CRI/T/102/99

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX

vs

TSOAKO TOTA

JUDGMENT

Delivered by the Honourable Mrs Justice K. J. Guni
on the 28th September 2000

The accused is charged with two counts. The first count is the charge of the crime of murder. It is being alleged that on the 17th July, at HA MOTETE, in the district of BUTHA-BUTHE, the accused did unlawfully and intentionally shoot and kill MALEFETSANE POTSANE. To this charge, the accused pleaded NOT GUILTY. Therefore a plea of Not Guilty was entered on his behalf. In terms of section 162 (1) (a) CRIMINAL PROCEDURE AND EVIDENCE ACT N0.9 of 1981, the accused tendered a plea of guilty to a crime of CULPABLE HOMICIDE

of which he might be convicted on this charge of murder. This plea was in accordance with his counsel's instructions. The Crown Counsel accepted the plea which was therefore entered on behalf of the accused.

The second count is the charge of the crime of contravening Section 3. (2) (a) of THE INTERNAL SECURITY (ARMS & AMMUNITION) ACT N0. 17 of 1966. It is being alleged that the accused did intentionally and unlawfully acquire and had in his possession a firearm to wit: 7.65 pistol and two rounds of ammunition, there at HA MOTETE, in the BUTHA-BUTHE District, without holding the said firearm's certificate or licence. To this charge the accused pleaded GUILTY. This plea was in accordance with his instructions to his Defence Counsel and accordingly accepted by the Crown Counsel. The Court entered a plea of guilty on behalf of this accused in respect of Count 11.

The Defence Counsel, Mr. Lesutu indicated to the Court that the accused accepts as established all the facts stated in the PREPARATORY EXAMINATION (P.E.) record. The P.E. record was accordingly read into the machine and therefore became this trial court's record.

The facts of this case as gleaned from that (P.E.) record are briefly as follows:-

It is common knowledge that stock theft is a very prevalent offence in Lesotho, particularly in the Mountain areas. This accused acquired this weapon, the subject matter of count II, for the sole purpose of protecting himself and his stock against stock thieves. The accused was offered to buy this gun only in June 1997, a matter of a few weeks before the commission of the offences with which he stands charged. He was still contemplating to regularise his recent acquisition of the said gun when this most unfortunate incident happened, on 17th July 1997.

The accused had a hired herdboy by the name MPHENG. The accused received a message through MPHENG from two fellow villagers by the names THOAI and PASEKA. There is a Land dispute between this accused and these two fellow villagers. These two gentlemen instructed MPHENG to inform the accused that wherever they meet him (meaning the accused), they will kill him if he had not by then killed them. (Presumably for that unnumbered site in dispute). That week after giving MPHENG the above message for the accused, PASEKA left their village for QWA-QWA, in the Orange Free state, The Republic of South Africa where he works. THOAI also left their village, went down to The Town of BUTHA-BUTHE. Apparently the accused had taken that message to be a warning or threat.

On Sunday the 17th July 1997, at night, although no exact time is mentioned, MPHENG sent an unnamed child to this accused to inform him that the two gentlemen in question are back in the village and that MPHENG has proceeded to the chief's place. We do not know the reason of MPHENG's visit to the chief's place that night because the court was not given that reason. This accused feared for MPHENG's personal safety because once before the two men in question way laid MPHENG and sprang a surprise attack upon his person. It occurred in the accused's mind that such an attack may recur. He also worried about his own personal safety. The fact that MPHENG was out there alone in the night, in view of the presence, in the village, of the two men who have promised to kill MPHENG together with, this accused, worried this accused. It crossed this accused's mind that under the cover of darkness, those men (THOAI & PASEKA) might just surprise MPHENG with an attack on his way from the chief's place that night. Armed with his newly acquired loaded, 7.65 pistol, the accused together with the child who brought him the message that the two men are back in the village, went looking for and trying to meet and assist MPHENG on the way from the chief's place.

Just as the accused and that child got out of the village and were entering the fields which bordered the village, the accused heard a cry. Someone was shouting

"Jooe, Jo nna ka shoa oe !!! The accused thought that cry was from MPHENG. The accused became convinced that MPHENG has fallen into the hands of THAI and PASEKA who may be engaged in an attack upon MPHENG's person. He then ran towards the direction where the cry came from. He then saw three men. He immediately presumed that it must be MPHENG and the two men who are attacking him. Acting, purportedly for MPHENG's and his own self defence he fired shots at one of the three men. He was certain he had fired at THOAI. He was astonished when PW1 whom he knew very well asked him why he shot at them. The accused then realised he had shot a wrong man, not THOAI nor his co-conspirator. He replied to PW1's enquiry thus: " I thought you were somebody else". The deceased, PW1 and their companion were from a party where they had been drinking. They must have been moderately drunk. They must have been excited and loudly happy. As the three men went on their way home which is the same village where this accused and his two land claim adversaries reside, one of them shouted the cry which attracted the attention of this accused who mistook that cry for help from MPHENG whom he feared had fallen into the hands of their enemies who would be engaged in the murderous attack upon MPHENG's person.

This accused, believing that it was MPHENG who was crying and the deceased and his companion were attacking MPHENG, he, (the accused,)fired the shots

which fatally injured the deceased. The shots were fired in the mistaken belief that MPHENG's life and that of the accused were in immanent danger from the attack by the deceased.

For the accused to succeed in his defence of self defence, the attack must be immanent or must have already commenced-GIDEON LETELE v Rex CRI/A/149/1968. Before the defence of self-defence becomes available to this accused, the deceased himself must have threatened by word or deed the life of this accused. There is nothing in the facts of the case which shows this court that the deceased did or said anything which seriously threatened the personal safety of this accused or those under his protection to this accused. GIDEON LETELE v Rex [Supra] R v MIYA AND OTHERS 1966 (4) SA 274.

Acting in anticipation of an immanent attack, may afford some measure of protection: The accused mistook the identity of the people involved in a play. He in fact made a number of errors. First, he thought those people were fighting when in fact they were playing. Secondly, he thought their play was an attack on the person of MPHENG. There was no attack and MPHENG was not even present at the scene. The third error was the identity of the assailants. There were no assailants. The people the accused wanted to kill [before they could kill him

according to the message they sent to him] were not present there.

It would appear that the accused was obsessed with fear for his life from those would be assassins . He was seeing them in his mind. In his own mind, he wanted, almost desperately, to see them, that night, attacking MPHENG on his way from the chief's place. We are here, dealing with the accused's beliefs at the time he acted as he did. The jury in an American case of DIYALO acquitted the NEWYORK POLICEMEN, on a charge of murder of a young man whom the police shot when he put his hand in his pocket while holding his door handle in order to open his door. The jury believed the defence by the policemen, when they claimed they sincerely believed DIYALO was putting his hand in the pocket to get out the gun. DIYALO had no gun. He only had his house keys in his pocket. The NEWYORK POLICE are trained and very skilled professionals. Their belief earned them an acquittal. This accused is an ordinary Peasant MOSOTHO farmer. He made a great mistake and committed the most regrettable error. He acknowledged his mistake right from the start. He has never tried to cover his bad mistake.

In mitigation his Counsel described the deceased as his friend. This implied that there were good relations between accused and deceased. Immediately he was

released on bail, the accused went and started to mend the rift he has caused between himself and the deceased's family. He indicated before this court that almost all the members of the deceased's family have forgiven him except the deceased's widow. The widow is unconsolable. This is understandable. She is now left alone to support herself and their children because of the irresponsible actions of this accused. The accused has offered to pass ownership of (15) fifteen of his twenty-five sheep to the widow. Paying part of what is regarded as compensation for the loss he caused to the deceased's family must earn the accused a reduction of the term of imprisonment that should be imposed upon him. MPAKA MOSALA v Rex. 1998 LESOTHO LAW REPORTS AND BULLETIN 1997 - 1998 page 240 particularly at page 247. This sentiment was expressed by the Judge of Court of Appeal of Lesotho in the above cited case.

As far as illegal possession of a firearm is concerned, the accused although he had no certificate authorising him to acquire and possess the said firearm, he had a valid and satisfactory reason to acquire and possess the same. He had not acquired that gun in order to perpetrate unlawful actions. He has not abused or misused that weapon. What happened was a very bad accident due to some degree of negligence. The accused had a right to protect his tock against the stock thieves and also for his own protection. It was observed in the case of PHAPANO

KHANYAPA AND ANOTHER v Rex. THE LESOTHO LAW REPORTS & BULLETIN 1997 - 1998 Page 8 at page 16, by AJA BECK as he then was, that the maximum penalty provided by Section 43 (1) of THE INTERNAL SECURITY (ARMS AND AMMUNITION) ACT N017 of 1966, should be reserved for most extreme cases of contraventions of Section 3. (2) of the same Act. The accused in that case had committed the most callous murder. In broad day light PHAPANO pumped no less than 20 bullets into the body of the deceased who had done nor said anything provocative to the accused. He had known and targeted the deceased whom he had successfully identified. The accused in our case has been convicted of a lesser offence than murder. This court should be more lenient to

an accused who has been convicted of lesser offence and has good reasons for having in his possession the said firearm.

SENTENCE

Accused Sentence

Count I 4 years imprisonment, 2 of which are suspended for a period of 3 yrs on condition that within that period the accused pass possession of 15 sheep to the widow of the deceased as part of compensation.

Count II (M200.00) two hundred maloti or (6) six months imprisonment. Both sentences to run consecutively.

The gun (7.65 pistol with two rounds of ammunition) is forfeited to the crown. The order for forfeiture is suspended for a period of three years on condition that the accused regularise his possession of the said gun by obtaining the firearm licence with which he can come to claim this gun from the Registrar of this court where the gun will be kept for the period of three years.

K.J. GUNI

JUDGE

For Crown : Ms Makoko

For Defence: Mr. Lesutu