CRI/T/112/96

IN THE HIGH COURT OF LESOTHO

In the matter between :

REX

vs

THIBELLO SEKAJANE **1st ACCUSED**

MPATAI SEKAJANE **2nd ACCUSED**

JUDGMENT

Delivered by the Honourable Mr. Justice M.L. Lehohla on this day of 17thDecember, 2001

The two accused stood trial before this Court charged on three counts of

(1) Murder

(2) Assault ; and

(3) Contravention of Section 3 (1) of the Internal Security (Arms and Ammunition) Act No.17 of 1966.

The charges read as follows:

In respect of Count 1 the crown asserted that the two accused are guilty:-

"In that upon or about the 18th day of September 1993 and at or near Likalaneng in the district of Maseru the said accused each or the other or both of them unlawfully and intentionally killed Sekhoane Tjotji".

In respect of Count II the Crown alleged that the two accused are guilty:

"In that upon or about the 18th day of September 1993, at or near Likalaneng in the district of Maseru, the said accused, each or the other or both acting unlawfully and intentionally pointed a fire-arm

at Mookho Mahana".

In respect of Count III it was alleged that on the same day and place covered in the other two Counts above the said accused are guilty "one or the other or both of them" in that they "were found in possession of a fire-arm in respect of which they did not hold a fire-arm certificate in force at the time".

The accused pleaded not guilty in respect of all the offences set out in the charges preferred against them.

Thereupon the Crown in order to prove its case sought to rely on both oral evidence and admitted evidence set out in the preparatory depositions of witnesses who testified at that stage.

The admitted evidence consisted of the evidence of :

PW 4 LEKHETHO TJOTJI

PW 5 D/Sgt BABI

PW 6 MAJOR TELUKHUNOANA whose depositions were accompanied

by a forensic report handed in marked Exhibit "A"

There was also handed in and marked Exhibit "B" the post-mortem report of a pathologist who performed the autopsy on the deceased. Unfortunately it is not possible to decipher his/her name from the signature appended to Exhibit "B".

The report indicates that the post mortem was conducted on 21st September, 1993. The deceased was an African male adult whose body was identified to the pathologist by one Lekhetho Tjotji (PW4).

The cause of death was described as bilateral hemopneumo thorax and hemoperitoneum caused by 2 cm shot wounds.

The external appearance of the deceased showed multiple puncture wounds and burn marks measuring about 2 mm in width. Five of these were on the left front chest. Two on the right abdominal wall. Another five on the front of the right arm. Burn marks support PW1's evidence that shooting was effected at close range for she saw the accused and the deceased next to each other when the gun report was heard and the deceased fell to the ground.

Regarding the lungs the pathologist discovered that there was penetration of the upper left lobe consisting of three perforations. There were also two perforations on the upper right lobe.

The liver had sustained two lacerations of about one centimetre on the upper surface of the right lobe.

The admitted evidence of PW4 was mainly as to the role he played as the deceased's younger brother who identified the deceased's body for purposes of being examined by the pathologist at Queen Elizabeth II hospital on 21st September, 1993.

The admitted depositions of PW5 D/Sgt Babi is to the effect that at the time he was attached to the CID branch of the L.M.P. and stationed at Thaba Tseka. He deposed that he knew the two accused before Court. He came to be involved in their matter after one Ntaba Leboela came to him at the police post to give him a report. Thereupon he set out for Tiping in the Likalaneng area where he found a crowd of people.

PW5 found the deceased Sekhoane lying down on his right side facing

down the slope. The deceased was identified to PW5 by Ntaba Leboela and the chief of the place. The deceased had laid dead.

PW5 undressed the deceased and examined him. It was in this connection that PW5 observed multiple wounds on the chest of the deceased which he concluded could have been caused by pellets.

PW5's depositions firmly indicate that his investigations led him to the two accused before court. He deposed that he demanded from the accused without success the shells corresponding to the pellets which had hit the deceased. He singled out accused 1 as the one who handed to him the shotgun which was placed before the court below and described its serial number as PO7880. He deposed that he seized the gun and kept it. The gun was duly handed in together with its two pellets and collectively marked Exhibit "1" in the Court below.

PW5 deposed that these two pellets had been found in the deceased's body during the post-mortem.

It was PW5 who conveyed the deceased's body from Tiping via the Marakabei Police Post **en route** to Queen Elizabeeth II mortuary. He deposed that

the body sustained no additional injuries while being so conveyed in a van belonging to the Roads Department.

Having interrogated accused 1 and obtained an explanation from him PW5 deposed that he arrested accused 1 and charged him with murder.

PW5 further investigated the question whether accused 1 was in lawful possession of the firearm but discovered that accused 1 had no licence to cover his possession of this gun which was lawfully owned by his brother Molebatsi Sekajane.

PW5 seized Molebatsi's licence but on his transfer to Thaba Tseka returned it to accused 2.

The admitted depositions of PW6 Major John Tlhabi Telukhunoana revealed that this witness was a member of the LMP working at the Technical Service Department. His duties entailed examination of firearms suspected to have been used in the Commission of Crimes. This witness has had a fairly broad training in this field ranging from instructions received from Lerotholi Poly-Technic in Lesotho to Kerven Street College of Technology and Irish Forensic

Science Laboratory both obtained in Ireland.

This witness handed in a report he had prepared on examination of the firearm. The report was marked Exhibit "A".

In brief PW6's report first gives an explanation that he obtained training in microscopic examination of fired bullets and cartridge cases, firearms mechanisms, photomicrography and restoration of obliterated numbers on metal.

Next he indicated that on 28th September, 1993 D/Tpr Moletsi handed him a shot-gun S/No. P07880 together with two lead shots for examination. He duly examined them.

He found the shotgun to be in good working condition. He also found that it had previously been fired though how long ago could not accurately be determined.

The two lead shots were found to be of size three (3) shot.

The admitted depositions were read into the recording machine and thus

made part of the record in this proceeding.

The foregoing formal admissions summarise the first route followed by the Crown in its attempt to prove its case against the accused. The balance of the route followed by the Crown for the aforesaid purpose consists of *viva voce* evidence tendered by two witness namely:-

PW3 Mookho Mahana

and PW1 'Matsebiso Bosielo.

The evidence adduced before this court by PW3 was to the effect that she stays at Likalaneng and that she knows the two accused before court. She testified further that she is familiar with the incident which occurred on 18-9-93 involving the two accused who are her co-villagers.

She quickly corrected herself as to the date she had supplied and said instead that the incident occurred on 18-05-1993 . But again she expressed her doubts concerning her correctness as to the latter date. Thereupon the court asked her if she went to school, and if so, up to what level. She replied that she did, up to Std V. But again was in doubt about this. Her explanation for this peculiar doubt was that she couldn't remember because she married either in 1988 or 1987

and she is definite that she was still at school when she married. Funny that marriage should have had such traumatic effect on her recollection of when it took place.

The court has therefore had to take caution of her evidence generally on the basis of her low standard of education, and particularly on the basis of the possible lapse of memory as to dates because this matter proceeded at the end of 2000 whereas the events occurred, as the indictment shows, way back in 1993.

Coming back to the evidence of PW3 the court heard that on the day in question and quite early at around 5 am while PW3 was in her house the two accused came there shouting from outside that they wanted Tseliso.

Tseliso is the brother of PW3. She explained to the two accused that Tseliso was not in. The two accused nonetheless insisted that PW3 should open the door, and she complied. They asked PW3 to come out. Again she complied.

PW3 testified that Tseliso had been staying with her at her (marital) home.

When PW3 peered through the door she was frightened to see that accused

1 was holding a gun in a pointing position and levelling this gun's muzzle at her. Thereupon through sheer desperation she dared accused 1 to rather come and shoot her children first before shooting her.

Thereupon accused 2 said to accused 1 "Thibello shoot, Molebatsi will pay". Saying so accused 2 imprecated curses upon PW3 swearing at her by her mother's private parts.

PW3 explained that Molebatsi whose name was mentioned immediately above is the elder brother of both accused. From this rather bizzare statement that accused, should shoot for Molebatsi would pay can thus be distilled the implication that whatever injury or damage could be caused by accused 1 the elder brother Molebatsi would bear the consequences so accused 1 was thus urged to act without fear of consequences for someone else would bear them. This in a way comes into even sharper relief when it later turned out during investigations that the gun used in the shooting of the deceased actually belonged not to the perpetrator but to Molebatsi the licencee of the gun in question.

PW3 proceeded to testify that accused 1 turned back and departed with her sister accused 2.

A short while later and when the coast was clear and she was in no danger of being spotted by the accused, PW3 went, so she testified, and reported the incident to the chief. She told the court that the accused didn't say why they were looking for Tseliso. However during cross-examination PW3 when asked to explain her statement that she only got to know meaning "to learn" when she was at the Chief's place, why the accused who were looking for Tseliso were so angry she replied "I learnt from the Chief that the accused (1) went to my place because Tseliso had raped his sister i.e. accused 2".

For all it is worth the allegation of rape of one's sister when considered along with facts which envelope the accused in an aura of suspicion for the offence or offences charged could well serve as providing a motive for that offence or offences charged.

After giving her statement to the Chief PW3 was told to go home. It was not long after she had left the Chief's place that she learnt that a person had been shot. She set out for the alleged scene and discovered the deceased lying there dead. PW3 said accused 1 appeared drunk. But, his sister, she said does not drink. PW3 explained that she feared accused 1 was drunk for he was very angry and had not seen him that way before. He was even staggering, she said.

Under cross-examination PW3 readily conceded that her brother and accused 1 maintained cordial relations. She buttressed this statement by saying she used to see them walking together. She even saw her brother taking the accused's stock for grazing along with his parents' stock. She went further and indicated that she has known both accused since 1987. PW3 said also that having learnt form the Chief that Tseliso was alleged to have raped accused 2 she confronted Tseliso late in the evening when the latter turned up home. She said Tseliso's response was that the said allegation about him was a baseless fabrication.

To the question put to her by Counsel for the accused that accused 1 says Tseliso had raped accused 2 PW3's satisfactory answer in the estimation of this court was "I know nothing since I was not there".

It was indicated to PW3 that the two accused came to her house in the night in question at around 3 am. In reaction to this PW3 said it was at 5 am. Otherwise she went along with the explanation proffered by the defence Counsel that accused 1 was angry and that he asked of Tseliso's whereabouts. She however rejected the assertion that accused 1 didn't point a gun at her and emphatically said "He did" . See page 6 of court's notes. To a further question

that :-" In fact he did not have a gun in his possession " it was PW3's unambiguous assertion that "He was holding it".

PW3 maintained the general pattern of her evidence-in-chief in reaction to questions put to her as follows i.e.:-

"It is accused 2's evidence that she never said ' Thibello shoot; Molebatsi will pay ' for there was no gun" she replied that "She (accused 2) uttered those words. The gun was with him (accused 1) and he was holding it like this " as was pointed in a levelled like fashion aimed at the witness's imaginary target.

PW3 denied that she supplied the portion about daring accused 1 to shoot her children first to strengthen her fabrication about the gun for the children at the time were in bed and asleep.

The court accepts that for a frightened mother apprehending immediate death PW3's explanation is not far-fetched namely that " I had to say so for if I died my children would be left in misery for Tseliso is useless" suggesting he couldn't look after them as well as she maintained she herself could.

Barring PW3's uncertainty about the dates her evidence made plain reading unpolluted by bias or ill-will towards the accused. In any case even if there was no gun carried by accused 1 the anger expressed by him at that hour in the month of May was enough to frighten her out of her wits.

It is to be wondered why the accused didn't report the alleged incident of rape to the Chief even that early in the morning instead of trying to take the law into their own hands.

Of some interest in this scenario is the fact that PW3 says accused 1 was holding a gun in the first instance. In the next instance the admitted evidence of PW5 Sgt Babi is that accused1 handed him the gun used in the killing of the deceased. Of course the entire defence and their witnesses deny that accused 1 handed the gun to Sgt Babi. But that is besides the point. The point is how did PW3 who first mentioned the gun being held by accused 1, know that Sgt Babi would later say accused 1 handed him a gun used in the killing of the deceased? It has not been suggested that PW3 and PW5 put their heads together to concoct the story about the gun against accused 1. In the light of this gaping hollow in the defence's fortifications it would be imprudent to reject the crown evidence on the particular issue. The law provides that for an accused person to escape criminal

liability his story need only be shown to be reasonably possibly true. Thus if his story is not reasonably possibly true it stands to reason that it is false beyond doubt and thus deserves rejection.

The last witness for the Crown was PW1 'Matsebiso Bosielo who gave oral evidence under oath and said that she is aged 38; and went to school up to Class V. PW1 said she resides at Likalaneng.

She recalls that on the day of the events in 1993; the actual date and month of which escape her, she was from her house going to the well to draw water.

PW1 said she heard some noise from the Cliff overlooking the well where she was. On paying attention to this noise she detected the voices of Thibello (accused 1) and Mpatai (accused 2). These two accused are co-villagers with this witness and she had no difficulty discerning their voices. The voices were saying "where is he/she ; where is he/she" without saying who it was this being inquired into.

PW1 said she heard accused 1 shouting for his brother Tloso to hand over to him something from the steel trunk. PW1 didn't see Tloso emerge. But she saw

figures from which the familiar voices referred to were emanating. She stressed as folows : "I heard when they were speaking that it was people I know for I knew their voices". PW1 stated further that because the two figures were not far (estimated at 100 metres) she recognised accused 1 and saw that he had been standing with his sister. She saw accused 1 leave the spot where he had been standing with his sister and head for the direction of his home. The sister remained standing there. A short while after entering his home he came back again. He came along. As he did so PW1 heard accused 2 say to accused 1 "Thibello there he/she comes towards you". Again it was not expressed by the utterer of those words who was being referred to. The language spoken was Sesotho and the Court takes judicial notice of the fact that this language makes no distinction of sex in the application of the pronoun referring to male or female persons when used in the singular. Sex is lost in the singular pronoun in Sesotho the same way as it is lost in English when reference is to plural pronouns.

PW1 told the Court that at the time she looked where accused 2 was warning accused 1 of someone's approach from the narrow mountain cut that separated accused1 from accused 2. The relative positions held by accused 1 and accused 2 satisfied me that accused 1 could not, without the warning given by accused 2, have seen the deceased's approach. In the words of PW1 " Thibello

was in a hollow and couldn't have been aware of the man approaching him". "See page 83 of Court's notes".

PW1 went further and in describing the situation and said :

"After accused1 had come out of the hollow and was level with the person who he was being warned about accused 2 said to accused 1 ' I said hey you there he is coming towards you. Release, shoot and Khoasa'. And we heard a gun report there and then".

It was PW1's evidence-in-chief that the gun report went just once. Thereafter PW1 said she and those who had come to the well "saw the person who had been approaching being very close to accused 1". At the same time PW 1 " heard..... a voice emerging from there saying ' why are you killing me cruelly ' ". PW1 said accused 1 asked the person "who are you. The man said ' I am Sekhoane and I stay at Ha Ntapa ' ". see pages 83-84 of Court's notes.

This witness testified that she and her company saw the man just falling down. As this happened accused 1 proceeded to the place where he had left his sister. When he reached her they left together and disappeared beyond an incline

over-topping the spot where they had been earlier seen standing.

In reaction to questions put to PW1 by the court she said that the two accused are her relations Their father is PW1's father's cousin. She also said her personal relatives with both accused are very good.

Under cross-examination she said she didn't know of any quarrel between her and the two accused in reaction to the question put on their behalf that they say PW1 is not on friendly terms with them. She stressed therefore that she knew her relations with them to be good.

She denied that the accused's stock trespassed on her husband's crops and destroyed them; hence the source of their alleged quarrel.

PW1 denied what was dubbed a second incident which formed the basis of her quarrel with the two accused. The text went as follows:-

"The 2nd incident was when your husband killed Sejakane's father's ram ----------? It is my first time to hear of that.

Did your husband kill a ram or not----------? I never knew my husband to have ever killed a ram"

It seems rather unfair that the nature of questions which could at best be put to her husband are instead put to PW1 despite her professed ignorance of what at best could serve as a basis for ill-will between her husband and the accused's father. I simply think that the element of bad blood in these circumstances is rather over-drawn; even if a cross-examiner is at large to cross-examine on anything.

PW1 said although the distance between her and where the accused were standing when she saw them is about the length of the football field she could hear them say "where is he/she; where is he/she" because they were talking loudly, the Court takes judicial notice of the fact that generally early morning silence tends to make voices carry far.

PW1 does not remember giving evidence at PE in 1995. She says her failure to remember is due to serious nervous problems she suffered from some time ago. The malady had manifested itself by bouts of falling sickness PW1 has undergone. However she says nobody reminded her of what she had seen and

observed in 1993 when events leading to this case took place.

She denied that she was schooled to implicate accused 2 today by saying accused 2 said accused 1 should shoot. The plausible reason for this suggestion is that nowhere in PW1's evidence at PE did she say accused 2 said accused1 should shoot.

The regrettable loss of memory PW1 has experienced with regard to the fact that she gave evidence at PE is no different from that of Sekonyela Ramaqabe who was PW8 in CRI/T/22/88 **Rex vsMotamo Sehlabaka** (unreported) at 26 where the following is reflected:

"PW8 Sekonyela Ramaqabe who was utterly at a loss regarding dates when matters he testified to occurred, and who further compounded this particular defect in his testimony by denying that he gave evidence before a magistrate at the preparatory examination of this case told me that he has read only up to standard 1. He told me he was notorious for forgetfulness and attributed this handicap to [a] motor accident which he was involved in". (see further page 31 where the following is reported)

"He also said he remembered giving evidence only before the police at T.Y. and that what he told them is substantially the same as what he told this court; although he has been asked certain other things here under cross-examination.

PW8 told me his accident which apparently affected his memory occurred in 1979. As a result of it he told me he even passed out and only came to in Hospital in the Republic".

Likewise I observe that with a few exceptions PW1's version before this court is substantially the same as what she deposed to at PE.

Indeed in re-examination she answered positively when asked as appears in the following text:-

"Do you still remember events that led to the death of the deceased--------? Yes

That these are the events you told this court------? Yes. (see p.94 of the court's notes)".

In an unprecedented move after the Crown had closed its case Mrs Kotelo for the defence made an application for the Crown to re-open its case. Needless to say the application was opposed by the crown and turned down by the court.

The first witness for the defence was DW1 Thibello Sekajane the 1st accused. He said he forgets his age but was born in 1973.

He testified that he lives at Likalaneng Ha Ramohope but was living at Mantsonyane in 1993.

However for purposes of performing some ancestral rites he was sent for to Tiping (Dipping). He arrived in the afternoon and proceeded to a beer drinking place. He sat there drinking beer in quarts as well as Sesotho beer till night time.

Later in the night he proceeded to Tiping and remained at 'Mamojabeng's till 4 am. At 4am his sister accused 2 arrived crying. She called DW1 outside. On coming outside he was told by accused 2 that Tseliso Mahana had raped her at a Stokvel where she and Tseliso had been. Asked where Tseliso was she pointed to him and said to DW1 "There he is coming following me". There and then and without asking Tseliso anything further DW1 told this court that he

attacked Tseliso who fled to his home chased by DW1 and accused 2. Tseliso outran the pursuing pair to his parental home.

DW1 says he knocked at the door of Tseliso's parental home . In response thereto Tseliso's sister PW3 peered at the door. DW1 asked where Tseliso was. PW3 asked what DW1 wanted Tseliso for. She was told that he had raped accused 2. Then PW3 said Tseliso had gone to Ha Ramohope.

Because DW1 was drunk and feeling sleepy he says he went home; followed along the way there by accused 2.

DW1 denied that he went to PW3's home carrying a firearm. His reason for saying so, he says, is that he doesn't own a gun.

Instead he says he was carrying a "Lebetlela" stick. He denies ever threatening or swearing at PW3. He concedes that he was angry and gives as the reason for being angry the fact that he was drunk.

If there is credible evidence to show that a man on a particular night was seen wielding a firearm which he later handed in to an investigator of the incident

arising from the use of such a firearm, the fact that he doesn't own a firearm is far from being an acceptable reason that he couldn't have been holding the gun on the night in question or that he didn't hand in the firearm contrary not only to what the investigator deposed to at PE but to the evidence admitted on his behalf by his own Counsel.

Again the reason being proffered for the anger exhibited at PW3's home suggests an attempt at escaping the logical consequence of that anger. If drunkenness was the reason for the anger it leaves unanswered what impact the vital question of the alleged rape committed to his sister had on accused 1's state of mind. Moreso when taken along with his own evidence-in-chief that without any further ado he attacked Tseliso when the latter was pointed out as coming following accused 2 after the alleged sordid act to her.

In an attempt to distance himself from any use of the firearm whether by pointing it at anybody or actually firing it anybody accused 1 sought to invent the story that all he was holding was a lebetlela stick. This would be a convenient weapon to be in possession of in the circumstances because without a gun then he would be faced with an awkward explanation to make namely how could he attack Tseliso with bare hands when he didn't know what possible superior

weapon the latter had.

Accused 1's story that he was armed with a lebetlela stick therefore is an obvious last minute fabrication and afterthought because to no one of the crown witnesses (especially PW3) was the version put that accused 1 was holding a lebetlela stick and not a firearm. This would have given the crown witnesses a fair opportunity to either deny or confirm accused 1's version.

For illustration of the principle entailed in the above proposition the authority of **Small vs Smith** 1954 (3) SA at 434 is very apt to the effect that :

> "It is, in my opinion elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved".

Phaloane vs Rex 1981 (2)LLR at 246 supports the above view in the following words:

> "It is generally accepted that the function of Counsel is to put the defence case to the crown witnesses, not only to avoid the suspicion that the defence is fabricating, but to provide the witnesses with the opportunity of denying or confirming the case for the accused. Moreover, even making due allowances for certain latitude that may be afforded in criminal cases for a failure to put the defence case to the crown witnesses, 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 the witness to every important allegation".

DW1 went further to tell the Court that along the way to their parents' home he and accused 2 didn't meet anybody. He only saw PW1 sweeping her forecourt. He said he left his sister at home and headed for the Cattle post to fetch an ox for the ritual earlier referred to.

When he later came home his brother told him the chief came asking for

him in his absence.

He proceeded to the Chief's place where he was interviewed by Sgt Babi. Sgt Babi asked him about the night's events and accused 1 related the story about Tseliso. However Sgt Babi told accused 1 that someone had heard that accused 1 was involved in that episode. Thus he took accused 1 to Marakabei police post. He didn't say what accused 1's involvement was, so accused 1 said. Nor did he say the name of the person he is alleged to have had an involvement with. DW1 denied that he gave Sgt Babi any firearm. He denied that relations between him and PW1 were good. The reason for this was, so he said, that his flock strayed into her yard and her husband who was still alive then quarrelled with accused 1's brother. The other reason is that PW1's husband killed accused 1's parents' ram. For these reasons he says PW1 has cause to falsely say he killed someone.

In answer to the Court's question accused 1 said the ram alleged to have been killed by PW1's husband belonged to accused 1's parents and not to him.

What I find strange is that accused 1 insists that 15 years after the alleged killing of the ram in 1985 someone who was not involved in that killing should come and lie about accused1 having killed someone before this Court.

Indeed it sounds even stranger when one considers, for all this story is worth, that if PW1's husband killed accused 1's father's ram for whatever reason he had thus exacted his revenge and the actual parties involved were to that extent "square" with each other. How then could PW1 who was not a party come and lie about accused 1 on the basis that her own husband had killed the belonging to accused 1's parents? Can she indeed behave as if it wounded her for her husband to kill that ram? And if it wounded her why not take it against her husband but instead take it against children of people who were wounded thereby and for that matter wait until 15 years have lapsed to do so.

In any case how would she have known that the deceased would be befallen by the tragedy that occurred so many years afterwards and use that occasion to lie against people he calls his relatives with whom she is on good terms? It appears to me that the weight of these questions bear rather heavily against accused 1's criticism of PW1. The same goes for accused 2 as it does for accused 1.

If logic is stretched to absurdity to accommodate accused1's fanciful criticism of PW1's evidence as definitely biased against him, his responses relating to PW3 and PW5 Sgt Babi readily reveal the baselessness and emptiness of accused 1's attitude. This is illustrated by the text running as follows:

"You want the court to believe that she [PW1] would lie about something as serious as killing a person---------? Yes

What about PW3 Mookho Mahana; what quarrel did you have with her-----? We never quarrelled with her.

What quarrel had you with Sgt Babi-----? We have never had a quarrel with him at all".

Despite accused 1's plausible responses to the two questions relating to PW3 and PW5 he has made so bold as to emphatically say these two people have conspired together with PW1 to falsely incriminate him.

Accused 1 denies that he admitted the evidence of PW5 which was deposed to at PE. He denies that his counsel did so on his behalf.

If the two immediate denials are a result of ignorance ; though I suspect that the denials stem more from stubborness than from ignorance, then accused 1's denial that when being recorded into the instant proceeding Sgnt Babi's deposition was interpreted from English into Sesotho was a deliberate falsity because I recall very well that I ordered that all the admitted statements be interpreted for the benefit not only of both accused but of the public whose constitutional right it is

theirs for proceedings to be conducted in the language they understand.

His denials in this regard therefore come to nothing.

He admitted that Mrs Kotelo is his counsel. He admitted that she acts on his behalf.

"When she accepts evidence she does so on your behalf ------- ? It must be like that". Indeed it is like that.

The protestations by DW2 also come to nothing. She likwise stated that she disputes and does not accept the admitted post mortem findings. I got a distinct impression that she didn't know what she was talking about when she said this. Her disarming response was "If I ever admitted it, I did so without knowing what I was admitting".

She denied that Sgt Babi gave back to her the licence for the weapon. She was not able to reconcile her denial with the fact that her situation was rendered impossible thereby inasmuch as this portion of evidence appears in the admitted depositions of Sgt Babi in relation to her own role as reflected therein.

In giving evidence DW2 said that on the day in question she was at a stokvel at Lekhalong. She said she drank beer there. She had gone there at 4 pm and remained drinking till late at night.

She had occasion at night to go outside to pass water behind 'Malimakatso's house. Then Tseliso crept behind her and said he had all these days been looking for her and that today he had found her. He dragged her into a ditch and raped her.

DW2 reported the incident to the stockvel owners Tsibela and his wife 'Malimakatso who confronted Tseliso about the rape. But Tseliso just said **" aache".**

Then DW2 went to where accused 1 was and reported to him. From then the story of DW2 is almost identical to that given by accused 1.

However the cross-examination sought to indicate to her that PW3 said DW2 and her brother came together to her house. But DW2 denied this and said she was coming behind accused 1.

She denied that she swore at PW3 and threatened her or incited accused 1 to shoot her.

Both accused 1 and accused 2 have earned themselves a proverb for deliberately dodging and failing to answer straight forward questions put to them by the very considerate but indeed purposeful cross-examiner Miss Maqutu.

As for the evidence of DW3 Motlalepule Mabone and DW4 Osia Kabi who sought to testify in this court that it was Molebatsi who handed the gun to Sgt Babi their attempt to persist in that regard was deflated when it was drawn to their attention that the instructions of both accused to their counsel was to the effect that accused 1 handed the firearm to Sgt Babi. Indeed the defence was hard put to it to say how it could be possible that a policeman acting on the results of information gathered from his investigative exercise would omit to ask the suspect to produce the weapon used in the commission of the offence.

The defence further failed to say why Sgt Babi omitted to say he received the gun from Molebatsi.

THE LAW

Reference to section 273 of the Criminal Procedure and evidence Act No. 7 of 1981 indicates that :

(1) "An accused or his representative in his presence may, in any criminal proceedings, admit any fact relevant to the issue and the admission shall be sufficient evidence of that fact".

In their invaluable works the learned authors **Hoffman** and **Zeffertt** at page 430 of **The South African Law of Evidence** 4th Edition say

"The purpose of the section [akin to ours cited above] is to enable the accused, despite his having pleaded not guilty, to reduce, the issues put into dispute by this plea, and which the State would have to prove, by admitting facts which then cease to be in issue". See **S vs Seleke** en 'n ander 1980 (3) SA 745 at 746 F - G saying;

"When an admission is made in terms of S.220 [ours 273], it means that the accused cannot later allege that that which was admitted has still to be

proved by the State. The words 'sufficient proof ' therefore absolve the State from the burden of proving in any other manner the particular fact which has been admitted,----------".

Mrs Kotelo raised what she has styled Procedural Point namely whether PW1 Matseliso Botsielo is a competent witness.

The learned Counsel's concerns with this witness are with regard to her forgetfulness which she terms amnesia coupled with falling sickness.

I have already made my preliminary remarks concerning this witness's forgetfulness. I need only reiterate that while on the one hand PW1's forgetfulness does not seem to have upset her depositions at P.E. on the other hand Mrs Kotelo's over-caution that the fate of the two accused should not be resigned to the likely delusions of a single witness should be sufficiently met by the fact that there is no such danger as may be occasioned by exclusive dependence on a single witness because PW3 also corroborates it in the material respects raised by PW1. For instance where PW3 says she saw a gun carried by accused 1, PW1 says she heard accused 2 incite accused 1 to shoot and thereafter she heard a gun report. Later on Sgt Babi says he received the gun from accused 1. Thus there is

sufficient safety provided by this corroboration against any possible miscarriage of justice likely to be occasioned by exclusive dependence on a witness whose mental well-being gives cause for concern to the defence.

I have observed this witness and have not at all formed in the slightest any opinion that her mental condition is a matter for any concern. On the contrary in my view she gave her evidence with clarity that betrayed her familiarity with the facts she was testifying to.

Having dealt briefly with points raised by the defence I wish to proceed to dealing with the position in law as I had already started doing.

Thus in **R vs Fouche** 1958 (3) SA 767 (T) can be distilled the general proposition that formal admissions dispense with the necessity to adduce evidence in an endeavour to establish proof of the facts in issue but which are admitted.

In making her final submissions Miss Maqutu for the Crown buttressed her viewpoint by reference to **S vs Mjoli and anor** 1981 (3) SA 1233 at 1247B where Viljoen JA is recorded as having said :

"By reason of the fact that an admission formally made by or on behalf of the accused is 'sufficient evidence ', the effect is that such fact virtually becomes conclusive proof against him because the accused himself or his legal representative on his behalf has made the admission and any effort by him or on his behalf to adduce evidence countervailing such fact would be inconsistent with his having made the admission". I am in respectful agreement with the position neatly set out in this exposition of the law.

It is significant that learned counsel for the defence confined herself to the submissions contained in her heads of arguments which in turn are confined to promotion of the view that it would be dangerous to base a conviction on the single evidence of PW1. Needless to say, I have indicated and Mis Maqutu for the Crown has properly submitted that the view maintained by the defence is mistaken in view of the fact that PW1's evidence does not stand in stark isolation in respect of vital or material aspects of the case to depend upon for purposes of securing conviction.

Of further significance is the bold move adopted by the learned counsel for the defence as evidenced by her laying her cards on the table, so to speak, and making her point clearly understood that the fate of the case for the defence stands

or falls on the course she adopted as outlined in her heads. Significally therefore she decided in arguments to remain silent on the issue that raised much controversy during evidence by the defence, namely, the question that the admission for the defence of Sgt Babi's evidence is something that the defence may not resile from. I can only say the wisdom of learned counsel in fighting shy of standing by her client's evidence on this controversial issue is undoubted and has not escaped the attention of the court because in my view the position of her clients is indefensible regard being had to the body of authority pointing to the opposite direction to the course they would have this Court pursue. Indeed learned Counsel in pursuing that would soon find herself in an unenviable position of riding on two horses by rejecting on the one hand what she solemnly admitted on behalf of her clients on the other.

It is illuminating to observe the Lesotho Court of Appeal recent treatment of a similar case to the instant one. The case in point is C of A (CRI) No. 8 of 1997 **REX vs Sehloho Joseph Maphiri** (unreported) at page 10 where it is stated :

"*Mr. Lesuthu* submitted that by admitting the evidence the accused did no more than admitting "that (the) witnesses who were to be called were going

to say exactly what they said at the preparatory examination. By such an admission we did not admit to the truth of the depositions".

The denouncement of the Appeal Court regarding the import of the above passage was fast and immediate ; and was as follows:

> "If what Counsel admitted on behalf of his client were 'admissions' this contention cannot be sustained. If an admission is made freely and voluntarily any fact so admitted is in terms of Section 273 ' sufficient evidence of such fact' ".

The Learned President of the Appeal Court namely the Honourable Mr. Justice Steyn went further to say :

> "However the procedure adopted by the crown, facilitated by the defence counsel and accepted by the court, in reading the evidence into the record in an attempt to convert such evidence into admissions in terms of Section 273 (1) appears to be not only inappropriate and ill-advised but may also not have achieved the desired objective. I say this for the following reasons:

Section 173 (1) of the *Act* provides as follows :

> 'Every criminal trial shall take place, and the witnesses, save as is otherwise expressly provided by this Act or any other law, give their evidence viva voce, in open court in the presence of the accused unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable, in which event the court may order him to be removed and may direct the trial to proceed in his absence ' ".

What rather causes me some anxiety regarding the Learned President's criticism of the adoption of Section 273 (1) is whether this section ceases to be the law anymore or whether it remains the law only as long as an accused person on whose behalf the admission of a fact was made by his counsel does not resile from such admission; so that if he does so resile the position becomes that *a priori* it was inappropriate and imprudent to have adopted that section in the first pace.

Be that as it may; consideration of cases cited in **Maphiri** above leaves no doubt about the need to follow the provisions of Section 273 (1) with great circumspection whenever the procedure set out in that section is invoked.

At page 13 of **Maphiri** above reference is made to **S. vs Thomo and Ors** 1969 (1) SA 385 where at 387 [F] - [388] **Wessels** JA says the following :

> "In the preceding paragraph I referred to the fact that certain facts were 'admitted ' at the trial. In terms of section 284 (1) of the Criminal Code an accused may ' admit any fact relevant to the issue ' and such admission ' shall be sufficient evidence of that fact '. Since the purpose of making admissions of facts is to dispense with the need to call evidence to prove those facts, the reference to 'evidence' is inappropriate unless it is understood to mean ' proof '. " I agree respectfully with this exposition of the law ".

While in **Maphiri** above it is evident that counsel for the defence associated himself with the stance adopted by his client, in the instant case counsel didn't argue this point at the addresses phase. Accordingly in **Maphiri** above the adoption of the procedure followed was described as an example of inadvisability or indeed illegality as follows:

> "The irregularity of the proceedings was compounded by the fact that Counsel for the defence must have intended, when admitting the

evidence of witnesses who had testified at the preparatory examination that the accused had stabbed the deceased, to convey to his colleague and to the court that this fact was not in dispute. It was of course open to the accused to give evidence that the stabbing took place in e.g. self-defence or in the defence of the life of another passenger on the bus. It was however quite improper to admit the depositions knowing that your client would contradict a key element common to both statements involved.

Therefore, once it appeared that there was no intention to admit this vital fact, the trial Court should in my view have inquired as to whether the decision to admit the evidence at the preparatory examination was indeed made voluntarily by the accused and was made in accordance with his instruction to his Counsel. To have proceeded with the trial without such enquiry was in my view irregular"

The learned President's remarks are quite apt and I endorse them. I would only indicate that the objection to the admission should in my view be raised at any stage during the recording of such admission. The whole purpose of

interpreting the version being recorded in order to be adopted as part of the proceedings is to ensure that what is being recorded is in accordance with the particular accused's instructions. What I find absolutely unacceptable is to let the admitted facts be recorded within the accused's presence and hearing, proceed to hearing the balance of the evidence and having had time to consider what may be perceived as weaknesses in the totality of the Crown evidence seek to have the crown case re-opened. In my view interrupting the admitted evidence in order to call viva voce evidence is not much different from making an application for the re-call of a witness who has finished giving his evidence. That can be done and has time and again been done in practice. The practice that I feel should be discouraged is one whereby one side seeks to have a second bite at the cherry at an awkward stage of proceedings as far as the other side is concerned.

The Honourable Steyn P. continued to consider the authorities in conjuction with the relevant evidence as well as the treatment by the Court **a quo** of the evidence and facts in **Maphiri** above.

He referred to the sentence relied upon by the court **a quo** where the learned Judge in that Court extracted a passage from 2nd Edition of **Hoffmann and Zeffertt :** *The South African Law of Evidence* in which the learned authors say :

> "There is no authority dealing with the circumstances in which formal admissions made in Criminal proceedings may be withdrawn. In principle there seems no reason why this should not be allowed at any time before the verdict--------".

It appears that the Court **a quo** banking on the suggestion contained in the learned authors' view that there seems to be no reason why admissions cannot be allowed to be withdrawn went further to develop and justify his attitude by concluding as follows :

> "It seems to me, therefore, where the accused, having admitted the depositions made at the Preparatory Examination, goes into the witness box, so to speak, withdraws part of the admissions he has made by denying the correctness thereof he is, on principle, entitled to do so and court cannot simply dismiss him on the ground that he initially admitted all the depositions made at the Preparatory Examination".

Of importance is that in immediate reaction to this statement the learned Steyn P categorically and unequivocally says "With respect, I am constrained to

disagree with this conclusion". For my part I most heartify endorse the learned President's reaction.

The court was addressed briefly in connection with the charge preferred in count 2 on this special day and after previous addresses had been heard and concluded and reservation for judgment postponed last Friday. Due to some omission both Counsel had forgotten to address court on this count of assault. The Court **mero motu** postponed delivery of Judgment to enable counsel to address it on this important Count.

Miss Maqutu accordingly submitted that evidence clearly reveals that the two accused set out for the home of PW3 early in the morning demanding to see her brother Tseliso.

Evidence again shows that she was put in fear for her life when a firearm was pointed at her by accused 1 who was very angry in company of accused 2 who was swearing at her and urging accused 1 to shoot at her.

Evidence further indicated that she went and reported the matter as soon as the coast was clear and could afford to do so without attracting the attention of

the duo who had accosted her in anger.

Learned Counsel indicated that inspiring another with fear that a firearm pointed at him is readily going to be used against him amounts to assault - I agree.

In response Mrs Kotelo submitted that accused 1 does not deny going to PW3's place. He is said to have been angry when he got there because of the alleged rape by Tseliso of his sister accused 2.

However accused 1 says he didn't point a gun at PW3. Thus he couldn't have been guilty of assault. The same goes for accused 2 who only met her brother on his way from there and retraced her steps without getting to PW3's place.

I have already dealt at length with the lack of substance in the denials by the accused in this connection. Because in my view their explanation cannot be reasonably possibly true in this regard it is rejected as false beyond doubt.

With regard to Count 1 it appears patently clear to this court that the two accused had embarked on a common action to punish Tseliso for his alleged

offence. But it so happened that the wretched soul, Sekhoane the deceased, happened to be at the wrong place at the wrong time. Thus it cannot even avail the accused were they to say that they didn't intend molesting or even killing Sekhoane but Tseliso instead. Thus the fact that it is Sekhoane who died does not affect the position regarding the intent to kill. The requisite **mens rea** is there coupled with the **actus reus**

In the result accused 1 and 2 are found guilty as charged in Count 1.

Further accused 1 and 2 are found guilty as charged in Count 2.

However in regard to Count 3 only accused 1 is found guilty as charged while accused 2 is acquitted and discharged in this Count on the tenuous excuse that the person who made an effort to ensure that the firearm was fetched from his steel trunk is accused 1.

My assessor agrees.

M.L. LEHOHLA

JUDGE

18TH DECEMBER, 2001

FOR CROWN : MISS MAQUTU

FOR DEFENCE : MRS KOTELO

EXTENUATION

We are now at the extenuation phase of this proceeding. Extenuating circumstances have been described by various authorities as such factors as should be taken into account for purposes of reducing the moral blameworthiness of an accused person in respect of a capital offence of which he has been convicted.

The sole purpose of determining the existence, if any, of extenuating circumstances is to help an accused person avert the full vigour of the law; by which I mean avoid the ultimate penalty.

At this stage factors to be considered are different from those considered in the previous stage from which we have just graduated. The test that an accused person who lays a claim to the existence of extenuating circumstances is a subjective test, and what this means is that the onus this time is on an accused person, on a balance of probabilities to establish entitlement to the finding that extenuating circumstances exist in his or her case.

It has been, on numerous occasions, stated that the factors to take into

account may include youthfulness on the part of the accused, drunkeness as an element in the commission of the crime, provocation can be one of the factors, the list we are told is not exhaustive. And these factors can act individually or cumulatively; it is cautioned that the court is definitely enjoined to overlook no element unless it is absolutely not connected with or has no bearing on the crime committed.

One of the approaches is that **an exparte** address can be made as was just done by Mrs Kotelo on the one hand. Otherwise another method would have been for the accused to give evidence to establish the existence of extenuating circumstances.

In **Naro Lefaso vs Rex** C of A (CRI) 7 of 1989 Schutz P.; as he then was, indicated that the defence Counsel should, when making an **ex parte** address to apply for the finding by court that extenuating circumstances exist meet and agree with the other side and find if they are agreed on factors that could be common cause as constituting extenuating circumstances.

Mrs Kotelo has addressed the court on the existence of extenuating circumstances in this case. Starting with accused 2 she said that she was minding

her own business and enjoying liquor at the stokvel, and when she went outside, as the evidence indicated, to pass water behind the house she was approached by Tseliso who she alleges raped her. And the natural reaction for accused 2 was to see the perpetrator of the offence perpetrated on her punished.

As learned Counsel indicated events from then on followed each other pretty much quickly, allowing not much time for cool thinking on the part of the accused; least of all accused 2.

Learned Counsel's next addressed herself to the question that although PW3 said she had not seen accused 2 drink, possibly it was because accused 2 used to handle her drinking very well, for as learned counsel indicated she had been drinking for a long time.

One of the factors that Learned Counsel wanted to be taken into account concerning accused 2 is that she delivered no blow to any of the crown witnesses , and that accused No.1 is not her servant but a brother.

She in terms indicated that there couldn't be any excuse for taking away the human life and that sadly enough it was an innocent life that got lost, but

urged the Court that it shouldn't overlook the fact that she had her own grievance in the matter because she had been degraded by a horrendous crime perpetrated against her.

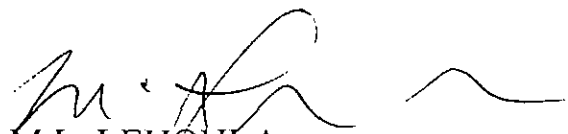
Regarding accused No.1 evidence here should be common cause that he had been drinking because the evidence so stated, and PW3 who cannot be contradicted in this regard indicated that she had never seen accused No. 1 that drunk or behaving that way before. And the fact that this witness says he was even staggering tends to give support to accused No 1's own claim that he had been drinking for a long time that day, taking Sesotho beer and quarts of bottled beer.

The learned counsel wished the court to take into account the effect of beer drunk in that fashion taken along with the reception of disconcerting and immediate report about his sister's recent rape by someone who is pointed at for that matter coming behind her while she was crying.

Counsel for the Crown responded to these submissions. But all in all I felt that the thrust of her arguments could only be weighty to the extent that there hadn't been any consensus between both counsel as to what is common cause

regarding the existence or not of the extenuating circumstances. However the court in such circumstances would be at large to revisit the evidence or any element that emerged from the evidence that supports the submissions to the effect that extenuating circumstances exist: One of the commonest ones and most outstanding is that there was drunkeness and I am prepared to accept that this drunkeness affected both accused 1 and accused 2. This has been borne out in evidence and the question of rape while perhaps doubtful the crown has not strained to disprove its existence. So one would take it that that would serve also as a factor which affected the minds of both accused. Thus taken cumulatively with the question of drink definitely one would not be wrong in regarding that extenuating circumstances exist in this case.

In the result the court finds that the existence of extenuating circumstances has been established in this case.



M.L. LEHOHLA

JUDGE

17TH DECEMBER, 2001

FOR CROWN : MISS MAQUTU

FOR DEFENCE : MRS KOTELO

MITIGATION

The court has just now been addressed by Mrs Kotelo for the accused on the question of mitigation of sentence, and I accept her statement that she has conferred with counsel for the Crown. Indeed learned counsel for the crown has confirmed that this has been the case.

From that point therefore I would take it that it is agreed by both sides on points which have been highlighted in the address in mitigation by Mrs. Kotelo. She indicated that the question of interest of society comes into play when considering the question of mitigation. She indicated further that the two accused cannot really be seen as common criminals. This aspect of the matter I think is borne out by the crown's intervention to the effect that the two accused have no previous convictions.

Thus Mrs Kotelo submitted that their removal from society doesn't seem to be likely to benefit society in anyway if such removal is for a long time. She urged however that while it may be important to teach them a lesson not to ever take the law into their own hands this aspect of the matter should be weighed

against the fact that, but for their act of indiscretion, they would be leading normal life.

Addressing herself specifically to accused 2 but by no means minimising the plea in the same vein for accused No1, she stated that accused No 2 has had a lot to lose in this episode. I accept the fact that both of them have got three (3) children apiece ; and therefore that accused 1 has got three young children and a wife. The fact that the law would require them to be separated from their families would itself be punishment no matter for how short a time.

The court has considered all these factors which have competently been placed at its disposal for consideration. But the court would be remiss regarding its duty if it could ignore the fact that an innocent human life has been lost. Furthermore it is a wrong thing to take the law into one's own hands. That type of practice has got to recoil upon the head of its perpetrator. One has a price to pay for that type of practice.

The Court also takes into account that the fact that you have reached the station in life in which you are of having three (3) children apiece without ever having contravened the law is something to your credit. The court has also to take

into account the fact that this case has been hanging on your heads for a long time since the commission of the crime in 1993 May to date, which is almost ten (10) years ago now. That in itself is a form of a punishment in the sense that it has engendered anxiety in your minds from day to day throughout all that period.

Will the accused stand up.

In Count one: accused 1 is sentenced to eight (8) years' imprisonment.

In Count two : that is assault, he is sentenced to five (5) months' imprisonment.

In Count three : that is illegal possession of a firearm, he is sentenced to two (2) months' imprisonment. All these sentences are to run concurrently with each other.

With respect to accused 2, she is sentenced to three (3) years' imprisonment in Count one, (that is of murder).

In count two, she is sentenced to three (3) months' imprisonment.

In count three she was acquitted and discharged. In the result the two sentences are to run concurrently.

That is the sentence of this court, and its order.

M.L. LEHOHLA

JUDGE

17TH DECEMBER, 2001

For Crown : **MS MAQUTU**

FOR DEFENCE : **MRS KOTELO**