

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

V

BOY PETER MASEKO

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 29th day of October, 1984.

The accused is charged with the murder of one Lebohang Oscar Leluma in that on or about 8th February, 1984 and at or near the Stadium area - Maseru Reserve - in the district of Maseru he unlawfully and intentionally killed the deceased.

Five (5) witnesses were called to testify in support of the Crown case. The defence called two witnesses and the accused himself gave evidence on oath.

The evidence of PW.1, Moeketsi Tsatsanyane, was not really challenged by the defence. I have, therefore, no good reason to doubt it. It was to the effect that he was the proprietor of a certain Ma-Africa Motor Garage in Maseru. On 7th February, 1984, he was away in Bloemfontein in the Republic of South Africa from where he returned on the same day. On the evening of the same day, the deceased called at his house and reported that he had left his (deceased's) mazda van, which he wished to sell at the garage. It was agreed that the deceased and PW.1 would meet at the garage on the following morning 8th February, 1984, apparently to discuss the details of the sale.

At about 10.00 a.m. on the morning of 8th February, 1984, the deceased duly came to PW.1 at the garage. The deceased was then in the company of another person whom he said was prepared to buy the van for ready cash. As he was not going to buy the van for ready cash (he was presumably going to pay the deceased after the van had been sold by the garage) PW.1 had no objection to the

2/ deceased selling

deceased selling the van to the new prospective buyer. The deceased then obtained the ignition key from PW.1 and together with the prospective buyer proceeded to the van. They started the engine of the van after which they returned to PW.1 and handed back the ignition key. Before leaving with his companion, the deceased authorised PW.1 to do some repair work on the van.

At about 12 noon on the same day, the deceased returned to PW.1 at the garage. He was still in the company of the prospective buyer and a third person whom he said was the elder brother of the prospective buyer. According to PW.1, the deceased told him that the elder brother of the prospective buyer also wanted to satisfy himself as to the condition of the van. So, the deceased took the ignition key from PW.1 and proceeded to the van together with the prospective buyer and his elder brother. PW.1 who had been talking to the deceased and his party outside the entrance of his office at the garage returned into the office.

A minute or two after he had returned into the office, PW.1 heard an explosion outside. He at first thought it was the back-firing of a vehicle passing on the road. However, when the explosive sounds repeated in quick succession, PW.1 had a mind that they were gun reports and he immediately went out of the office to see what was happening.

It is perhaps necessary to mention at this juncture that according to the evidence, the garage building is situated opposite the Lesotho High School in Maseru. Immediately on the southern side of the building there is a caltex petrol service station. There is then the main tarred road leading from T.Y. to the main traffic circle in Maseru. Beyond the tarred road is the Lesotho High School. On the northern side of the garage building, there is a gravel road running from east to west towards the main bus stop in Maseru. Across that gravel road is the Metro wholesale. On the north-western side of the

3 / garage building

garage building is a yard used partly as a parking area for vehicles that have come for repairs at the garage and partly as a scrap yard. The yard is, therefore, virtually littered with a number of vehicles. On the western side of the garage yard, there is another short gravel road that links the main tarred road with the gravel road passing on the northern side of the garage building. Next to the short gravel road that connects the tarred road with the road passing on the northern side of the building but still within the garage yard, there is a peach tree. The entrance to PW.1's office is on the north-western side of the garage building so that one faces the garage yard as one comes out of the office. Immediately outside PW.1's office entrance, there was an E.20 combi which had been parked there for some days.

Now, PW.1 told the court that when he came out of the office and was next to the E.20 combi parked outside his office entrance, he saw a man approaching in his direction about 10 paces (indicated) away. As soon as he noticed him, that man raised his hand and pointed a gun at him. It was a hand gun or pistol with a darkish barrel. The moment he saw the barrel of the gun being pointed at him, PW.1 got a fright and immediately took cover behind the E.20 combi. He had no time to scrutinize the gunman so that he was unable to identify him. As the gunman went to one side, PW.1 moved to the other side of the E.20 combi. PW.1 eventually managed to scape and ran away. He ran to the southern side of the garage building and did not know what the gunman remained doing on the north-western side. However, soon after he had come to the southern side PW.1 noticed the gunman appearing from the eastern side of the building. He immediately took to his heels and hid among the vehicles in the garage yard from where he could see the gunman leaving the premises and going in the direction towards the main tarred road. I shall return to PW.1's evidence later in this judgment.

The evidence of PW.1 was, to some extent, corroborated by that of DW.3, Thabo Matlole, who testified that on the

4/ day of the

day of the shooting he was employed at PW.1's garage. Just before the shooting he had parked the truck which he was using for his work and wanted to do some minor repairs on it. He took a spanner from a tool box at the garage and was removing a bolt from one of the old vehicles in the yard when he heard footsteps of a person passing behind him. He turned round and noticed a man who was not one of the workers at the garage. That man came from the direction of the tarred road and was going among the many vehicles that were parked in the yard. At that time he also noticed, next to a mazda van, three men (obviously the deceased and his two companions). The man who came from the direction of the tarred road went behind the three men. DW.3 then heard explosions "Qhoa! Qhoa!" There were altogether 4 explosions which came in rapid succession.

As he heard those explosions DW.3 looked around and noticed that the man who had just passed behind him was holding something he could not clearly identify. The man was, however, facing towards the three men next to the mazda van. The explosive sounds clearly came from that man.

As the man was making the explosive sounds, the other three men ran away in the direction towards the bus rank but as they were running, one of them fell to the ground. After one of the three men had fallen down and the other two run away, the explosive man who had been following them returned.

DW.3 then ran away and was joined by PW.1 who had just come out of his office. They ran to the southern side of the garage building.

According to DW.3, when he ran to the southern side of the building with PW.1, the latter was just coming out of his office and the explosive man never pointed a gun at him. The question that immediately arises is why then did PW.1 run away. It seems to me DW.3 must be making a mistake here and a reasonable explanation which I accept is the one given by PW.1 namely that he ran away because he saw that person

5/pointing a gun

pointing a gun at him.

Be that as it may, the evidence of DW.3 confirmed that of PW.1 in that soon after they had run to the southern side, the explosive man emerged from the eastern side of the building and they had to run back to the north-western side from where DW.3 also saw that man leaving the premises and heading towards the main tarred road.

DW.2, Lesupi Metsing, another employee at PW.1's garage, testified that on 8th February, 1984 he was cleaning an engine next to the office entrance when he noticed three men arriving in a redish vehicle. After they had come to the garage, the three men went to a mazda van in the middle of the yard, a distance of about 12 paces (indicated) from where he was working. As they stood next to the van, they were talking although he could not follow their conversation for he was busy working. DW.2 then suddenly heard gun reports. Three shots could have been fired but as he was frightened DW.2 was not positive. The gun reports came from the direction of the mazda van and towards the peach tree. The three men who were standing next to the mazda van then ran away in the direction towards the bus stop.

Although in his evidence he said the gun shots were from the direction of the mazda van and towards the peach tree, DW.2 said he did not actually see anyone firing the shots. If he did not see the person who was actually firing in the garage, I fail to understand how DW.2 could have been so certain that the shots were fired from the direction of the mazda van towards the peach tree.

In any event, DW.2 went on to say as the three men were running away, one of them fell to the ground. It was then that he noticed a man approaching him from the middle of the yard. As he approached DW.2, that man was holding a firearm which he pointed at him. DW.2 then quickly took cover behind a vehicle which was parked next to where he was working. He eventually managed to escape and ran across the gravel road that passed on the

6/ north side

north side of the garage building. He sat outside the gate of the Metro Wholesale from where he could see the gunman leaving in the direction of the main tarred road. I shall return to DW.2's evidence in a moment.

Now, coming back to his evidence, PW.1 told the court that before the deceased and his two companions arrived, PW.2, Tlhanka Metsing, had come to the garage asking for a brake-down to tow his vehicle which was giving trouble. As the brake-down was out at the time, P.W.2 had to wait for its return.

After the gunman had left, PW.1 looked around to find what had happened to his employees. He then noticed PW.2 lying flat on the ground next to the peach tree in the garage yard. He called out at PW.2 and asked him whether he had not sustained any injuries. PW.2, however, got up from the ground and suddenly took to his heels without saying a word. It was not until four (4) days later that PW.1 met PW.2 who then told him that when he heard the gun reports he took cover by lying flat on the ground where PW.1 had found him.

PW.1 said, on the the day of the shooting, he had about 6 employees at his garage. He tried to make inquiries from them about the shooting incident but, with the exception of DW.2 and 3 who said they too had been chased around by the gun man, none of the employees appeared to have seen the shooting.

Assuming the correctness of PW.1's evidence on this point, I must say I find it rather strange that people who were working on the garage yard at the time of the shooting could have failed to notice it. No doubt the employees were deliberately concealing the truth from PW.1.

Be that as it may, PW.1 told the court that as PW.2 rose from the ground and ran away DW.3 drew his attention to another person who was lying prostrate on the ground about 4 or 5 paces (indicated) from where PW.2 had been lying. PW.1 went to that person and identified him as the deceased. That was confirmed by DW.3.

7/ The deceased

The deceased was lying about 10 paces (indicated) from his mazda van. Between him and the spot where PW.2 had been lying, there was another E.20 and the peach tree. According to PW.1, the deceased was clearly seriously injured for he was bleeding and obviously very tired.

PW.1 tried to raise the deceased from the ground but found him too heavy. He then left the deceased and rushed into his office from where he tried to phone the police. The police telephone was, however, engaged. He rushed back to where he had left the deceased and with the assistance of one Mike Thoahlane managed to carry him on to his (PW.1's) panel van in which he rushed the deceased to the casualty department of the hospital. No additional injuries were sustained by the deceased whilst being transported to the casualty department.

Having taken the deceased to the casualty department, PW.1 proceeded to the police station to make a report. As he was trying to make a report about the shooting incident, One Sergeant Mochema told him that the culprit had already been arrested and pointed out at the accused person who was then standing behind the counter at the police charge officer.

PW.1 then returned with sergeant Mochema to the casualty department of the hospital. They found the deceased still at the casualty department and he was clearly dead. PW.1 was present when sergeant Mochema examined the injuries on the body of the deceased. He noticed that the deceased had sustained bleeding injuries on the back and the chest.

In the course of the trial, the court was informed by counsel for the crown that the medical doctor who had performed the post-mortem examination on the body of the deceased was out of the country and, therefore, not available to testify in this case. The defence counsel was, however, not opposed to the

8/ to the post-mortem ...

to the post-mortem examination report being handed from the bar as evidence in this case since the contents thereof were not disputed. Counsel for the defence confirmed and the post-mortem examination report, dated 15th February, 1984, was accordingly handed in and admitted in evidence. It was marked Exhibit. B.

Briefly, the evidence disclosed by Exhibit B was to the effect that the deceased had sustained several bullet wounds on the body and consequently died of cardio-respiratory failure.

It was further admitted by both counsels that there was no dispute as to the identity of the deceased in this case wherefor no need to call as witnesses the people who had identified his body before the medical doctor at the post-mortem examination.

On the evidence, I am satisfied that at the material time, there was a man carrying a firearm and firing shots within PW.1's garage yard. The deceased was then hit and injured. It was not really disputed that the deceased died as a result of those injuries.

The only important issue for determination by the court is whether or not the accused was the person who did the shooting and, therefore, fatally injured the deceased. In this regard, the court heard the evidence of PW.2 who confirmed PW.1's testimony that on the day in question, he had come to the garage to hire a brake-down to tow his vehicle. He was told that the brake-down was out but might come in at any time. PW.2 then decided to sit in the shade under the peach tree on the garage yard waiting for the arrival of the brake-down.

It was while he sat in the shade under the tree that PW.2 noticed a person already seated in a squatting posture next to him. He was surprised to see that person seated next to him because he had neither seen or heard him arrive there and contrary to common practice among people in this country that person uttered no word of greeting when he came and sat next to where PW.2 was seated. PW.2 and that person glanced at each other. He could see that he was the accused person and

9/ even noticed

even noticed that his teeth on the upper row had a gap. Shortly, thereafter, PW.2 heard a loud explosion behind him. When he tried to look at the accused to see if he too had heard what he had heard, PW.2 noticed him swiftly passing in front of him. The accused went to the peach tree next to which they were seated and parted the branches with his left hand. On his right hand the accused was holding a small gun of which PW.2 could see only the black barrel. PW.2 then clearly saw the accused firing a shot in the direction of the vehicles in the garage yard. Out of fight he threw himself down and when another shot was fired, PW.2 was lying flat on the ground.

PW.2 confirmed the evidence of DW.3 and PW.1 that when the latter called him out, he got up and ran away. He went to hide next to a house belonging to one Mapula from where he went straight home.

He subsequently went to the police station and made a statement in which he said he could positively identify the accused. He and DW.2 were later taken by two police officers to an identification parade at the Central Prison in Maseru. It was explained to them that they were going to point out at the person they had seen shooting at PW.1's garage if he were among the people on the line up.

When they came to the Central Prison, PW.2 and DW.2 were taken to one room from which they were called out one by one, to the place where the parade was assembled. PW.2 had no difficulty in pointing the accused as the person he had seen seated next to him and firing shots within PW.1's garage premises. Although he could not dispute that the accused was wearing a blue track suit, PW.2 denied that he had been told by the police to point at a person wearing a blue track suit in the line up.

Returning to his evidence, DW.2 confirmed PW.2's evidence that following the shooting incident at the garage he and PW.2 were taken in a police vehicle to an identification parade at the Central Prison in Maseru. According to

10/ him, DW.2

him, DW.2 had told the police that due to fear, he had not clearly seen the gunman and could not, therefore, identify him. He was, nonetheless taken to the Central Prison.

I must say I find it highly improbable that DW.2 had told the police that he would not be able to identify the gunman and yet they took him to the identification parade. That would clearly serve no purpose. In all probabilities DW.2 was being untrustful on this point. However, DW.2 went on to say, immediately on arrival at the prison, one of the police officers who were accompanying them told him and PW.2 that they should point at a man wearing a blue track suit in the line up. DW.2 and PW.2 were then taken to a certain room from where PW.2 was the first to be called to the parade. When PW.2 returned into the room DW.2 himself was called to the parade. He found ten (10) men on the line up. Only one of them was wearing a blue track suit. In accordance with the police instructions, he pointed at that man.

Although he did not know the person he had pointed at the parade, DW.2 was certain that it was not the accused who is now in the dock. After he had pointed out that person DW.2 was taken not to the room but to the vehicle and then back to his place of work.

As has been pointed out earlier, PW.2 categorically denied the suggestion that before he and DW.2 went to point out at the gun man in the parade, the police officers had told them to point at a person wearing a blue track suit. In this regard, PW.2 was supported by PW.4, W/O Ts'otetsi, who told the court that in February, 1984, he was attached to the Traffic Section of the Police Force and stationed in Maseru. He was not involved in the investigations of this case. On 29th February, 1984, he was, however, requested by the C.I.D. police to hold an identification parade at the Central Prison here in Maseru. Two (2) people were to identify a person at the Central Prison.

At about 10 a.m. he and D/Sgt Matamane drove in a police vehicle to the Central Prison. PW.2 and DW.2, the two people who were to identify, were also in that vehicle. Before coming to the prison D/Sgt Matamane explained to PW.2 and DW.2 that following a crime which had been committed at the garage on 8th February, 1984, they were going to the Central Prison to point at a person they knew was involved in the commission of the crime. This was said in the presence and hearing of PW.4.

After dropping them at the Central Prison, D/Sgt. Matamane left and told PW.4 that he would return later. PW.4 then informed one of the prison warders that he had people who were to identify a person. The prison officer then took PW.2 and DW.2 into one of the offices while PW.4 proceeded to a place where the parade was to be assembled. That place was within wall-enclosures and out of view from the room into which PW.2 and DW.2 had been taken.

PW.4 then asked another prison officer to bring the suspect and 9 other people of more or less the same height and complexion. It was only then that the accused and 9 other people were brought to PW.4 who asked them to form a line up. He explained to the accused what charge he was facing and that he could choose any position in the line up. Accused did and said he was satisfied with the way in which the parade was arranged. PW.2 was then called from the room. PW.4 told him to look at the people in the line up and touch the suspect if he could see him. PW.2 went and touched the accused.

According to PW.4, after pointing at the accused, P.W.2 was taken not to the room but to the vehicle which was parked outside. Before DW.2 was called, accused who had been wearing a greenish shirt wished to exchange clothes with another person in the parade. He did not, however, wish to change his position in the line up. He was allowed to exchange clothes with another person but

keep the same position in the parade. When DW.2 was called to the parade PW.4 gave him the same explanation as he did to PW.2. After looking at the people on the parade DW.2 pointed at a person with whom the accused had exchanged clothes. The parade was then dismissed. It may be observed that although PW.4 says after he had pointed out the accused, PW.2 was not take back to the room where D.W.2 was waiting, DW.2 and PW.2 say he was. They do not, however, say when he returned into the room. PW.2 told DW.2 to point at a person wearing a blue track suit. In that event the irregularity cannot, in my view, be fatal to the identification parade.

The evidence of PW.3, Molahli Molahli, was that on 8th February, 1984 he was working for Radio. Lesotho. On that day he went for shopping at one of the shops next to Ma-Africa Motor Garage. He used a Government car to go to the shop. When he got out of the shop and before he could get into his car he noticed two men running from the direction of the garage towards the centre of the town. After the two men had passed, he again noticed another person running towards the town from the same direction i.e. from the Ma-Africa Motor Garage. PW.3 entered into his car and started the engine. The three people who were running away were still within his view.

Before he could engage the forward gears, PW.3 noticed a police officer, Sergeant Mochema, also coming running from the direction of the garage. The police officer immediately opened the door, got into the car and told PW.3 "Let us go, we are chasing that person." He was referring to the person whom PW.3 had seen running from the direction of the garage towards the centre of the town after the other two had passed. The first two persons were by then out of view but the third one was still within PW.3's sight.

PW.3 then drove the car and followed that person

13/ who was

who was running along the T.Y. tarred road. When he came to the cover of Oxford furniture shop, that person turned to the right towards the bus stop. PW.3 also turned his car to the right towards the bus stop. That person who was still within his view then crossed the road and turned towards Co-op Lesotho offices. PW.3 also turned his car and drove in the direction of that person. When he was next to him, PW.3 stopped the car and heard Sergeant Mochema ordering that person to stop. The person complied and placed his hands on the waist. PW.3 clearly saw him as the accused. Sergeant Mochema was already holding a firearm which he pointed at the accused. He ordered him to hand over his gun and the accused did hand over a revolver which Sergeant Mochema took possession of. PW.3 then got out of the car and opened the rear door. The accused got into the car and PW.3 immediately drove straight to the police charge office. He was present at the charge office when Sergeant Mochema handed the accused and his revolver to the police at the Central Charge Office. Accused's revolver was also opened in his presence when PW.3 noticed 4 empty shells being taken out.

PW.5, Major Manamolela, testified that on 8th February, 1984, she was at her office at the Police Headquarters in Maseru when she received a report following which she rushed to the Central Police Charge office in Maseru. She arrived at the charge office simultaneously with PW.3, who was with the accused and Sergeant Mochema. Sergeant Mochema who is now late then handed to her a .38 special revolver with the explanation that he had taken the revolver from the accused. When she opened it, PW.5 found four (4) empty shells and one life bullet in the revolver. She took possession of the revolver, the four (4) empty shells and the life bullet. She subsequently sent the revolver and the (4) empty shells to a ballistic expert in Pretoria in the Republic of South Africa for examination. Later on,

14/ the revolver

the revolver and the four (4) empty shells were returned together with ballistic expert's report. The revolver, the four (4) empty shells, the live bullet and the expert's report had since been in the police custody. She formally handed them in as exhibits in her evidence and were respectively marked Exhibits 1,2,3 and A.

According to Exhibit A which was duly sworn to by the Ballistic Expert Detective Sergeant Gary Charles Arntsen of the South African Police Force in the Republic of South Africa, both Exh. 1 and 2 were subjected to expert examination. The results were that Exh.1 was in working conditions and Exh. 2 had been fired from Exh. 1.

In his evidence, the accused told the court that his home was at Clemont in Durban (Natal) in the Republic of South Africa. In December, 1983 he and his wife left the Republic of South Africa for a visit in Lesotho. They entered Lesotho through Ficksburg Boarder post. After crossing the boarder they went to accused's maternal grandmother in the village of Ha Nkuke at St. Monica's in the district of Leribe. After greeting the grandmother, the wife left on the same day for her maiden home at Chebiri village in the Mohale's Hoek district while the accused himself remained at St. Monica's. However, on 8th February, 1984, the accused left St. Monica's to go and see his wife in Mohale's Hoek. He was travelling by taxis. On the way he got off the taxi and went to see a friend of his one Jersy Ramakatane at the village of Ha Mabote on the out skirts of Maseru. He was running short of money and wanted his friend to advance him with some cash for paying the taxi fares. He was given R50. Jersy Ramakatane then took him in his car and dropped him at Ken Turkey where he (accused) wanted to buy chicken and some other food stuff for his wife in Mohale's hoek. Ken Turkey shop is opposite a certain school of which he did not know the name.

It may be mentioned that in Maseru there is only one Ken Turkey shop which is next to Ma-Africa motor

15/ garage

garage opposite the Lesotho High School. The court, therefore, takes judicial notice that the school which the accused is talking about is the Lesotho High School.

Having bought the chicken and some other food stuff at Ken Turkey, the accused then walked to the bus stop in Maseru. He never went to a garage with many vehicles. He did not know PW.2. From Ken Turkey shop, he walked along side the main tarred road leading from T.Y. When he came to the robots, the accused turned right and went to the bus stop, where a policeman arrested him saying he suspected him of having killed a person. He believed the policeman picked on him because he was not wearing a blanket. He walked with the policeman to the charge office. PW.3 was, therefore, telling a lie when he said he drove him in a car to the police station. The accused said he did not have a firearm with him and did not even know what it was. PW.3 was again deceiving the court when he testified that he (accused) had handed a revolver to the police officer.

According to the accused, he did know PW.5 and had seen her for the first time when she and another police officer took him in a car to the garage with many vehicles next to Ken Turkey shop.

Accused told the court that he was kept at the police charge office for about 2 days during which he was assaulted by the police officers in an attempt to force a confession from him. He was then taken to court, hospital and finally the prison. He confirmed that whilst at the prison, the identification parade was held when PW.2 pointed at him. After he had changed his clothes with another person in the parade, DW.2 also came but pointed at the person with whom he had changed clothes. DW.2 and PW.2 could have been told by the police how he was dressed and that he had two front teeth missing on the upper row of his teeth.

I do not see how, even before they had met and seen him, the police could have known the way in which the

16/ accused would

accused would be dressed at the parade. I have no hesitation, therefore, in rejecting the suggestion that the police had told PW.2 and DW.2 how the accused was dressed.

The accused conceded that prior to the shooting incident he had had no dealing with the Lesotho Police. He did not know PW.2, PW.3 and PW.5. He had never clased in any way with those witnesses and no grievances existed between him and the witnesses.

That being so, I find it difficult to imagine any good reasons why the witnesses should fabricate against the accused in this case. They cannot, even by any stretch of imagination, be said to have an interest or bias adverse to the accused.

The accused suggested that the police officer who arrested him at the bus stop picked upon him because, as a person from outside Lesotho, he did not put on a blanket. Although it is often said the Basotho people traditionally put on blankets, anyone who has been at the bus stop in Maseru will know that that place is milling with hundreds and hundreds of people who are not wearing blankets. The accused's suggestion cannot, therefore, hold water.

In my view, the real important question is whether or not the witnesses who say they identified the accused had proper opportunity to do so. PW.2's evidence is that at about 12 noon on the day in question, he noticed the accused already seated in a squatting posture next to where he was seated in the shade under a peach tree. His attention was attracted to the accused by the fact that he had not seen or heard him coming. He only noticed him already squatting next to him. Contrary to common practice among the local people, the accused did not even greet him when he came and squatted next to him. He, therefore, looked at the accused and when he also looked at him, PW.2 noticed accused's rather conspicuous gap on the upper row of his teeth. He was then startled by an explosive sound and when he tried to look at the accused to find out if he too had heard the explosion, he noticed the accused quickly passing in front of him,

17/ parting the

parting the branches of the peach tree and firing a shot with a gun he was holding in his hand.

It seems to me under the circumstances, PW.2 did have a good opportunity to observe the accused and was testifying to the truth when he said he positively identified him.

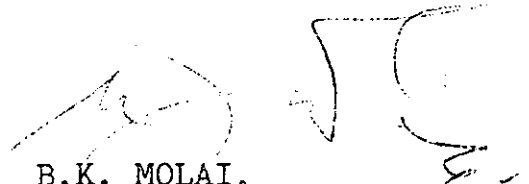
PW.3's attention was also attracted by the sight of two people followed by a third running away. Then a policeman hurriedly got into his car and told him to chase after the third person who was still within his view. He drove the car and followed that person who never got out of his view until he stopped the car next to him. That person was immediately disarmed of a revolver which he had in his possession and put into the car. PW.3 then drove to the police charge office where the person whom he clearly identified as the accused was handed in.

Although the accused said he walked to the police station and was not taken there in PW.3's car, the evidence of PW.3 was in a way corroborated by that of PW.5 who told the court that she arrived at the charge office simultaneously with PW.3 who was with the accused and the late Sgt. Mochema. I find no good reasons to doubt PW.3's evidence supported by that of PW.5 on this point and I am prepared to accept it as the truth.

Considering the evidence as a whole, I am satisfied that the accused is the person who was carrying Exh. 1 from which shots were fired on the premises of PW.1's garage on 8th February, 1984. There is no evidence that besides the accused any other person carried a gun from which shots were fired. The question whether or not the accused was the person who did the shooting and, therefore, fatally injured the deceased must in my judgment be answered in the affirmative.

There is no doubt in my mind that by shooting the deceased several times with a lethal weapon such as Exh. 1, the accused had the requisite subjective intention to kill. I accordingly convict him of murder as charged.

My assessor entirely agrees with this decision.



B.K. MOLAI,
JUDGE.

29th October, 1984.

For Crown : Mr. Kalamathan,
For Defence : Mr. Sello.

EXTENUATING CIRCUMSTANCES

The court has rejected as false the Defence's story that the accused did not kill the deceased and accepted as the truth the crown version that he did. Consequently the accused was convicted of the murder of the deceased.

Having convicted him of murder, the question that now arises is whether or not there are any factors, connected with the commission of the crime, tending to reduce the moral culpability of the accused. In this regard the court has had the benefit of able and eloquent addresses from counsel on either side.

It is trite law that the onus is on the accused to establish, on a preponderance of probabilities, the existence of extenuating circumstances. In the present case the accused himself did not give evidence on extenuating circumstances. However, the defence called two witnesses, 'Manchakha Tsosane and Jersy Ramakatane to testify in that regard. The gist of their evidence was that to the best of their knowledge, the accused and the deceased did not know each other.

According to her evidence, 'Manchakha Tsosane lived in Butha-Buthe and was the wife of a certain Thabo Eliot Motloug. After 12 midnight on 31st December, 1983, the deceased, Oscar Lebohang Leluma, came to her house desperately looking for her husband, Motloug, who was here in Maseru at the time. When he could not find Motloug, the deceased left. 'Manchakha Tsosane, to whom the deceased was well known, believed that the latter was leaving for Maseru. She, therefore, told the deceased to give her regards to her husband, Motloug. The deceased, however, told her that she would never see her husband again. On Monday, 2nd January, 1984, she received the news concerning the death of her husband. The matter was reported to the police but as far as she was aware, the murderer has not been traced up to now. She was positive that she did not know the accused person who was a complete stranger to her.

20/ In his

In his evidence, Jersy Ramakatane told the court that he had been sitting in the court room throughout the proceedings in this trial. His evidence must, therefore, be approached with caution.

He said he was a businessman in Maseru. He knew the accused and the late Motlounq who was his partner in business. The late Motlounq was renting a room at his (Ramakatane's) place at Ha Mabote on the outskirts of Maseru where he stayed while in Maseru. Although he knew him, the deceased was not a friend of his. The deceased was, however, a friend of the late Motlounq.

Following certain reports, the details of which were clearly hearsay and, therefore, inadmissible evidence, Ramakatane went to the mortuary where he found the dead body of Motlounq. He noticed about 4 bullet wounds on the body.

'Manchakha Tsosane also reported to him what had happened at her house in Butha-Buthe on the night of 31st December, 1983. He informed the police about what 'Manchakha Tsosane and other people had reported to him.

Notwithstanding the information he gave to the police, the latter have, to the best of his knowledge, never detained the deceased for interrogation in connection with the death of Motlounq. However, because of what 'Manchakha Tsosane and other people had told him, Ramakatane believed that Motlounq had been killed by the deceased, Oscar Lebohang Leluma. That was also the general belief among the acquaintances of the late Motlounq.

Although it was not clear from the evidence of Ramakatane whether it was before or after the burial, the accused who was also a friend of Motlounq did come to him before the 8th February, 1984 when he and other people "obviously" said something concerning the death of Motlounq.

I am not so sure that I understand what the witness means by the term "obviously". Whatever that means the accused who gave evidence in his defence never told the court that following the death of Motlounq he had said anything of the sort to Ramakatane.

21/ In his able

In his able address the defence counsel referred the court to a number of authorities, both in the Republic of South Africa and in Lesotho, all of which indicated that where an accused person had killed a deceased following his belief that the latter was causing harm to him or a close relative of his, extenuating circumstances were found to exist. (Rex v. Fundakubi and Others 1948(3) S.A. 810, Mokola Ramone v. Rex 1967-70 LLR. 31, S.v Ndlovu 1970 (1) S.A. 430, Rex v. Rai Manyangaza and Other 1971-73 LLR. 171 etc.)

It is to be observed, however, that in the present case, there is no evidence that the accused is a relative of Motloug nor is there any evidence that he had a belief that the deceased was causing harm to him or a close relative of his. All that the evidence of Ramakatane, if it were to be believed, points to, is that the accused was a friend of Motloug. The decisions to which this court has been referred are, therefore, no authority that even where the belief is that the deceased had killed a friend the court should find that extenuating circumstances exist.

It was argued, however, that the underlying philosophy in all these decisions was not so much that the deceased had harmed the accused or a relative of his but that he had harmed a beloved one and the principle should, therefore, be extended to cases where a belief that the deceased had harmed a friend existed.

Assuming for the sake of argument that it is so, the difficulty in this case is, however, that the accused has taken the line that he did not kill the deceased and the court found otherwise. The accused has not gone into the witness box after conviction to tell us that Motloug was his friend or beloved one and what his state of mind was after he had learned of his death.

I do not conceive it to be the duty of this court to speculate as to what the accused's state of mind was at the

22/ time of the

time of the killing. The one person who could have enlightened the court and whose vital interest it was to do so was the accused who has, however, chosen to conceal the truth. That being so, the argument does not, in my view, advance the case for the accused any further.

It was further argued that the court should take into consideration the probability that the accused was not alone in the commission of this offence. He was with some other persons and he played a minor role.

This argument was based on the evidence of PW.2 who had said while he was sitting in the shade of the peach tree on the garage premises he heard a gun report behind him. It was contended that someone other than the accused himself must have fired that shot and probably fatally injured the deceased. I am not persuaded. The evidence of PW.2 was that when he heard that first shot he tried to look at the accused who had been squatting next to him but at that time noticed him swiftly passing in front of him and parting the branches of the peach tree from where he fired another shot with the gun he was holding in his hand. It seems to me, therefore, that at the time PW.2 heard the first shot behind him, the accused was no longer squatting next to him. He was already on his feet and that explains why the moment PW.2 turned to him, the accused was already passing in front of him.

The second ground on which the argument was based is that according to the post-mortem examination report, the deceased had 5 bullet wounds. The firearm alleged to have been found on the accused had the capacity to load five rounds of ammunition. When it was opened, only four (4) empty shells and a live bullet were found thus suggesting that only four shots had been fired from the gun. If the accused fired only four shots, he could not have inflicted five (5) bullet wounds on the deceased. Another person must, therefore, have fired the fifth shot which may well have caused the fatal injury on the deceased. The argument that the deceased had sustained five (5) bullet wounds was

based on the fact that according to the post-mortem examination report, there seems to have been 5 entry and 5 exit wounds on the body of the deceased.

It may be mentioned that at the time the post mortem examination report was admitted in evidence and handed in as an exhibit, I pointed out the difficulty involved in handing in from the bar documents such as this post-mortem examination report which are, more often than not, written not only in scientific language but also in an illegible handwriting and asked that it be explained to the court. None of us could explain with any certainty what is meant for instance, by "31CS" and "81CS" or "T12" and "L2". Only the doctor who performed the post mortem examination could explain this and how the 5 entry and exit wounds were made on the body of the deceased. Particularly so because according to Ramakatane, there were only four (4) bullet wounds on the deceased.

Be that as it may, there was no doubt in my mind that considering the totality of the evidence particularly that of DW.3 who actually saw the gun man firing shots in the direction of the deceased and the two people with whom he was going only one person fired the shots. Wherefor I found as a fact that no other person beside the accused had fired the shots that fatally injured the deceased.

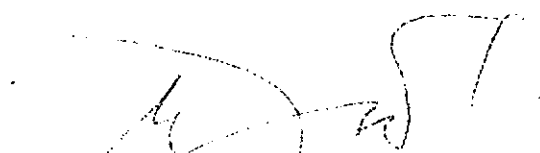
If there were people with whom the accused was committing this offence, it may be argued that they were the two people with whom the deceased was going. It is, however, unlikely that either of those people actually shot at the deceased for DW.3 told the court that as the shots were fired, he positively saw those two people running away in the same direction with the deceased who shortly thereafter fell to the ground. In my view the deceased could not have run away together with the people who were shooting at him. If the argument is intended to suggest that in committing this offence the accused acted in concert with the two men with whom the deceased was going then on the evidence it would appear that the role played by the two men was merely

24/ to decoy

to decoy the deceased to the garage where the accused would do the actual shooting. I am unable, therefore, to accept the argument that the role played by the accused in the commission of this crime was a minor one.

In the light of all that has been said, it is clear that I take the view that no extenuating circumstances exist in this case and the proper verdict is, therefore, that of guilty of murder with no extenuating circumstances.

My assessor entirely agrees with this finding.



B.K. MOLAI,
JUDGE

20th November, 1984.

For Crown : Mr. Kalamathan
For Defence : Mr. K. Sello.