injuries on the palms and fingers of the left hand
G
- (j) The continued gripping of the pistol after the fatal shot.

H The law as already shown above, demands of the prosecution to prove beyond reasonable doubts each and every fact above. The prosecution also bears the undeletable burden of proving to that standard that each of these facts even if proved either singly or cumulatively or conjunctively leads or lead to no reasonable hypothesis other than
I the guilt of the accused. Has the prosecution discharged this burden? I shall provide an answer to this question on each and every fact

relied on separately, although not necessarily in the same order as presented above.

However, before attempting to prove these answers, it will be eminently proper and indeed obligatory on my part to first highlight on the real condition of the scene of the incident as found by the first eye witnesses for the prosecution on 5 July 1998. As rightly commented by PW11 Msangawale, "the fatal scene was indoors", that is, it was a bedroom. These witnesses as already shown herein were PW1 PC Moses, PW2 S/sgt Fulgence, PW3 cpl. Mohamed, PW4 Asst. Inspector Hiiti, PW6 Ninna and PW7 Dr Allan Joyce. They were all of one accord on these undisputed facts which have an overriding importance in the determination of the accuracies and/or truthfulness of the opinions of the two experts called by the prosecution and eventual decision on the ultimate issue. When these witnesses entered the fatal room on the night of 5 July 1998 they perceived these facts:

- (a) the body of Cliff was lying across the bed at the bottom, with only one wound which was visible externally on the forehead or crown as they put it but technically on the frontal and parietal junction of the head from which blood and brain tissues were issuing;
- (b) there was blood issuing or oozing out of the mouth and nose of the deceased;
- (c) there was no blood or any other part of the deceased's body;
- (d) there was only one pool of blood on the bed under the head of the deceased, which had come out of the said wound;
- (e) there was only one pool of blood on the floor directly under the bed where the head of the deceased lay which had come from the pool of blood referred to in (d) above and
- (f) there were a few spots of blood on the eastern wall of the bedroom above the bed near where the head was situate and/on other walls of the room.

- A The evidence of DW4 Ekko is similarly to that effect.

These facts then lead me to this unavoidable question: How many gunshot wounds did Cliff have which were visible externally as his body left Tanzania for burial in New Zealand via Nairobi, Kenya?

- B This question becomes singularly distinctive because of the naked fact, that the two prosecution experts advanced their theories and rested their opinions and/or conclusions on the untested assumed facts that Cliff had two wounds on his head, an entry wound on the forehead and an exit wound on the occipital area. I will not be prepared to buy their theories unless and until I am convinced beyond reasonable doubt, but not beyond any shadows of doubt, that that was the case.

- D This germane question was waved aside by both sides in this case without the slightest explanation. I can understand why the prosecution did so because trying to provide an answer to this question would have been tantamount to a technical suicide, laying bare the fallacies upon which its circumstantial evidence is based. But what baffled me is why it brought the evidence which has made this question irresistible. By bringing the evidence and ignoring it with the contempt it does not deserve was like a tailor who tries to get a cloth to mend a hole in the sleeve of a coat by snipping a piece out of the back and hoping no one will notice.

- G However, I cannot fathom or conceive of any plausible excuse as to why the defence counsel never thought it wise and prudent to explore it to its logical conclusion when it was obvious from the evidence of the prosecution. Anyway that was their prerogative I am not equally privileged. The law casts a duty on me to leave no stone unturned provided its existence is brought out plainly by the evidence. After all, we are constantly reminded that in life the stone which the builders reject often turn out to be the cornerstone of the building. I am not sure if this is always sufficiently remembered. But it would have been priceless for the defence counsel to have realized early enough that it was through such ingenuity that Portia thwarted Shylock's heinous ambitions.

From the beginning it was not only assumed but also believed that Cliff committed suicide by shooting himself through the mouth. This belief was allegedly prompted by what seemed to be a fact that Cliff had only one externally visible wound. Even after the Republic had eventually settled for the contrary view and believed that Cliff was actually murdered by the accused, it nevertheless led evidence to resurrect this belief in the trial of Kerstin. This evidence came from PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW9. An array of witnesses; these are witnesses who actually not only saw but also handled the body of Cliff at various stages from the fatal room up to the Kilimanjaro International AirPort (KIA) from where the body of Cliff had only one external wound be it a gunshot one or otherwise. This visible (external) wound was located on the frontal and parietal junction of the head. PW2 wrapped this wound in the presence of PW4 among others. PW5 Dr Mosha who performed the first post mortem examination was very emphatic that he examined the entire body of Cliff and indeed turned it over to ascertain the number of wounds it had but found only one wound, as above described.

PW5 went further to confess that basing on this fact and the information he had obtained earlier from the police officer in attendance Detective Staff Sgt Mathias (who was also at the scene of the incident the night before) and the morgue attendant that the deceased had shot himself through the mouth, he concluded that death was suicide by a gunshot wound and the only visible wound on the head was the exit wound. PW5 was honest enough to admit that he never opened the mouth and in so failing he was negligent. But his explanation was that he saw no need to do so because that would have involved incising the jaws. I think this omission, in view of the prevailing uncontested belief that it was a suicide through the mouth, was not recklessly culpable. But that is beside the point. PW5 was shown picture number E of Exhibit P16 (Exhibit P16 E) which was taken in New Zealand at the time of the third autopsy showing what is believed to be a wound but not visible at all as it is bandaged. He was categorical that he never saw that wound on the body of Cliff

- A on 5 July 1998. He was accordingly very firm that Cliff committed suicide. A very obvious unfortunate feature on all the pictures forming Exhibit P16 is that there is no single picture showing an open or clear unbandaged wound on the occipital region of Cliff's head as
B the ones shown in the pictures forming Exhibit P1.

- PW7 Dr Allan, as already shown stitched the wound on the forehead. He too was unequivocal that that was the only externally visible wound on Cliff. PW9 climbed aboard and rode along with PW12, PW13
C and PW14 on their incessant claims that Cliff could not have committed suicide. He too never believed that bizarre story. Fortunately he has the golden chance to clear this mystery before the body of Cliff was finally flown to New Zealand. Apparently he never utilized it.
D He escorted the body to Nairobi where it was embalmed. He testified that when the body was at KIA he had the chance of seeing it. His clear evidence is to the effect that he saw one stitched wound "just on top of the forehead" and/or "high on the forehead" as he personally
E put it.

- It the light of the above, it goes without saying, therefore, that the body of Cliff, left Tanzania with only one gunshot wound which was visible externally. That was the wound which was on the frontal
F any parietal junction of his head. The evidence of the prosecution has satisfied beyond shadow of doubt now that the much talked about second wound on the occipital region as shown Exhibit P. 16 E was not there as definitely it could have been seen by all these witnesses
G as it has not been claimed that it was as small as a puncture.

- Even if I am forced to pursue this issue to its logical conclusion I would further hold that no cogent evidence was brought by the prosecution to prove beyond reasonable doubt the existence of this
H second occipital wound. No single witness came from Nairobi or New Zealand to testify that he or she actually saw with his/her own eyes, this wound. PW12, PW13 and PW14 only testified that they learnt through Dr Bruton that Cliff had two wounds, an entry and an
I exit wound. It is common ground that the body was received in New Zealand

by undertakers Grihim Funeral Services, Auckland Airport and taken
A straight to facilities at Tuakau on 10 July 1998. The following day it was taken to Waikato Hospital for the third autopsy. PW14 was at the airport to receive the body. He never testified on the number of
B wounds he saw on the body of his brother.

Neither he nor his parents witnessed this third autopsy. They all saw the body before burial, even PW8 who was described by PW12 to have been crying profusely. But none of them testified to having
C seen this second wound, let alone the undisputed wound on the forehead. None of the undertakers came to testify that when they received the body at the Auckland airport they saw the wound on the occipital
D region of Cliff's head. So the existence of this occipital wound begs more questions than it answers. However, what is of importance here is the irrefutable evidence of eye witnesses from the prosecution
E side that Cliff had only one externally visible gunshot wound on his body when the body left Tanzania, if any, in trying to connect the accused with to death of Cliff.

Dr Bruton was engaged specifically to conduct the third autopsy to find out the real cause of Cliff's death. He was to confirm whether or not Cliff had shot himself through the palate as was claimed then
F in Tanzania. The question is: did he disprove this allegation? I am afraid to say that from the evidence on record, it is clear that he did not. The only evidence we have is his side remark made in 2000 to Mr Morgan as is contained is his statement (Exhibit P15) to this
G effect:

In March 2000 I was asked by Mr Stuart Morgan of Auckland to advise
H as to whether there was a bullet wound in the mouth.

I wrote to him on 7 April 2000, advising as follows:

I have examined my notes and report and I do not specifically mention
I the hard palate. I do clearly recall, however, that I did look and there was no evidence of a gun shot wound delivered through the mouth. I have been unable to discover the Xrays taken at the time of the postmortem.

- A This remark definitely invites more questions than it attempts to solve. If he was engaged to contradict the suicide theory through the mouth would he have been so casual, if not negligent, in the discharge of his duties as to fail to mention specifically in his notes
- B and report that he checked the palate and found no entry wound if he had done so? I believe he wouldn't. There is undisputed evidence that blood was coming out of Cliff's mouth and nose. His report is silent on the quantity of blood he found in the mouth if he opened it
- C and its source. Am I supposed now to rely on his memory? Should I trust his bare assertion that he only recalls that there was no gun wound in the mouth when the same has not been subjected to the purifying process of cross examination and it is not even based on a cursory reading of the x-ray? It would be risk taking on my part to do so, particularly having regard to the already established fact that Cliff had only one visible wound on his body when the body left Tanzania. I am also puzzled on where the X-rays which were allegedly taken on 11 July 1998 were when they reached PW13 on 9 June 2000. In view of this state of uncertainty, I hold that Dr Bruton has not convinced me that he did check the mouth of Cliff to rule out the suggestion that Cliff shot himself through the palate. It was the duty of the prosecution to disprove this and not for the Accused to prove it.
- F

- G In the light of the above findings I am forced to hold that the apparent wound on the occipital area of Cliff's head allegedly observed by Dr Bruton and very much relied on by PW11 and PW15 in their investigations and conclusions now assumes a diminished significance or becomes totally irrelevant in trying to connect the Accused with the murder of Cliff.

- H The "I don't know syndrome" and "the inconsistent versions of events" of the Accused, if so do they detract from the cogency, plausibility and/or truthfulness of her evidence? Did the Accused make the alleged inconsistent statements on how Cliff died? In trying to answer these questions I will be guided by the now salutary general rule of law
- I that witnesses should be weighed and not counted. The rule further

says that more weight ought to be given or attached to the evidence given of people's acts than their alleged words which are easily mistaken or misinterpreted. Misinterpretation can occur either innocently or deliberately as when a witness has his or her own interests to serve in the case or is naturally biased against the opposite party. Deliberate misinterpretation ought to be frowned upon as it is indeed a lurking perjury which destroys totally the credibility of the witness.

In trying to impress upon me to find the Accused a liar, Counsel for the Republic have thus submitted:

It is obvious that when witnesses want to prevaricate or lie they would always say I don't know. The accused seems to remember only those things which tend to be in her favour. As part of the 'I don't know syndrome' even the eye bruise she says she does not know where it happened. Whenever it comes to any fact which could tend to implicate her she would simply say 'I don't know'. She would only recall details which tend to exonerate her. There could never be a better instance of lies. To this end we pray to the Honourable Court that this scenario be, viewed within the ambits of the rule laid in the case of *August Mahyo v. Republic*.

I have quoted them in full. Have they made out their case? This is a very unfortunate and definitely unsatisfactory way of urging a Court of law and justice to condemn a witness let alone an accused in a criminal case where he/she has no duty of proving his/her innocence on the ground of prevaricating or lying. Which instance of lying, even a fleeting one, have they made out against the Accused? None. I should state forthwith that this submission is as porous as of course it is self-defeating. If a witness responds to a question with an "I don't know" or "I don't recall or remember" answer it will be straining credulity to the limit to hold that he or she is lying or is prevaricating. It would be monstrous for a Court worth the name to so hold. This is because the truthfulness or falsity of the answer should be gauged in the context within which it is given. One has to look at the nature of the question which drew such a response before deciding on whether or not it deserved that response. A person may give and indeed we

A all give such responses without in any way wishing to suppress the truth consciously or unconsciously.

B Counsel for the Republic have sought to rely on only one instance of the "bruised eye" which they have termed a "scenario". What a jaundiced outlook: Anyway, has this "scenario" not been reasonably explained by the accused? I believe she has satisfactorily done so. I will elaborate.

C There is no dispute that the accused had a bruised eye on 5 July 1998. She does not dispute to have told PW9 that she might have fallen at the Discovery Club. PW14 testified that when he met the Accused upon her arrival in New Zealand he noticed the bruised eye. When he asked her what had happened she is said to have told him that she had ran into something while looking for her glasses. D The Accused did not attempt to deny having told so PW14. If the accused was trying to "contrive to tell a lie" as Counsel for the Republic eloquently capitalized on it, couldn't she have only denied to have E told them so? What was easier for her to do? To say "I never said so" or to say "I might as well have told them so"? I think the former was much easier, although she knew that the Republic had the duty to prove what it was alleging. From this the Republic is drawing an F inference that there had occurred a minor scuffle "in which the Accused received a bump to the eye and in the volatility of the situation the Accused pulled the pistol on the deceased and deliberately shot him". This argument is superficially attractive because it has omitted to G consider two proved facts. What the Republic has failed to appreciate is whether the gigantic Cliff could have stood idly by, let the accused, a weakling in comparison, get hold of the pistol from wherever it might have been and let her shoot him at close range while he was H gripping the pistol as the experts it has called have testified. The Republic might have found it a very convenient theory to rescue itself out of the predicament it has placed itself in, but as is always said convenience and justice are often not on speaking terms. After I all, if that was the case, the deceased could have been found with

two shot wounds what was in fact not the case. What was the explanation of the Accused all the same? A

With transparent honesty, the Accused was very definite that the bruised eye was an insignificant problem to her in the face of the unbearable traumatic situation she had suddenly found herself in. B She further said:

I know I knocked my head when looking for my glasses. It is possible that's where I got a bruised eye ... I did stumble at the Discovery Club. C It could have been there that I bruised my eye, but as I have said that was not important to me ... my husband had just died and I cared little for the bruises. I am not lying. If my husband could have hit me my entire eye could have sore. He hit me rarely but when he did you could see it. D I did not physically fight with my husband that night ...

The accused further explained that she could have bruised her eye when she bumped her head on the car when they were leaving the Discovery Club, but as it was not bleeding, it was of little importance E to her. All this speaks for her honesty. No one but the most callous can fail to understand her and sympathise with her for failing to be certain on the exact time or place her eye got bruised, particularly F when it was a superficial bruise that is not bleeding. I accept her very probable, if not totally, convincing explanation. Even if I had not believed her on this I would have hesitated to count this seemingly trifling discrepancy against her, for as it was lucidly stated by T. Fuller "The breast plate of innocence is not always scandal free". G

I shall have to dwell a little longer on the theme of "I don't know syndrome" if only in order to quench the thirst of Counsel for the Republic. While summing up to the gentlemen assessors I did put H this question: who among the prosecution witnesses was never a victim of this syndrome, and if I may extend it further the "who told you so"? Or "I can't answer that" or "I can't recall or remember" syndrome? I directed the gentlemen assessors that the record shows no exception and that is true. If then, I have to use this "syndrome" as a yardstick for determining the veracity of witnesses, who will I

- A pass this test? And in a case of this nature where the law indisputably tilts in the favor of the accused person who stands to gain from the rigorous application of it, if not the accused? Well they have called the tune, they must be prepared to dance in response. This standard
- B should now be applied equally to the prosecution witnesses. It is good for Counsel to remember this adage of respectable antiquity: *the measure you give is the measure you will get.*

- C As already shown in this judgement, Counsel for the Republic has not been kind or beneficent enough to highlight me on one of the 'I don't know' answer which the Accused gave which I could have used to draw adverse inferences against her. I should not be counted as boasting to have been a bit industrious when I say what
- D follows. I had the opportunity to scan the entire evidence of DW 1 Kerstin which covers about eighty (80) pages (handwritten). I found out only eighteen (18) answers which fall within this "syndrome". But what is more significant is that subjective evaluation of the same
- E leaves every fair-minded person convinced that considering the context in which they were given the most reasonable inference to be drawn is that she was not lying or prevaricating. She was asked, for example, of the identity of the people Cliff was to meet at the Outpost. She
- F replied that she did not know who they were. I did ask her if she recalled the volume of the whisky Cliff took to her home (if it was one litre or three-quarters of a litre, etc) and she replied that she did not know. At one stage she was asked if she knew what took
- G place in the bedroom when the police officers were there; her response was the same. She was very clear in her evidence and that was also the evidence of PW7, that she never entered the room with the police. Can any reasonable and impartial Court condemn her of lying or
- H prevarication on the basis of these innocent and true answers? My undisguised answer to this question is in the negative. Other answers she gave were similarly innocuous.

- I Many prosecution witnesses gave such answers. One of them was PW2 S/Sgt. Fulgence. When asked if there were curtains in the bedroom, his reply was that he did not recall if there were any. This

was in spite of the fact that he was the only officer who was photographing the fatal room. All the same I was not invited by the learned Counsel for the Republic to hold that he was contriving to tell a lie. He was asked if the pistol (Exhibit P2 in the deceased's hand was cocked or decocked. His reply was:

I do not know if the pistol was decocked or not

Should I then hold him a liar because of this answer? I shall be the last person to do so. PW2 was testifying on a fact which was not particularly within his own personal knowledge for there is no evidence to indicate that he was so told by PW4 Assistant Inspector Hiiti. That answer was proper. PW4 himself gave the "I don't know" answers about nine (9) times in his short evidence covering only 15 pages.

Nonetheless the same cannot be said of PW13 Lynette. She testified while under cross-examination that she had been married to PW12 for the past 46 years, and that she had been faithful throughout to her husband. When asked if she knew before Cliff's death that he had an extramarital relationship her reply was, understandably, that she 'did not know' that. But when asked if she was surprised when she became aware of it, she demurred and then replied:

I don't know if I was surprised when I heard of this

Who can believe her on this? The fact whether she was surprised or not was within her personal knowledge. No sane, objective and intelligent person can call this prevarication. It was a downright lie. This was a graphic demonstration of a witness attempting to seek refuge behind this "syndrome" to conceal the truth although the question was an innocent one. The inescapable inference from this answer is that PW13 should not be taken for granted as an honest and truthful witness. If she could lie on such an innocuous issue why should she not lie on graver issues? If I may borrow the very instructive dictum of Counsel for the Republic in their final submission and use it as mine I would leave PW13 at this juncture saying that "It is always easier to tell the truth than to contrive to tell a lie."

A PW4 Hiiti as already alluded to gave similar answers about nine times. Some of these answers definitely exposed him as a liar and/or a very unreliable witness. He also tended to expose his ignorance on weapons. It is an undisputed fact that he was the witness who
 B prided himself of having been one of the two police officers in charge of the investigations at the scene of the incident on 5 July 98. He is the only person who handled Exhibit P2 at that time, took it to their
 C armoury where he registered it and eventually handed it to the RCO (Regional Crimes Officer) later in the day. When under examination in chief he was asked to tell the Court the serial number of Exhibit P2 His answer was that he could not remember the number. When
 D he was asked by Counsel for the defence to point out the firing hammer on Exhibit P2 his answer which sent seismic shock in the Court was:

I do not know where the hammer of this pistol is

E Yet, this is the very witness who had the audacity of telling the Court that when he handled the pistol at the scene that night it was in a "safety position". How could he determine that it was in that position when he did not know where to locate the hammer on it whose position is the indicator that the pistol is decocked or not? He never provided
 F an answer to this vital question.

When PW4 was asked as the one in charge at the scene, if fingerprints at the scene were taken he replied that he did not know. But within the same breath he belied himself by asserting that:

G What I am sure of is that no fingerprints were taken on that day of anybody or on anything at the scene

H After confidently asserting in his evidence that in a homicide case there are known procedures which require fingerprints of suspected persons and on firearms to be taken immediately he said.

I If fingers of suspects were examined for seats from the fired firearm that I cannot tell

A These are definitely not doubtful pieces of evidence but very discrediting ones. But Counsel for the Republic are pretending to be unconscious of this. I think that every objective person will agree with me if I
 C say that there is more than a modicum of truth in the saying that "He who praises the rain it has rained on him". Did the Accused give any inconsistent versions of the event?

This is the contention of the Republic. In support of this the Republic is relying on what is alleged to have been stated by the accused to PW8, PW12, PW13 and PW14 and David Schaefer.

Before the accused is held accountable for these alleged inconsistent statements the Republic has to prove that she actually made them. She has unequivocally denied to have done so in her evidence. Was the Accused
 D misquoted by these witnesses? Were these witnesses truthful in their assertions against the Accused or have they contrived this evidence? After properly evaluating their evidence in its entirety I am persuaded to believe that they might have been untruthful because they started with a wrong major
 E premise. Their major premise was that Cliff was not a candidate for suicide. Therefore he could not have committed suicide. In so believing they compromised their objectivity. They then began to look for "facts" to support this hypothesis. This they found in the alleged inconsistencies of Kerstin's version to each
 F one of them individually.

PW14 testified that when the accused telephoned to inform him of Cliff's death on the first occasion she told him that she was having a shower when she heard a gun shot and when she went in the bedroom she found Cliff on the bed. On the second occasion she is alleged
 G to have belied herself when she told him:

I was lying on the bed, my face down and Clifton asked me where the gun was and I replied "up in the cupboard" I then heard Clifton saying
 H "Tell my father I tried" and then the shot went off

To the prosecution, the Accused had lied. Of course if this was the case, the two versions are mutually inconsistent. But did she make these statements? PW14 has proved himself to be an utterly unreliable
 I and inconsistent witness who at times contradicted himself.

A PW14 testified to the effect that the Accused told him that there has been "a terrible shooting accident" He asked her two times if Cliff was okay but on both occasions the Accused kept quite. On the third time when he asked if Cliff was dead she began to cry and then gave the first version alluded to above. However PW14 belied himself while answering a question from one of the gentlemen assessors on this, PW14 testified that when he asked the Accused on the third time if Cliff was dead PW14 testified that Kerstin replied "yes" However, when I put the same question to him he replied that Kerstin never said "yes" but she only began to cry.

PW14 admitted in his evidence that he made his first statement to the Tanzania Police on 14 March 2001 (after the trial had started). The same was shown him, and he accepted it. He also admitted that in the said statement he recorded that after Kerstin had told him that there had been a gun accident she immediately told him that Cliff had shot himself. This was in crying contradiction to what he said in his testimony (only seven days later). When asked to account for this he could not. If PW14 himself gave such inconsistent statements on what Kerstin had said to him how can he be believed on his assertion that Kerstin made inconsistent statements to him on Cliff's death? What are those inconsistent statements? I think he was imagining them and in the process he ended up confusing and discrediting himself.

The overall credibility of PW14 was further watered down by the impossibility of some crucial facts he testified on and his lack of being candid. There is no doubt that they had resolved that Kerstin had lied to them as early as 5 July 1998. That was why they ordered more autopsies to be conducted. That Dr David Bruton had reported to them that Cliff had not died of a gunshot wound administered through the palate before they came to Tanzania, is plain from 'their evidence. It goes without saying therefore, that by the time they came to Tanzania in mid-July 1998, going by their evidence they had with them "concrete evidence" disproving the suicide theory being then held strongly in Tanzania. That's why even Peter Ward was with them. However, when PW14 was asked on cross-examination

that after visiting the fatal room and spotting blood spatter on the western wall why they never thought it prudent to involve the local Police his reply was:

At that juncture we saw nothing suspicious which could have justified our involving of the local police officers.

Again he was definitely lying here. That PW14 could have been lying in his evidence is further demonstrated by his claims that when they visited the fatal room in July 1998 and on 12 August 1998 they found blood spatter on the western wall. This was plain poppy-cocky as there was no such blood on 5 July 1998 and if there was blood on that wall then, the same could not have survived the cleaning exercise done on the very night of 5 July 1998. For all these reasons I have found it impossible to believe PW14 on his assertions that the Accused made inconsistent versions to him. I uphold the accused's denial to the effect that she never made inconsistent statements to PW14.

It is also the contention of counsel for the Republic that the Accused told PW13 Lynette that she did not know what had happened as she heard the gun shot and she got up to go mad at Cliff for shooting when the children were asleep only to find him lying across the bed. I find no discernible discrepancy in this. Here we have rather a difference of precision than of substance. It was a shortened version of the entire episode. Even PW13 admitted in her evidence that the telephone conversation with Kerstin on that day was very brief as most of the conversation was with PW12. Whatever the case I believe nothing good could be said of the Accused by PW13 who unequivocally stated and believed that Cliff was very unhappy with the Accused as his children were not always happy and were not having the upbringing that Cliff had as a child. On top of that she had unreservedly stated that when Cliff and Kerstin separated she made it clear to her son that she was on his side. So PW13 apart from exposing herself as a liar as already shown, she could not be said to have been a dispassionate witness on the whole. She might have been anxious to have the Accused take the rap for Cliff's death who she believed could never commit suicide.

A PW12 was either a liar or had misinterpreted what Kerstin had told him. Either way, he rendered himself an unreliable witness. He testified that Kerstin told him that after leaving her house following Cliff's death, she went to look for Schaefer at Mezza Luna where
 B she found him and the policemen on patrol. This definitely was not the case. Credible evidence on record is to the effect that she first went to Ekko's house and then to Discovery Club. If PW12 was not
 C lying here to increase the litany of the alleged inconsistencies, then he never heard properly or he has a very poor memory, which cannot be trusted. How true then it is that more weight should be given to acts of men than to words allegedly said by them as these are easily mistaken and/or misinterpreted.

D PW12's credibility has also been tainted either by his own inconsistencies or mendacity. In his evidence he first testified that when they came to Tanzania, after Cliff's death, he never discussed with anybody about Cliff's death except the Accused only. Shortly
 E thereafter he contradicted himself when he testified that on arrival in Tanzania they made an appointment with PW7 Dr Allan as they had the pathologists report with them and wanted to discuss it with him. They actually went to see him and it was at this stage when
 F they met the wife of PW7 at their home and she confided in him (PW12) that Cliff was a very good man and he never shot himself. Apart from the naked fact that PW14's evidence is totally silent on this visit, the undisputed evidence on record is to the effect that
 G PW12 was lying because by then the wife of PW7 was not in Tanzania but in Europe.

H PW8 Joanna is on record saying that while in New Zealand, Kerstin told her that she was lying on her stomach when Cliff came out of the bathroom and asked her where the pistol was and she (Accused) had told him that it was in the cupboard where he had left it. She further testified that the Accused told her that both the doctor and the police report said that Cliff's palate was damaged and then she
 I said what sounded unusual to her.

This was that the Accused said "... but I did not shoot him" and never finished the sentence. This was the evidence of PW8 who testified, unabashedly, that she was a great friend of the accused but was "lucky" to have a love affair with her husband, whom she deeply loved and very much wanted to marry but she has "lost that chance". She further testified that she was not only upset and shocked by the death of Cliff but the death was the "most devastating to her". I do not believe that a person of that character who is a living model of infidelity, emotionally disturbed by the alchemy of infatuation can be an objective and/or impartial witness particularly when it comes to the issue of the cause of death of the one she deludes herself to have loved most. Her perception of things must be warped. She may also be trying to endear herself to the family of Cliff for some other motives unknown to us. Twice in her evidence she confessed to have lied to her husband and the Accused. How can we trust her today?

Counsel for the Republic have urged me to accept her evidence as she "was a freshly forthright and contrite witness" who directly answered questions as to her affairs with Cliff. If that were held to be true, then we will agree with Shakespeare when he said:

"There is no art to find the mind's construction in the face":

Macbeth, Act I Scene IV, Line II.

But I will not be swayed by these heady superlatives heaped on PW8. She does not deserve them. PW8 has now confessed to her infidelity not because she is "forthright and contrite" but because she could not have avoided admitting it when it is already public knowledge short of exposing herself to the inevitable charge of perjury if she had denied it. Why did she have to be contrite after the death of Cliff? She remained in New Zealand for two days after Kerstin's departure. If she heard from Kerstin all that she testified to on 15 March 2001 what prevented her from disclosing it to Cliff's parents then or the police in her statement she gave on 2 March 2000? She never did so because Kerstin never told her so. She is trying to add insult to injury. She has concocted it to victimize Kerstin whom:

- A she views as the person who stood in her way in her ambitions to marry Cliff although she was, without shame, giving counsel to Kerstin on family issues. If counsel for the Republic think that PW8 Joanna is "a freshly forthright and contrite witness" now, then I invite them to contemplate with an open mind what we were told some 500 years back to the effect that:

The devil can cite Scripture for his purpose. An evil soul, producing holy witness, is like a villain with a smiling cheek. A goodly apple rotten at the heart.

- C O what a goodly outside falsehood hath!

The Merchant of Venice, Act I, Scene. 3, Line 99.

- D So let that be said of PW8 Mrs Joanna Mc Callum, here. Though pretending to be a holier than thou outlook she remains at heart an incorrigible liar who concocted this calumny against Kerstin.

- E Of course the Republic has another card up its sleeve. This was the statement David Schaefer allegedly made to PW10 on the night of 5 July 1998. I have used the word 'allegedly' advisedly because the statement is containing untrue allegation. It is recorded therein that Schaefer reported to PW10 that the Accused had informed him when she followed him at Discovery Club that she had a quarrel with Cliff at her home and that Cliff had threatened to kill her with a pistol and therefore she had left to look for help. Schaefer is also alleged therein to have told PW10 that he had then left with her to her home to reconcile them only to find out that Cliff had already committed suicide. All this is sheer baloney and smacks of a fabrication done definitely by an unintelligent person. How could Schaefer have known that Cliff had committed suicide when going by the same statement, the Accused had left him alive? How does one reconcile this version of Schaefer with the one he gave to PW1 and PW3? If that was what actually Schaefer was told by the Accused why did he tell these police officers a totally different story? Why did he find it difficult to tell them that the Accused had been threatened by her husband with a pistol, and instead he impressed upon them that there

was a "big problem" at her home and beseeched them to accompany them to Njiro to see for themselves? It will be tripping over one's logic to imagine, leave alone to believe, that Schaefer could have entreated them to abandon their duties to go to Njiro to see for themselves the threats of Cliff which were no longer there as the victim of the alleged threats was already with them. For these obvious reasons I reject and dismiss Schaefer's alleged statement in its entirety.

In the light of the above I hold that the Accused never made any inconsistent statements to any one in connection with the events relating to the death of Cliff. In some instances she was misinterpreted either deliberately or unwittingly. In others the alleged statements have been contrived to serve the interests of those alleging them.

Having disposed of these crucial issues it is incumbent upon me to tackle the remaining ones, which are basically dependent on the testimony of the expert witnesses. This will necessitate me then first, to dispose of the belated prayer of Counsel for the Republic to reject and dismiss the entire evidence of the defence forensic expert Mr Gregory Love, who testified as DW6, because to them he does not qualify as such expert. This request, belated as it was, has greatly exercised my mind. However, after going over the law on expert evidence, his CV and his entire evidence and recalling vividly how well he stood by, to the most searching and the longest cross-examination in the trial, I have decided to reject this prayer. DW6 is a competent and professional forensic expert. His analysis of the issues showed great perception, objectivity and candour on his part. I do not blush to admit that we were lucky to have him as a witness in this case, otherwise we could have been misled by the warped opinions of the expert called by the prosecution, as I will show later in this judgment. It will be blinking to reality to rule in favour of the Republic, because DW6's performance was beyond all superlatives.

The law on expert opinion evidence in this country is very clear. It is spelt out in section 47 of the Evidence Act (TEA) which provides as follows:

- A 47(1) when the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger or other impressions, opinions upon that point of persons possessing special knowledge, skill, experience or training in such foreign law,
 B science or art or questions as to identity of handwriting or finger or other impressions are relevant facts.

(2) Such persons are called experts.

- C In this case the experts were to give opinions on blood spatter and ballistics. In ordinary parlance blood spatter is the splashing, dropping, spreading and/or flying through the air of blood from an animal, and for the purpose of this case from a gunshot wound.

- D The duty of an expert is to furnish the Court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Court to form its own independent judgement by the application of these criteria to the facts proven in evidence: see
 E *Davie v. Edinburgh Magistrates* (8), *Daubert v. Merrell Dow Pharmaceuticals Inc.* (9) and *United States of America v. Roy Van WYK* (10).

- F It is now well established in our jurisprudence that it is not necessary that the expertise should have been acquired professionally. Special skill is not confined to knowledge acquired academically but includes also skill acquired by practical experience: see *Gatheru s/o Njagwara v. Republic* (11). For these reasons, it is settled law that it is the
 G function of the Court only to determine whether or not a witness has undergone such a course of special studies or experience as to render him an expert in a particular subject.

- H In the present case, PW15 is a retired police sergeant of the Illinois State Police, US now consulting as a forensic expert and instructor. He holds a Bachelor of Science degree in Criminal Justice Management with emphasis on Crime Scene. He is also a graduate of the FBI National Academy and is certified as a Senior Crime Scene
 I Analyst recognized by International Association for Identification. His day-to-day duties are to examine documents that are sent to

him for review by his clients. That is all one can gather from his evidence. For his part DW6 Love holds a Bachelor of Science degree in Psychology, a Master of Science degree in Applied Information Analysis and has a Diploma in Advanced Applied Forensic Science. Experience-wise he has an impressive record. He has served in both the Australian Army and Royal Australian Airforce (1963-1973) wherein he got his initial studies in blood spatter.

He was a consultant to the South East Asian Institute of Strategic Affairs (SEAISA) (1974 - 1990). From 1991-1994 he was a consultant to the ICRC and UN agencies as WEP, UNICEF and UNDP on matters pertaining to aviation operation and accident investigation. From 1994 to date he is self employed as a consultant Crime Intelligence Analyst and Forensic Examiner based in Nairobi, Kenya. He is also a member of the American College of Forensic Examiners.

DW6 has investigated about 30 murder or murder related cases, when he was with the SEAISA. He has served in Vietnam with the UN Peace Keeping operations and has visited crime scenes in that Chapter of a forensic expert in Vietnam, Thailand, Cambodia, Laos, Indonesia, Singapore, Papua New Guinea, Burma, Somalia, South Sudan and Kenya. He has also investigated on blood spatter where it was associated with death or injury and has testified on blood spatter on several occasions. He is also a qualified photograph interpreter. He, therefore, has a fund of knowledge, skills and experience in blood spatter. All this was stated in his evidence and not disputed at all. That is why I am accepting him as an invaluable expert in this field. Fortunately, even the gentlemen assessors found him to be so and found PW15 to be unhelpful in this trial.

It is now trite law that although the Court is not bound to accept the opinion of the expert if it finds good reasons for so doing, it is also accepted that rejecting such expert opinion without assigning reasons might well be unjudicial, see, *CD de Souza v. BR Sharma* (12), *A fortiori*, since the evidence of an expert is likely to carry more weight than that of an ordinary witness, higher standards of accuracy and objectivity are required of him and "should provide

- A independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise” and “should never assume the role of an advocate”: See *Autospin (Oil Seeds) Ltd v. Beehive Spinning* (13), and *National Justice Compania Naviera Sa v. Prudential Assurance Co. Ltd* (14). Equally settled in our law is that bare opinions of experts unsupported by reasons may as well be unconvincing. That is why it is now agreed that when the facts in question upon which an expert testified are dependent upon ordinary human powers of perception an expert may be contradicted by lay witnesses. Furthermore, where in a case a judge having heard expert evidence, considers it to be evenly balanced he has to decide on the basis of the burden of proof. All these principles of law will guide me and be followed in my evaluation of the evidence of the experts who testified in this case.

- The gentlemen assessors have advised me to find PW. 15 not as competent on blood spatter issues as he purported to be and Counsel for the Republic would have me to believe. They based this opinion on the naked fact that he gave false and misleading interpretations on blood spatter found on the deceased’s body and even assumed the existence of blood pool from the photographs he relied on even when lay witnesses who were at the scene never saw much blood.

I am in full agreement with the gentlemen assessors because there is plenty of cogent evidence on record to bear them out on this.

- Counsel for the Republic had invited me to reject the evidence of DW6 because he partly said that blood spatter is not nowadays considered as an exact science and that he alleged that blood spatter can travel to a distance of 3 meters. The fact that DW6 said as by the way that blood spatter is not regarded these days as an exact science does not necessarily detract from his proven expertise on blood spatter analysis. One ought to have seen him articulately answering from his finger tips well researched questions from Counsel for the Republic in order to appreciate that he knows his stuff. Indeed if those answers had been given in his evidence in chief I would

have held that he had rehearsed them. But that was not the case. Counsel for the Republic were admittedly well prepared for the cross examination and he too responded with excelling competence, wisdom and wit. If one metaphor may be allowed here I would say that a “balloon cannot be larger than the gas that is pumped into it”, or as Peter Drucker aptly observed: “No book will ever make a wise man out of a donkey or a genius out of an incompetent”. DW6 knows how to interpret both blood spatter and photographs and in this particular case he has proved to be head and shoulder over PW15.

Did DW6 fail to account for his opinion for which he is being condemned as an amateur expert? My considered answer is in the negative. This is how he rationalized it:

There are three types of blood spatter, namely, high velocity, medium velocity and low velocity. The longest distance the high velocity blood spatter may go will depend on the size of the droplet. There is micro spatter, the diameter of the blood droplet being less than 0.5 mm. There is macro spatter whose diameter is greater than 0.5 mm. According to the formula for momentum which is mass $\times$ velocity, the distance will depend on the resolution of that formula. Generally speaking, back spatter which contains all those drops, in experiments have shown that it can travel between 20 cm up to 2 metres. However, we can occasionally get what we call a flyer and this is a clot of blood which may also contain some blood tissues or even a bone. Because of its increased mass, it may travel further, but that is an exception rather than the rule. The very high velocity spatter is very much like an aerosol spray.

Back spatter “is the ejection of blood and tissue from a gunshot wound of entrance.” See **Gunshot Wounds: Practical Aspects of Firearms, Ballistics and Forensic Techniques** by Vincent JM Di Maio, (2 ed) (1999) at page 119, 120.

Counsel for the Republic then sought to contradict him with the findings recorded in Di Maio’s book, at page 120 which show that the maximum distance was 60 cms while on average the majority of stains were between 0 and 40 cms. To this DW6 correctly responded

A that the experiments mentioned in the book were carried out on calves and not human beings, and that the text further shows that the distance would be greater in humans. Also when confronted with the statistics shown in the book of Professor Herber L, McDonna, Blood Stain Patterns (which was not made available to the Court), and quotation from a pamphlet titled Bloodstain Pattern Interpretation, wherein it is shown that on entrance wounds blood travels horizontally three to four feet, he replied:

C My distances are very approximate. This is a scientific method in so far as it allows a certain amount of error.

D On top of that these two texts do not speak of "flyers" which were specifically mentioned by DW6. Whatever the case may be, all this goes to lend credence to the observations of FD Roosevelt to the effect that: "There are as many opinions as there are experts"

E Hence the distance of the law that the Court is not bound to accept the opinion of experts on every fact and that the opinion should be based on proven facts and reliable principles and known methods. This then leads me to the next issue of the position of the deceased's body on the bed.

F *The Position of the Body on the Bed*

G It is the contention of the prosecution that the deceased before his death was seated on the western edge of the bed facing the western wall. He was then shot in cold blood by the Accused, fell on his back on the bed and then the Accused moved him to the position portrayed in Exhibit P1. 13. The defence has challenged this hypothesis claiming that it is based on unproven facts. After dispassionately scanning the entire evidence I am satisfied that the defence has a valid argument here. This hypothesis is based on the postulated facts of PW11 and PW15 to the shooting and that there were two pools of blood on the bed suggesting two positions where the body rested after death. However, there is no cogent evidence to support the first proposition, and no scintilla of evidence to support the second one.

Neither PW11 nor PW15 was at the scene on 5 July 1998, as indeed nobody witnessed the shooting. While PW11 visited the scene or fatal room on 4 April 2000, PW15 never visited the scene at all. PW11 based his postulation on the information allegedly obtained from the accused on 4 April 2000.

The Accused has resolutely denied having told PW11 that Cliff was seated on the bed prior to the shooting. Who was telling the truth then? Has the prosecution proved that which it is alleging beyond reasonable doubt? I am led to believe that it has not. Why?

In his evidence PW.11 was very unequivocal that when the Accused was telling him so, he was not alone but was with other police interrogators. He named them to be Inspector Peter Mkunda, Inspector Peter Hiiti and Staff Sgt. Fulgence who was taking photographs. Fortunately both Hiiti and Fulgence testified as already shown. The evidence of these two police exposed PW11 as a liar. Both testified that their role in the investigation of this case ended on 5 July 1998. PW2 went further and unequivocally testified that after the work of photographing the scene on the night of 5 July 1998 he: "never conducted any other investigative works either at the scene or later". And he said so twice while under examination-in-chief.

In view of the unconditional denial of the Accused that she never told PW11 that Cliff was seated on the bed or showed him where he was seated before the fatal shot and the evidence of PW2 and PW4 discrediting PW11 as shown above, I hold that the postulation that the deceased was seated on the bed has not been proved at all.

The prosecution has also used this sitting position on the edge of the bed and the alleged subsequent relocation of the body theory to explain the absence of blood on the lower part of Cliff's body. This theory has not been proved. The absence of such blood cannot be taken to establish that the deceased was shot at (by the Accused) while seated on the western edge of the bed while leaning forward as postulated by PW15.

A Was the Pistol in the Deceased's Hand Decocked?

This was one of the major assault weapons in the prosecution's armoury. PW4 of all the eight prosecution witnesses who were at the scene, was the only witness who testified that Exhibit P2 was decocked or as he put it was in "a safety position". He never told the Court at what stage he found this out. PW15 also testified that when he enlarged Exhibit P1, 13, the pistol in the deceased's hand "appeared to be decocked". On the undisputed evidence of PW2, I am holding it as a fact that the first photograph to be taken at the scene of the incident on 5 July 1998 was Exhibit P13. Basing on the evidence of PW2, PW4 and PW15 the prosecution has put up an apparently convincing case that as a dead person could not decock Exhibit P2 then the only person who could have done so was the Accused. It has urged me to draw an adverse inference against the Accused, therefore, as the pistol could not have been decocked as Counsel have put it by the "ghost of Julius Ceasar."

E The evidence relied upon by the prosecution on this issue is, unfortunately, not watertight. Where it is not patently contradictory, it is of doubtful utility.

F I have already shown in this judgement that PW4 was a witness who proved incompetent to testify on gun issues and obviously unreliable on other related issues. PW4 admitted to have no expertise in guns. When he was asked to tell the Court what he did with the pistol when he took it from the hand of the deceased he fumbled and gave conflicting versions. This is what he said:

H After removing the pistol from the body of the deceased, *the first thing I did was to remove the magazine and I inspected the safety catch of the pistol. The first thing I did was to check the safety catch of the pistol and when I found out it was safe ... then I proceeded to remove the magazine from the pistol.* [emphasis supplied]

I If he was not lying then I will be justified in holding that he could not recall what he did with Exhibit P2 and as such he could not be relied upon on his assertion on the physical condition of the pistol.

When PW4 was requested to point out the "safety catch" on Exhibit P2, he indicated the firing hammer. The clear fact is that Exhibit P2 has no safety catch but a decocking lever. How can he then be believed on his assertion that the pistol was decocked because the safety catch was safe? This is the witness who confessed that he did not know where the firing hammer on Exhibit P2 was. While under re-examination he Exhibited his incompetence when he asserted that he was certain of Exhibit P2 having been fired because the wound on Cliff "had not been caused by a panga" Ridicule as this answer was he further ridiculed himself by asserting: "If I had not seen the wound on the deceased, I would have reached a conclusion that it had not been fired." Unbelievable, to hear that from an Assistant Inspector of Police.

Although PW4, going by his evidence, believed the pistol was decocked and for that matter he knew it could not have been decocked by the deceased, one wonders then why they initially settled for a suicide theory. In answer to a question put to him on cross examination, he readily conceded that in the situation presented by this case, an inquest could have been conducted. Does one conduct an inquest in a clear case of homicide and if the pistol was in a decocked position why did he not reveal this fact to the other witnesses gathered at the scene? For as far as it is known even PW2 was not aware of this fact. In view of all this it would be risking even to assume that PW4 found Exhibit P2 in a decocked position.

Of course there is also the evidence of PW15 alluded to earlier. This evidence had been challenged by DW6. DW6 was of the opinion that one cannot tell from photograph Exhibit P1. 13 the position of the hammer so as to determine whether or not the pistol was decocked. He has found support on this from PW11.

PW11 testified that he did scan the photograph of the deceased holding the pistol in his left hand. His finding was that it showed no clear position or location of the firing hammer either by the naked eye or through a magnifying glass. This tells it all, and bears out the opinion of the gentlemen assessors.

- A When this aspect of PW11's evidence was put to PW15 he readily surrendered and said that there were two conflicting opinions on the same point from the same side. Indeed there are as many opinions as there are experts under the sun. It goes without saying, therefore, B that the prosecution has abysmally failed to prove that Exhibit P2 was decocked when it was found in the hand of the deceased.

- Even if I had held it was found decocked I would have proceeded to hold that, contrary to the view held by the prosecution, the Accused C was not the only person who had the opportunity of doing so. The night watchman who rushed to wake up Maria Joseph after the Accused had left and rushed back to the house could have done so out of curiosity. This John Robert although listed and summoned by the D Prosecution as its potential witness never testified at all. The undisputed evidence on record is to the effect that the bedroom door was open while the door of the house was not locked. There is evidence that even PW7 not only entered the bedroom alone before the arrival of E PW4 and his team but also handled the body of Cliff before testifying him dead. Counsel for the Republic never directed their suspicions against these two. The "ghosts of Julius Caesar" were, therefore, many.

F ***The Blood Spatter***

- Through PW15 the prosecution sought to establish that blood spatter patterns were observed on the deceased's right shoulder and left hand on Exhibit P18 and that there were no blood spatter patterns G on the right hand nor on any other part of Cliff's body. Of course the blood spatter on the right shoulder is more clearly visible to the naked eye on Exhibit P19. From these observations, PW15 made the following conclusions:

- H (a) that the blood pattern on the left hand indicated that it was on the weapon or close to it when the fatal wound occurred and the right hand was not in the area.
- I (b) that the blood spatter on the shoulder could only have been there through either of one of these two methods:

- (i) the deceased could have moved his head to his right after he A was in his final position with blood on his shoulder coming from his nose and mouth, or
- (ii) the deceased's arms could have been pulled up and down thereby B causing the right shoulder to touch the nose.

PW15, quite correctly and logically, ruled out method (i) above and settled for method (ii) and the prosecution, swallowed his theory C bait, hook and line, and

- (c) that the absence of blood patters on the rest of the body would suggest that that was not the original position where the deceased was seated.

The fallacies bedeviling these theories become self-evident when D one considers the disproved fact that the deceased was seated on the edge of the bed before meeting his death, the fact that the left hand could have been on the pistol even if the deceased had shot himself and the fact that a cursory looking at Exhibit P18 and 9 E among others, clearly proves that the Accused had no hand in the blood spatter on the right shoulder being there. That's why DW6 rejected the same outright.

DW6 was of the emphatic opinion that pictures being pictorial F representations of a scene or event have their own limitations as evidence. To him they are of great use, as indicators and memory aids to investigators while important details contained in them do not take in the weight of evidence unless corroborated by other means. G His response to PW15's explanation on how the blood spatter could have got there was that it was totally erroneous to draw those conclusions by merely looking at the photographs. DW6 reasoned that if the H shoulder had come into contact with the blood on the face, the blood pattern displayed on the shoulder would have been a smear or a blood transfer and not a blood drop with gravity run off. He described gravity I run off to be a phenomenon of separated blood plasma or a whole blood or cerebrospinal fluid draining off the central drop due to gravity.

A He defined run off to mean liquid moving in the direction dictated by gravity from the main body of the drop. He found the run off from the blood drop on the shoulder to be in the same direction as the blood run off from the mouth and nose of the deceased. This is indeed obvious to the naked eye of any unbiased observer, not necessarily being blood spatter expert. He accordingly ruled out the possibility of the deceased's arms and shoulder having been moved from the position shown in the photographs. This reasoned argument is paralytically compelling and I accept it.

C I have accepted the evidence of DW6 because it also accords with the facts on the ground. When PW4 and his team arrived at the scene, they never observed the blood spatter pattern on the deceased's shoulder. That blood definitely dropped there afterwards, when the Accused had not a ghost of a chance to touch the body, leave alone pulling up and down the arms. Secondly, as the photographs themselves show distinctly, they were taken after PW2 had wrapped the deceased's head. It is obvious that the head was definitely lifted up in the process. There is no evidence to negate this. It ought to have been in that process that blood spatter got to be on the right shoulder. Had PW15 been objective enough, could he have failed to detect this? At any rate he ought to have been honest enough to tell the Court that since Exhibit P1.8 was taken after the scene has been changed or disturbed, no adverse inference should be drawn against the Accused because she had nothing to do with this particular blood spatter. In concealing this fact and I have no other way of putting it more benevolently, may, be hoping the Court will not notice it, he definitely undermined his impartiality as an expert witness.

H Contrary to the bold conclusion of PW15 that there is blood spatter on the left hand of the deceased, DW6 was of the view that there is no such blood spatter visible from the picture of the left hand. This appears to be the correct view because PW15 never observed the same on Exhibit P1, 13. Even the first witness who actually saw the body and handled it never saw such blood spatter on the left hand of the deceased. All the same DW6 was frank enough to testify

that on Exhibit P1, 8 there were small marks visible around the web of the left hand but one cannot say for certain what these marks are without laboratory analysis and that the latter could not be done with a photograph without the original marking itself. The problem with PW15 was that he was making bare assertions but not supporting them with facts and/or reasons in most cases.

Regardless of the merits or demerits of the view of DW 6 on the issue and whether they are blood spatter or not the bottom line is when did that blood get to the left hand of Cliff in order to be part and parcel of the circumstantial evidence? The prosecution never answered the question. Exhibit P1. 13 and P18 were not taken simultaneously. Exhibit P1. 8 was definitely taken after, the scene had been changed. In view of this plain fact, the presence of blood spatter on the left hand becomes of little evidential significance, if at all, in the case.

That the objectivity of PW15 was totally compromised and his professional competence damningly tainted was eloquently brought to light by his total failure to interpret properly or correctly the pictures taken at the scene of the incident, or by his attempt to distort them to the prejudice of the Accused.

PW15 testified that he used pictures number 1, 8 and 13 (i.e Exhibit P1, 1, 8, 13) among others to investigate the course of death of Cliff. He mentioned the other items he relied on to be Exhibit P 16 police reports, an autopsy report, videos, sketches and diagrams, out of these objects the only ones tendered in evidence were Exhibit P1, 1, 8, 13 and Exhibit P16. If by the autopsy report he had in mind Exhibit P. 15, the same was not even shown to him. I will therefore rest my determination on the weight to be accorded to PW15's conclusions on the proven or undisputed facts contained in the evidence actually before me.

PW15 did examine picture number 13 or Exhibit P1.13. He testified that he observed what appeared to be a pool of blood near the right hip of the deceased on the bed. From this he concluded that the

- A deceased fell after being shot. It is the contention of the prosecution that after the deceased had fallen on this position the Accused moved him and positioned him on the bed as depicted in picture number 13. I have found this proposition as startling as it is preposterous.
- B This is because there is not even a scintilla of direct evidence to support it. PW15 was adamant that he concluded that that spot near the hip was blood because red colour appears as black on black and white photographs.

C The conclusion of PW15 was rebuffed by DW6 for three good reasons. These were that:

- (a) there is no corroborative evidence to suggest that the mark on the blanket is in fact blood.
- D (b) Many colours present themselves as black on a black and white photograph plus black itself and
- (c) As the head contains a finite amount of blood, if that was the first position of contact there would have been more blood there than indicated by the size of the unidentified mark.
- E

DW6 further reasoned that if the deceased was moved from that alleged first point of contact to the second position, then there ought to have been blood markings between the two points, which is not the case.

F

There is not even a shadow of reply to this evidence. On the contrary it finds overwhelming cogent support from the prosecution witnesses. All the witnesses who were at the scene of the incident, as already shown, never saw this imagined pool of blood on the bed near the right hip of the deceased nor the trail of blood from that first position to the second final position. For these reasons I have found myself in concurrence with DW6 that since the quantity of blood and cerebrospinal fluid is much greater at the final position as shown in Exhibit P1. 13 appear to the unruffled, then the body was not moved at all. This is a very convincing explanation and not a conjectural one.

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The Republic had contended as already shown that the absence of blood on any other part of the deceased's body was indicative of the fact that the deceased had been seated on the bed prior to the fatal shooting. This assumption has already been disproved. However, the likelihood that the deceased could have been lying on the bed was not explored at all by either side and/or ruled out. The prosecution side had the duty to rule out this probability. All the same the defence (DW6) attempted to show that there are people who shoot themselves with handguns through the head while lying and still remain gripping the weapon. This was not rebutted. If that was the case here then the said absence of blood could be explained through this phenomenon as well as the fact that the deceased never fell on the Accused's legs as she too was lying (but curled) on the same bed. At any rate even assuming without deciding here that the deceased was seated, DW6 offered a plausible explanation on how the deceased could have shot himself without harming his wife. Even PW11 was equivocal on this. In response to a question put to him under cross examination on whether or not the deceased was seated or lying on the bed, contrary to his earlier bold assertions that he was seated, he said: "I don't know". This is because he could have so many options. To sit, to stand or to lie depending on the situation.

To me this is not only a doubtful piece of evidence but a very discrediting one. This is because he had confidently maintained all through prior to that that the deceased was seated on the bed as he had been so told by the Accused. Indeed a good lie can sometimes have all the graces of artistry, but only the truth can have the ring of sincerity.

Absence of Gun Powder Residue/Injuries

PW15 also examined all the pictures forming Exhibit P16. He particularly examined photograph A (which is similar to photograph H) "for gunpowder pattern or injuries on the deceased right hand" He found none. It must be recalled that according to the defence, the deceased shot himself by pulling the trigger with his right thumb while the left hand was gripping the barrel of the Pistol. PW15 testified that he, however,

- A observed a dark colouring at the tips of the fingers and thumb of the said hand. This colouring is visible to the naked eye. PW15 opined that that was not gunshot powder pattern, but a pooling of the blood. According to PW15 this phenomenon "occurs in the extremities and is typically for fingers or toes several hours, after death."

Basing on this conclusion of PW15, it is the contention of Counsel for the Republic that the absence of gunshot powder patterns on the right hand should lead to an only irresistible conclusion that Cliff never shot himself but was shot by the Accused. On the face of it, it appears to be a very formidable argument. It looks so because it has been misleadingly presented as I shall show shortly. It is assuming that the Accused has the duty to prove some facts.

- D All the same time the conclusion of PW15 has been challenged by DW6. To DW6 the colouring is not post mortem lividity or *livo mort's* which occurs soon after death due to the obvious blood pressure over a period of two to eight hours in only certain parts of the body.
- E To DW6 blood will drain to the lowest point of that part and cause discolouration which is reddish purple and is commonly found in the back or chest of the trunk of a body which has been lying on its back or front immediately after death and left undisturbed for hours.
- F He was very emphatic that lividity normally does not place in the limbs or digits. From his experience and that of many experts, he opined that judging from the density and distribution of the colouring, the colouring on the tips of the fingers and thumb on the photographs is gunshot powder residue.

- Here we have two conflicting opinions. If personal preferences were permitted in works of this nature, I would not have hesitated to accept the version of DW6. This is because he gave a well reasoned opinion and not a bare conclusion. I will refrain from judging on who is right or who is wrong here. The best I can say is that the opinion of the experts on this issue appear to be balanced but I am not prepared to give the benefit to anyone. This will remain an open academic issue. Maybe an apposite opportunity will present itself in the future which will necessitate us to make a definitive decision

on it. This is all because this issue shall be conclusively determined without the aid of expert opinion but purely on the basis of the requirement of the law. It is the contention of the Republic that the defence conclusion is flawed. It is arguing that the gunpowder residue could not have remained on the fingers of the deceased after the body had been washed twice (in Arusha and Nairobi) before embalmment. The submission concludes thus:

If so, wouldn't the residual pattern wash away? Would it remain even after a week when the said photograph was taken? Again Mr Baldwin's evidence is to be preferred.

The question which this submission inevitably invites is whether this Court should prefer PW15 to DW6 simply because the body showed no gunshot powder residue after a week even assuming that this was the case. What about if the same was there initially but as suggested by the prosecution it was washed away in the washing and embalming process? I would have readily acceded to the prosecution's submission if the photographs were taken at Arusha at the scene of the incident or at the hospital before any washing of the body was done. This is a classic demonstration of where perfunctory performance of one's duties sometimes leads to disastrous consequences. The prosecution cannot be allowed to benefit from the inefficiencies of its investigators. It is not the duty of the Accused to prove that there were gunshot powder residue on the right hand of the deceased. It was the duty of the prosecution to prove beyond reasonable doubt that right from 5 July 1998 that the said hand had no such residue. The prosecution failed totally to discharge this burden of proof. Had it done so then the burden would have shifted to the Accused to show that there were some residue.

All the same DW6 already had advanced an apparently plausible explanation to answer the submission of learned counsel for the Republic. His evidence which was not contradicted was to the effect that he believed the colouring to be gunshot powder residue because it is only soot which is easily washed away. But heavy particles of the residue being barium, lead stiphonate and antimony along with

A nitrites which are burnt residue if cellulose are often embedded in the skin pores and at times cannot be fully visible without the application of solvent chemicals as the one used in embalmment, and that it is normal for embedded gunshot residue to remain and become visible after embalmment.

There is no dispute that there were no injuries on the palm and/or fingers of the left hand which was found gripping the pistol by the barrel. The defence has given an explanation why this was so. DW6 testified that this was because the hand was either over the foresight blade or below it, and in that case the hand moved back with the slide. To defy this explanation counsel for the prosecution, on cross-examination, requested DW6 to grasp the barrel of Exhibit P2 as the deceased would have done if he shot himself. He did so and demonstrated to our satisfaction (myself and the assessors) that there was still a gap in the ejection chamber even to allow the ejection of a spent cartridge or casing. DW6 further testified that the slide of the pistol actually moves from the bridge position to the rear position and that any movement over 1.95 mms would allow the ejection of the cartridge as that is the length of the 9mm cartridge. Indeed even the prosecution expert had testified that the gripping would only have made it difficult for the casing to be ejected but not impossible. The explanation of DW6 appears to be convincing and in the absence of evidence to prove that he was wrong, I accept it. Therefore the absence of injuries and the ejection of the empty cartridge have been adequately explained by the defence.

It was strenuously argued by PW11 that the deceased could not have killed himself and at the same time remain grasping the pistol in his hand. The Republic is contending that the "gun on the deceased's hand" was in fact planted and was not originally there. It has also relied on the report or statement of Dr Bruton in which he does not mention that there was a "cadaveric spasm when the gunshot entered the deceased" thereby causing a death grip. This argument is totally lacking in cogency. That the cadaveric spasm was not mentioned does not prove beyond reasonable doubt that the deceased never

experienced it. I would have been easily tempted to believe so if the Republic had specifically brought evidence to prove so or Dr Bruton had specifically mentioned so. Omission to state has many causes: negligence inadvertence, concealment etc. That Dr Bruton might have forgotten to mention it is hardly surprising at all. If he forgot to indicate in his notes and report of the autopsy he performed on 11 July 1998 the fact whether or not he opened the mouth of Cliff to check if palate was damaged, which was a hotly contested issue and when he was specifically engaged to do that, can any one be surprised if he not only never mentioned the cadaveric spasm in his report, but may be never considered it at all? My considered answer to this question is in the negative.

The Republic is also contending that "taking the body stature of the deceased, a casing could not have been ejected if a grip was maintained". I have already disposed of this issue. However, for the purpose of satisfying Counsel for the prosecution, I will elaborate further. I did direct the gentlemen assessors that we never saw the deceased who was said to be strongly built. But we saw DW6. He definitely is not a sixfooter as Cliff was said to have been, but he is undoubtedly well built and stout. Yet his grip around the barrel of Exhibit P.2 left a gap along the ejection chamber wide enough to allow the ejection of a cartridge.

While under examination in Chief PW11 strenuously argued that while a person is in the process of dying he is struggling against death and for that reason he "cannot continuously hold to the gun". To him the gun must fall out of his hands. Nevertheless his adamancy waned progressively while under cross-examination. At one point he said.

Yes, I said that if Cameron committed suicide he could not have been found holding the gun in his hand. I would not agree with you if you say my hypothesis is wrong. For the majority of the people this is not always the case. For the minority of the people it depends on the circumstances of each case. Yes the minority can be found with handguns after committing suicide.

- A This latter admission is completely devastating as far as the prosecution's contention is concerned. No *iota* of evidence was led by the prosecution excepting the deceased Cliff from this minority. Of course evidence was also led to show statistics of people who have committed suicide with handguns and found with the weapon in their hands. In view of the concession by PW11 that this actually happens, I see no compelling reason to go through Mr Dr Malo's figures, which, all the same were accepted by PW11. That was why on the last question on cross examination he conceded as follows:

If I had been at the scene of crime on 5 July 1998 I could have been in a position to answer if it was an accident, a suicide or a homicide.

- D This piece of evidence tells it all. It is eminently evident from the evidence of PW11 that not only does he now believe that the deceased could have shot himself and still remain clutching or gripping the gun in his hand but also up to this day in spite of all the investigations and re-investigations he is not yet certain on whether Cliff was killed by Cliff or was killed by Kerstin Clifton Cameron. All said, I concur with the evidence of the Defence as supported by PW11 that the act of the deceased found gripping or clutching the pistol is not consistent only with the same having been planted on him but does happen quite commonly and is also consistent with suicides.

It goes without saying, therefore, that the prosecution has absolutely failed to prove either at all or to the required standards all of the facts it has been relying on to establish the charge of murder against the accused, exclusively on circumstantial evidence. DW5 Hoops was categorical in his evidence on the attitude of Cliff towards life in general. For the sake of clarity and the avoidance of any mistake I will reproduce the relevant portion of his evidence here. He said:

- H He (Cliff) became so serious and depressed in the last six or eight months before his death. Cliff did on several occasions express to me that the pressures on him were becoming intolerable and at times he said that he felt like blowing his fucking brains out. This type of conversation continued until the last two weeks before his death.

Indeed it continued until his last evening here on earth. This is evident from the evidence of DW2 Regina. According to Regina on 4 July 1998 at about 6:00pm while at Fleet Air offices the deceased had asked her if she knew what he felt like doing that day when she sighed and said nothing he quickly added: "I feel like blowing my fucking brains out".

He shortly took leave of her and she never saw him again alive. In their very stimulating long submission Counsel for the Republic have urged me to find both Kerstin and DW2 Regina as liars, but DW5 Hoops was not touched at all. I accepted the evidence of DW5 as well as that of DW3, among others, on the dispositions and past habits of Cliff, unreservedly, to be true. This is because I know of no rule of law which bars the reception of evidence prejudicial to the character of the deceased when his death or its cause is in issue; see *Joy v. Phillips Mills Co. Ltd.* (15). DW2 was attacked because she is said to have lied for her employer, Cliff, in the past and so she should have been lying for her present employer, Kerstin. I saw DW2 in the witness box. She was a firm, confident witness who was unshaken by the most rigorous cross-examination mounted by Mrs Sumari. Unlike the white lies or *splendide mendax* she gave to Cliff's creditors on Cliff's instructions that he was not in the office while he was actually inside (and at times hiding himself in the adjoining bathroom), there is no evidence to suggest that she was instructed by Kerstin or anybody on her behalf on what to testify on in this case. DW2 testified truthfully on what she witnessed during her entire 10-month stay with Cliff. I take her to have been a very reliable honest and truthful witness and accept her entire evidence as true. Some of the creditors of Cliff she mentioned who Cliff was running away from were coming from: Bytrade, Balton Tanzania, Modern Refrigeration and Mr Raymond.

The accused Kerstin gave her evidence and stood up well for cross examination, with commendable composure and transparent honesty as already herein indicated. That she broke down and wept at one point while testifying, was not an indication of a guilty conscience

A nor were they feigned tears to draw sympathy. She was genuinely touched by the death of her husband whom she then recalled lying on the bed apparently staring at her but dead. I am convinced that she told the Court the truth and I believe her.

B On the totality of the evidence on record, I am forced to believe that Cliff might have resigned himself to the philosophy of: "He that dies pays all debts". The Tempest, Act II, Scene 1, L 66 and decided to take his own life. After all, events have an embarrassing way of deflating even not only the most charismatic of politicians but also other stoic personalities of Cliff's type. History is replete with instructive examples. The great probability that Cliff might have taken his own life was not eliminated by the prosecution at all. On the contrary, it was nurtured to almost full maturity by the prosecution itself. The Republic brought not less than seven witnesses to develop and sustain the probability that Cliff took his own life. At this juncture it is no longer of concern whether he shot himself through the mouth or the forehead, although the greatest probability, from the evidence available, is that it was through the mouth or palate.

F All said and done I join the gentlemen assessors in their unanimous opinion and hold without any hesitation that the prosecution has failed to prove its case against the Accused beyond reasonable doubts.

G I accordingly find the Accused Kerstin w/o Cliff Cameron not guilty as charged of the murder of her husband Clifton Don Cameron or of any other kindred offence, and I hereby acquit her.

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I

RICHARD LUBILO AND MOHAMED SELEMANI v. REPUBLIC

COURT OF APPEAL OF TANZANIA AT MWANZA

(Kisanga, Lubuva and Lugakingira, JJ.A.)

CRIMINAL APPEAL No. 10 OF 1995

(From the decision of the High Court of Tanzania at Tabora, Katiti, J. dated 13 December 1994 in Criminal Appeal No. 251 of 1991)

Evidence – Confession – Admissibility of confessions – Confession contained in a statement involuntarily made – Whether admissible – Sections 27, 28 and 29 of the Evidence Act 1967.

The appellants and several others were charged with 35 counts of armed robbery before the District Court of Igunga. The appellants were convicted of eight counts and sentenced to 30 years imprisonment with corporal punishment. They both appealed to the High Court where the convictions and sentences were sustained in four counts. They further appealed. The only evidence upon which the convictions were based was a statement which both the Courts below treated as a confession which was repudiated and retracted by the appellants during the trial.

Held: (i) In order for a confession to be admitted in evidence it must be voluntarily made, as provided under sections 27 and 28 of the Evidence Act 1967;

(ii) It is incorrect to say that involuntary confessions are admissible, under section 29 of the Evidence Act 1967, when they are true.

Appeal allowed

Cases referred to:

- (1) *Izengo v. Republic* [1982] T.L.R. 237
- (2) *Maona and another v. Republic* Criminal Appeal Number 215 of 1992 (unreported)
- (3) *Marus Kisukuli v. Republic* Criminal Appeal Number 146 of 1993 (unreported)