CRI/A/1/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

Seboka Mpe **Appellant**

and

Rex **Respondent**

J U D G M E N T

Delivered by The Honourable Chief Justice, Mr. Justice J.L. Kheola on 11/9/95

The appellant was charged with the crime of contravening section 3 (2) (a) read with section 43 of the Internal Security Act No. 17 of 1966 (Arms and Ammunition). It being alleged that upon or about the 21st day of September, 1989 and at or near Corn Exchange in the district of Leribe the said accused did unlawfully have in his possession a firearm, to wit AK47 rifle and 18 rounds of ammunition without a certificate in force at the time.

He pleaded not guilty. At the end of the trial he was convicted and sentenced to pay a fine of M70-00 or 7 months' imprisonment in default of payment.

The appellant is now appealing to this court against the conviction on the following grounds:

1. The conviction is against the weight of evidence.

2. Taken together with that of the respondent's evidence, the evidence and the story of the appellant may reasonably possibly be true.

3. There is no basis upon which the appellant's evidence and that of his witnesses was rejected. This is more so in casu when there is no comment about their evidence except a cursory one on that of the appellant.

The evidence of P.W.1 Trooper Rankhelepe, was to the effect that following the information they had received, on the cede September, 1989 they went to the home of the appellant at Mapoteng. He was accompanied by five police officers. They arrived there while it was already dark. When they approached the home of the appellant they separated and approached the house from different directions. He approached the house in the direction of the front door. There was light inside the house. He knocked at the main door which was left ajar. He found three men sitting at a table. They jumped with surprise because he (P.W.1) was holding a big SLR rifle. The appellant pulled a big gun (rifle) that was lying on the table but it fell on the floor. Two people who were with the appellant took to their heels. He followed them. He suddenly heard three gun reports behind the house. He took cover and went back to the house. He met the appellant at the door holding a big rifle. He (P.W.1) pointed at him with a pistol and took the big rile from him.

Thereafter he (P.W.1) heard many gun reports but kept on holding the appellant. He then saw the lights of a vehicle and

rushed to it with the appellant. He discovered that it was the police vehicle and found his colleagues there. He noticed that the appellant was bleeding from the leg. He asked him about the injury but the appellant did not answer him.

When he asked him about the rifle the appellant explained but did not give him anything. They returned to their Maputsoe police station with the appellant being under arrest. He examined the rifle and found that it was an AK47 rifle with serial No. 1953 but there were other numbers which were not part of the serial number. There were eighteen rounds of ammunition. The appellant was taken to Hlotse Hospital for medical treatment.

Under cross-examination P.W.1 insisted that the appellant had only one wound on the leg. He denied that he had multiple injuries. He denied that they were accompanied by a civilian named Manama Polaki when they arrived at the home of the appellant. P.W.1 says that on the following day i.e. the 22nd September, 1989 or on the 23 September, 1989 the appellant was taken to the magistrate's court and was remanded into custody.

P.W.2 Detective Trooper Tshabalala confirmed part of P.W.1's story. He was not present when P.W.1 found the appellant in the house. He says that when they approached the house they did so from different sides. He was from the back. There was some shooting before he saw P.W.1 and the appellant standing somewhere near the house. He went to them and saw that P.W.1 was already holding an AK47 rifle which he did not have in his possession

when they left for the home of the appellant. Until he parted with P.W.1 when they approached the house of the appellant P.W.1 did not have an AK47 rifle in his possession.

P.W.2 says that when he came to P.W.1 and the appellant that night he noticed that the latter had a wound on the leg. He denied that the appellant had three injuries or wounds that night.

The appellant's story was that on the cede September, 1989 at about 6.00 p.m. he was sitting at his verandah with his wife, his five children and one Lefa Hlajoane who is the headman of that village. P.W.1 and one Manama Polaki arrived. They ordered him to raise both hands and they were pointing guns at him. They escorted him to some place out of his yard. During the escort they shot him three times. He was taken to Maputsoe police station and spent the night in a cell. On the following morning he was taken to his house where an extensive search was made but nothing was found.

After the search he was taken to Hlotse police station and then to Hlotse Hospital. He was admitted for a few days and then transferred to Queen Elizabeth II Hospital and remained there for three weeks. After his discharge from the hospital he went to his home and remained there for a week before he was again arrested by the police. He says that the AK47 rifle (Exhibit "1") was not found in his possession but P.W.1 was already holding it when he arrived there.

The version of the appellant is substantially corroborated by headman Lefa Hlajoane regarding the shooting of the appellant by P.W.1 and Manama Polaki.

The learned magistrate who convicted the appellant has not given any reasons for her judgment. What she did was to give a summary of the evidence led by the prosecution and the defence and suddenly returned a verdict of guilty. She has failed to give reasons why she rejected the evidence of the appellant and his witnesses and why she accepted the evidence by the prosecution. She blames the appellant for his failure to support his story with a medical report to show that he had one injury on the foot. It seems to me that the learned magistrate misdirected herself as to upon whom the onus of proof is in a criminal trial. The onus remains on the prosecution throughout the trial.

In R. v Difford, 1937 A.D. 370 at p. 373 Greenberg,J. said:

> "... no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

Similarly in R. v M. 1946 A.D. 1023 at p. 1027 Davis, AJA. said:

> "...the court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there

is a reasonable possibility that it may be substantially true."

In the present case the onus was on the prosecution to prove that the appellant had only one wound on the foot. It was the police who took the appellant to Hlotse Hospital. One wonders why they did not produce a medical report which, under normal circumstances, would be found in the police docket.

It seems to me that the story of the appellant was, reasonably possibly true. He ought to have been given the benefit of doubt.

It is correct that in cross-examination of the Crown witnesses the Defence Counsel did not challenge the allegation that the appellant was found in possession of a firearm. In Rex v 'Mota Phafane 1980 (2) L.L.R. 260 it was held that it is important for the defence to put its case to the prosecution witnesses as the trial Court is entitled to see and hear the reaction of witnesses to every important allegation. But failure to put his case does not always imply an acceptance of the evidence of the Crown Witnesses. The evidence for the defence is entitled to the same careful consideration as if the elements of the defence case had been put to the witnesses for Crown.

In the present case the learned magistrate failed to give careful consideration to the defence evidence as if the elements of the defence case had been put to witnesses for the crown.

For the reasons stated above the appeal is allowed. The appeal fee must be refunded to the appellant.

J. L. Kheola.

J.L. Kheola

CHIEF JUSTICE

11/9/95