CRI/T/6/97
IN THE HIGH COURT OF LESOTHO

In the matter between:

REX
V
POTLAKI CHITJA

For the Crown : Mr. Kotele
For the Accused : Mr. Mpaka
Gentlemen Assessors: Messers G M Motsamai and T J Mathiba

JUDGEMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 7th day of December 2001.

This matter ended in an application for discharge of the Accused at the end of the Crown's case in terms of section 175(3) of the Criminal Procedure and Evidence Act 1980 as will be more elaborated after the analysis of the evidence which follows.

The Accused pleaded not guilty to a charge of murder and contravention of section 3(1) (2) (a) read with section 43 of Arms and Ammunition Act 17/1966 as amended. Firstly, it was said that on or about the 7th July 1994 at or near Pela Tšoeu in the District of Leribe, the said accused who was then about 35 years of age did

unlawfully and intentionally kill his cousin Napo Chitja. It was alleged that he shot at the deceased with the gun described below.

Secondly upon or about the 7th day of July, 1994 at or near Pela - Tšoeu in the district of Leribe, the said accused did unlawfully possess one rifle without a fire arm certificate. The description of the firearm was amended to read "pistol". The firearm was described as 9mm (283) pistol (serial number rubbed off) By Major John Tlhabi Telukhunoana a ballistic expert whose statement witness statement was handed in by consent

There had been seen seven (7) witnesses at the preparatory examination (the PE) which was held and completed on the 29th November 1996. The witnesses at the PE had been as follows PW1 NO. 8354 Lesotho Mounted Police Service (LMPS) Trooper Mohapi, PW2 NO. 4687 LMPS D/Trooper Kharafu, PW3 Joseph Chitja. Their depositions like the four mentioned hereunder were admitted by consent and read into the recording machine in terms of Criminal Procedure and evidence Act No7 of 1981 (C. P & E.) and became evidence in this case. The witness deposed as to the death of deceased who died on his way to hospital. Pw4 at the PE was Thabo Nako, Pw5 was Senooe Ntika, Pw6 was LMPS Officer No. 4341 Senior Inspector Tshabalala, Pw7 was Selebalo Chitja. The statement of Firearms Inspector Major John Thlabi Telukhunoana was admitted as evidence by consent. In addition the report of post mortem report of the deceased's body was handed in by consent.

The statement of Major Telukhunoana was handed in by consent marked production "A". The statement indicated that Pw1 handed over Exhibit "1" which was a 9mm (c283 pistol serial numbers removed off), 9mm shot find cartridge cases. Major Telukhunoana said in his report he examined the pistol and found it in good working condition. He also fired cartridges therein for microscopic examination. He found that the fired cartridge cases had been fired from the said pistol.

The post mortem report which was marked production "B" showed the following. That death was due to internal haemorrhage, secondary to a bullet wound on the right side of the chest which appeared so extremely affected the stomach and went through the intestines.

The Accused would admit that he killed the Deceased but this was in self defence. The question that remained would therefore be whether there had been intention on the part of the accused to kill the deceased.

The evidence of Joseph Chitja who was Pw3 at the PE was admitted as evidence by consent and read into the machine in terms of the CP&E. Joseph Chitja resided at Pela -Tšoeu under Chiftainess Mamajara Majara. This was the village of both the Deceased and the Accused as I noted. The witness knew the Deceased who was his cousin. He also knew the Accused who was his nephew. Accused's father was the elder brother of the witness.

On the 19th July, 1994 the witness received a report that the Deceased had been injured. He went to the scene. Then he took Deceased in a car and drove him to Hlotse Hospital. He then proceeded to the Police station where he reported the death of the Deceased. He took the police to the mortuary when the Declared body was left. The witness deposed that where he took the Deceased where he had fallen he did not recognize any injuries as there was many people gathered there. He was present when a post-mortem examination was done having identified the body as that of the Deceased.

The witness deposition also contained a useful background which was as follows: First as the previous statement must have partly suggested to Accused, Deceased and the witness were relatives. They had once been a family meeting in which Accused father was complaining that there was a problem between the Accused and the Deceased and arising out of a forest plantation. The witness knew plantation to have originally

belonged to one Motsarapane Chitja who had since died .

The heir to Motsarapane Chitja's estate was one Selebalo Chitja. The latter was Deceased's half-brother, that is they belonged to the same father but the Deceased's mother was the younger wife while Selebalo's mother was the first wife. The said Selebalo's heir could be his son Potlaki the Accused. It could not be the Deceased. The witness believed so although this had not been decided by the family. The witness did not know who owned the exhibit "1" (the gun). The witness had never seen Accused until after a long time since the death of Deceased. He had never asked the Accused about the death of the Deceased. Neither had Accused explained to the witness what had happened concerning the death of the Deceased. When the Deceased was laid to rest the Accused was absent.

Senior Inspector Tshabalala who the first witness in this trial was still a member of the LMPS. He had been stationed at Hlotse Police station in the Criminal investigation Department at the time of the events surrounding the death of the Deceased. He stated that he knew the Accused before court. He did not know the Deceased. He stated that on or about the 7th July 1994 Accused reported himself at the Police station accompanied by his attorney Mr. Mentjies. The Accused had been wanted and investigations were being conducted in connection with the death of the Deceased.

Accused was cautioned and he gave an explanation. The explanation led to the witness going to Pela-Tšoeu (Accused's village). The witness was accompanied by the Accused, Detective Trooper Mohapi, Detective Trooper Kharafu and a few other police officers. On arrival at his village Accused pointed to a place where he said he had placed the gun. A search was made at that spot but nothing was found. On that day the witness and fellow officers met Accused's father (PW 2). From him they asked for assistance in finding the gun allegedly left by the Accused at that spot which he had pointed out. The witness and his entourage including the Accused then went back to the police station.

5

The witness then said if he remembered well it could have been on the afternoon of that day when they had attended Accused village when Accused's father came to the police station. He handed in the a gun (pistol) with two rounds of ammunition. At that time the Accused was called from the cell. He was confronted with his father and asked to identify the gun and ammunition. Accused agreed that, that was the gun he used to kill the Deceased with. The witness denied under cross examination that the Accused was even threatened nor that he identified the gun under any threats. Nor was the Accused assaulted which the witness denied. Nor was he under pressure to the extent that he had no alternative but to own up to the gun when he should not have. Neither had he reported such .threats to the Magistrate on remand or at all.

The witness then testified that as a member of the investigating team he has since been in possession of the gun and ammunition as an exhibit in this case. He latter took the gun to the examiner who gave a written report. The gun was handed in without objection and marked exhibit "1". The witness agreed under cross examination that a name of another person was mentioned who actually picked up the gun where it was thrown or placed. But he did not remember the name of that person. I believed this witness who was credible and reliable having not been shaken on any aspect over which he testified. I believed consequently that the gun ended being in possession of the Accused by his own admission.

PW 2 stayed at Pela Tšoeu Ha Majara which is Accused's and Deceased's village. Accused was the witness's own son. Deceased was the son of the witness's younger brother. The witness was not in his village in 1994 around the date of the Deceased's death. He had been working in the Republic of South Africa. He only learned of the death of the Deceased (who he also regarded as his son) and the suspicion against his son when he arrived at home during one morning. He was informed further that there had been a fight between the two. At that time the Accused had been arrested and was already in custody.

6

The witness continued that he was contacted by PW 1 and other police officers (accompanied by Accused) who sought for his assistance in order to find the gun involved in the killing of the Deceased as had been alleged. The gun had not been found at the spot (at the Tšinabelo tree) which the Accused had mentioned. The witness asked Accused whether by chance there could have been someone who was around or within the vicinity at the time when he disposed of the gun. The Accused agreed and mentioned the name of one Motsarapane Ntsoakele who was his cousin.

The witness then asked PW 1 and his group to go back to the police station and await his report. In the meantime the witness contacted the said Motsarapane Ntsoakele. He explained to that person the need to bring out the gun as he had been suspected that he could have seen and taken the gun. The gentleman did duly take out the gun and two bullets which he handed over to the witness. It was a blackish gun (pistol) which he took to the police. He also saw a wood saw. He had actually not known what happened which led to the fight and the death of the Deceased. He buried the Deceased his nephew. The Accused was his only child. He was later released on bail.

Mr. Mpaka's cross-examination of the witness revealed the name of one Motlalepula Matlotlo who was the witness's nephew. He was said not to have been in good terms with the Accused, while he was a friend of the Deceased. This Motlalepula Matlotlo was a gentleman who once fought Accused assaulted and injured him on the knee through a gun shot. The matter had been taken to the chief who did nothing and took no steps. The matter was taken to the police who just arrested the culprit Motlalepula Matlotlo but later released him. That the culprit was who a friend of the Deceased was said to have brought a measure of discomfort to the Accused. It was not made clear as to how this contributed to the motive behind the alleged fight.

What was important was the fact that there had been a dispute over a tree plantation. The witness said he inherited the plantation from his father. He thought that

the rightful person to use the forest was his son. Indeed others could cull the trees but it had to be through this witness's permission and in his absence through his wife. It was correct that this view was not shared by all members of the family. Some members of the family however felt that the Deceased also had a title to cull the trees from the forest plantation. That is why the Deceased complained that the Accused was trespassing and had to be stopped.

The case of the Accused was said, as suggested to the witness, to be that he had gone to cull trees from the forest. It was in the process when Deceased came. Accused was told that he had to stop culling because he was trespassing and what he was doing in the forest. When the Accused could not respond the Deceased pulled out a gun from his waist. He shot at Accused once but missed. He then put back the gun. A stick fight ensued. Accused's stick broke. He looked for means of escaping but failed having been then mindful that the Deceased was armed with a gun.

The terrain had been such that the could not avoid charging directly the Deceased/ this he did. He knocked the Deceased over and in the process his gun fell The Accused immediately took possession of the gun. He rose up but still could not go past the Deceased who stood in his way. Consequently he shot at him to frighten him. He then took a different direction, the

Deceased having remained just looking in the direction of the Accused. Accused then walked away out of the plantation.

While a distance out of the plantation he was able to see the Deceased walk out and take a different direction without difficulty. He then threw away the gun. He realised that his finger had been damaged in the process. He met one of his relatives one Hlehlelane. After that he went out of the country and contacted one of his relatives one Jack Moloi who advised him to go back and report himself to the police. In order to be able to report himself he contacted a lawyer Mr Mentjies who accompanied him to the police. He was then placed under arrest.

8

He would corroborate PW l's story that on the following day he was taken to his village to search for that gun. He said the gun was not hidden but was just thrown away because he intended to cross the border into South Africa. He had not thought of turning to the chief or police. He learnt of the Deceased's demise afterwards.

Witness responded further to the cross examination that the Accused had looked terrified when first confronted with police. The witness was asked to say if the gun before the Court looked like the one he handed over he agreed. He agreed that the Accused would be correct if he said the gun did not belong to him and that he only handled or took possession of the gun when he fought the Deceased.

Mr Kotele was able on re-examination to remove the impression that the witness had only learned of the fight and the death of the Deceased when he arrived in Lesotho. He had learned about the death of the Deceased while he was in Vereeniging where he worked. There he had even met the Accused who had been on the run. The witness seemed to minimize the dispute over the tree plantation by referring to the animosity between the Accused and the said Motlalepula who was the Deceased's friend as if it was the source of the dispute. It was said the said Motlalepula even cut trees himself.

That the dispute over the forest was revealed further when Gentlemen Assessor Motsamai sought clarification from the witness. That again the said Motlalepula was playing some kind of a negative role in the Chitja's family's relationship. For example the witness testified that he was himself attacked and chased with a gun by the said Motlalepula. The matter was reported at the police.

PW 5 was Senoe Ntika who had been PW 5 at the PE. He came from the village of Thaba Tšooana, in the area of Pela-Tšoeu. He knew the Deceased and the Accused who came from a neighbouring village.

9

On this morning of the fight at about eight hours the witness had come from another village to see his relatives then saw a hand beckoning. It was of someone who was lying down. It was on the side of a donga or rivulet on the side which had no tree plantations.

He approached the person who had beckoned. It was along a footpath to the village. When he approached that man the man first covered his face but he however realized that it was the Deceased. Deceased said "Potlaki has shot me when we were in the forest." Deceased then

pointed to the spot on his body where he was shot. The witness saw a small wound on the right side from just above the waist line (above the witness belt as demonstrated).

The witness said seeing that the Deceased could not rise up he went to one Marolo in the village to come and carry away the Deceased to hospital. On the way the witness said he tried to raise an alarm at the next village. At the Deceased's village he found one Tsietsi Chitja with whom he came down to where the Deceased lay injured. They found the Deceased having been already removed to a nearby bus stop having been removed away from the place at which he was. Police had not arrived. Accused was not around. Neither had the witness seen the Accused that morning.

The injured Deceased was carried in a vehicle to the police post Ha Khabo. The witness and Marolo accompanied the Deceased. Deceased died after about an hour on the way. Along the way he had received no further injuries. It was at Ha Khabo police post where on learning that the Deceased had already died the witness and others were advised to proceed to Hlotse police station. There the further advise was to carry the Deceased's corpse to the mortuary. The witness had not taken part when the Deceased was ultimately buried.

On cross examination of this witness by Mr. Mpaka it was revealed that when the

10

Deceased was undressed at the mortuary a further wound was discovered at the back on the right shoulder the witness was not aware it that wound had been an exit wound.
On the 4th December 2001 on the second day Gentleman Assessor Motsamai fell off because he got engaged in a criminal trial in another Court. This Court remained with Gentleman Assessor Mathiba whose enthusiasm went a great deal to assist the Court.

In ruling application for discharge at the end of Crown's case I continued with the following back round. We have a situation where a number of witnesses was led in this case. It is that number of five (5) witnesses whose evidence have been analysed thoroughly in the heads of argument of Mr. Mpaka which I have followed in my analysis. I need to mention that this case is an old one. It is a case in which an Accused had to stood charge since 1994. It has had a lot of problems even when this accused stood charge before the High Court, where we eventually imposed Mr. Mpaka on the side of the Accused because he met problems. Initially the wish of the Accused was to instruct Mr. Moloi from South Africa, a lawyer of his choice who he was not able to secure. The evidence of these five witnesses has gone smoothly, that is, within a few days we had dispatched the whole evidence. I may say by way of repetition that I agree with analysis by Mr. Mpaka.

Then came a date in about the beginning of August 2001. It was about the 3rd of August 2001 when it was reported that a witness Thabo Nako who was PW 2 at PE would not be found. The Registrar was instructed to issue out subpoenas. Still on the first day of hearing of this case this week the witness was still not available.

Then Crown Counsel was pressed to get Tpr Kharafu to explain why the witness could not come, because Tpr Kharafu is the investigating officer. So it made sense that he should be present throughout this case. In the end on Wednesday (the 5th December 2001) Tpr Kharafu was available. And if I noted well the presence of Tpr Kharafu was tied to an application that Crown Counsel had made and the application had been made that evidence of Thabo Nako be

admitted as part of evidence in terms of s.227(l) of Criminal Procedure and Evidence Act which suggests that such deposition of witnesses at PE can be admitted as evidence before Court. The section seems to impose certain conditions:

11

1) There must be evidence that there has been a diligent search for the witness. That despite such search the witness is still not available before Court.
2) That there must be someone to testify to the facts on oath. That is why the presence of Tpr. Kharafu was required. Ultimately as said before he was present and he testified.

He testified that he was a witness in this case and was investigating officer thereof. He knew that evidence of Thabo Nako was required and after postponement was handed a subpoena by the Registrar. It is this subpoena that he was armed with and went to home Thabo Nako. And at the village of Pela-Tšoeu and at home of Thabo Nako he was advised of witness's address in Welkom. In fact it is two addresses which were found in the area of Welkom. One address is called Orlando No.7, one address is called Bochabela Location No.5. He then went back to his station where he informed his superiors about the information he got about this witness.

As the witness observed it was required that he should then go to the place of Welkom to find the whereabouts of this witness. Having done so he would be able to cause him to come to Court. And as he advised this Court this practice was a normal practice and it oven meant that without him attending to Welkom there was no way to cause witness to come. As it is, as this Court assembled it was found out that nothing was done to cause witness to come to Court. The reason given by Tpr Kharafu was that there would be no money to transport him to Welkom. What is unfortunate is that at the stage when he was giving evidence he had made no return of service to the Registrar. The back-side of the subpoena which was meant to be filled in to show a return had not been filled in. In fact he produced those forms from his pocket. He had not delivered the return to the Registrar nor Crown Counsel. This is regrettable.

Now on the fourth month we were having to grapple with the problem of the witness once again. And the situation was such that I thought there had been a lot of irresponsibility on the Crown or police. I would not allow further postponement again because it was now causing prejudice to this Accused and it could not be done any longer. The Crown closed its case since it had no choice. Because I was disinclined to grant any further postponement to accommodate this question of a witness about whose attempt to secure was half-hearted or was not done. I

12

even would fail to understand why the Crown did not pursue the police about this return and why the Registrar did not request production of return of service. Neither had there been any attempt to find out from the Officer Commanding the station of Trooper Kharafu why no attempt was made to search for the witness.

Having made this application to have the evidence of Thabo Nako put in, it was obvious that the evidence could not be put in because the search had not been a diligent one as required by section 227(1) (a) (iv) of the CP&E. If I did allow that evidence then there would be

floodgates of applications of admission of evidence from the PE into the records of criminal Court proceedings of the High Court. There would be batches and batches of depositions which were to be admitted into the proceedings of the High Court without proper evidence. With this in mind I rejected the application.

The Crown closed its case. Whereupon Mr. Mpaka made an application for discharge of the accused in terms of s.175(3) of the CP&E. His attitude was that there was no prima facie case which the accused could answer. Having made a thorough analysis of evidence give in this Court as shown he ended up submitting that there was no evidence that Accused could be called upon to explain. Then Accused made references to several decided cases one of which is R v Thoabala 1981(2) LLR 363 at 365 where Molai AJ (as he then was) commented about s.175(3) of the Criminal Procedure and Evidence Act in a quotation from the case that was to be found at page 5 of Mr. Mpaka's heads of argument. At page 365 of the case the learned judge continued to talk about the requirements of the kind of application that Mr. Mpaka had made. And further commented about the facts of that case which the learned judge was deciding in relation to establishment of a prima facie case on the face of the evidence which was the correct test. This the learned Judge emphasized.

Mr. Mpaka continued from his heads to speak about the position in law of self-defence. He quoted from a book by CR Snyman, Criminal Law. At page 89 of the book he quoted thus:

> "If the possibility of a private defence is raised in the evidence; the onus is on the state to prove beyond reasonable doubt that the accused did not act in self-

> defence."

Then Counsel referred to the case of R v Zikalala 1953(2) SA 568(A). I quote from that case to say that:

> "The trial court should at least have had a reasonable doubt as to whether the crown has established, that the appellant did not kill the deceased in self-defence." (My underlining)

Counsel submitted that there had been no sufficient evidence tendered by Crown to rebut Accused's defence. He argued that there was none on the record. In the circumstances if the Accused would be required to go into the witness box it would amount to his being asking to describe the way the act was committed.

Counsel further argued that if the Court was to order the Accused to go into the witness box it would amount to the Court requiring the Accused to tell how the crime was committed, and in addition it would be to require the Accused to bolster the Crown's evidence or as it were to hang himself with his own evidence. So the Court would be doing that in anticipation that the Accused would be tempted to incriminate himself as it were. He said that that is not how this Court should operate.

Counsel then spoke about the remarks of Lehohla J in Masupha v Masupha CIV/T/260/99 (unreported) where at page 3 he made a comment about a prima facie case, and its requirement in a similar case. And that quotation appears to me to be very pertinent to the

situation that we are discussing because it impresses that even at this stage where there is no prima facie case being the standard that is required accused can be acquitted. This argument would similarly extend to that charge speaking (in the instant case) about possession of a gun, in the sense that surely Accused cannot be put into the witness box for illegal possession of a gun when there is nothing against him except that the gun (which he took from Deceased) was in his possession which he does not deny. And to put him into the witness box would be to repeat what has been said by others.

14

The best that could be said against the Accused was the statement the Deceased made. That the Accused had killed him. Deceased when he spoke did not mention any circumstances except that "he has killed me" without indicating the way in which this would be translated into a criminal offence. Accused incidentally admits to have killed the man but in self-defence.

Mr. Kotele for the Crown also made several submissions where he talked about amongst others Masupha v Masupha (supra). He referred to Evidence by SE Van der Merwe whereat page 147 learned author talks about prima facie case, onus and the legal position of where insufficient evidence has been put by Crown where then there must be acquittal. But what interested me most was this case of R v Heroldt & 3 Ors 1956(2) SA 722, where the learned Judge Bekker J at page 723 made an important comment. It was in page 723 where an interesting quotation is to be found. I referred the quotation to Crown Counsel and I had wanted Counsel to comment upon this morning. The learned judge says:

> ".....it is of course beyond question that in a particular case the attendant circumstances might be such that a failure of justice could possibly result if an accused persons were to be discharged at the close of the case for the prosecution even though it has failed to present a necessary degree of evidence that the attendant circumstances in such evidence in my opinion be of such a nature as to afford a necessary grounds upon which that discretion should be judicially exercised." (My underlining)

I understood that a judge or a presiding officer in my situation should look at attendant circumstances and such circumstances should be such as to allow a judge to make his decision very wisely. My understanding was that such circumstances should be hard facts that the Crown can invite the Court to speak about. It must not be speculation. It must be a set of facts which must have been put in in order for accused to respond thereto. If not the Judge will not be able to exercise his discretion because there will be no basis for the excercise. But those facts must be present.

My suspicion furthermore is that those attendant circumstances must be a set of facts.

15

However, as Mr. Kotele concludes from this statement by the learned judge, this principle requires some qualification. It is that if there remains a reasonable possibility that, at the end of the whole case, the accused will be acquitted for lack of evidence implicating him, he will be entitled to his acquittal because ex hypothesi if there is no prima facie evidence against the accused, it would not have been proper to let him go to the witness box in the first place. My

conclusion is that this is a situation that we have now. If Accused would be acquitted now why would he go into the witness box when the state would be still be required to prove its case beyond a reasonable doubt?

The Accused might have killed the deceased unlawfully. He might be telling an untruth in that he killed in self defence. But there is no evidence to rebut his alleged self-defence. Our law presumes one innocence until one is proved guilty. This man's story might be true, but we have nothing to prove that what he is saying is not reasonably possibly true. Or rather the Court would be going beyond what is required of if at this stage of these proceedings if we go that far in our inquiry. It is because the Court ought not to deal with questions of credibility at this stage.

What we should consider is whether there is a prima facie case to the Accused to answer or explain. The best that remains is a suspicion. But put simply it is this way. They (Accused and Deceased) were alone inside or outside the forest. No one saw what happened according to evidence which we have. So that this man ought to be discharged just now at the end of the Crown case.

Accused if you killed this man unlawfully it will remain on your conscience. You are discharged. You may go. The gun is forfeited to the Crown.

T Monapathi
Judge
7th December 2001

Copy: Officer Commanding LMP Leribe