

CRI/T/123/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

**REX**

and

**PETER POTSANE MOOROSI**

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete  
on the 11<sup>th</sup> April 2002

The accused is facing two counts.

On the murder indictment, it is alleged that on the 7<sup>th</sup> August 1998 and at or near Mafeteng Prison compound in the district of Mafeteng, Lesotho, the accused did unlawfully and intentionally shoot and kill one Lekhetho Leokane; on the second count it is alleged that upon the same day and occasion he attempted to kill one Hlomohang Shoaepane by shooting him through both thighs. He pleaded not guilty to these counts.

Mr Nteso representing the accused then formally admitted as evidence the depositions of the following witnesses at the preparatory examination: P.W.1 Superintendent Makaliana, P.W.7 Detective Inspector Ntsika, P.W.8

Trooper Jane, Detective Foloko, P.W.10 Senior Inspector Mothibeli; these were read into the machine as evidence. Also admitted were the post mortem report and its findings and the medical report concerning the injuries under count two.

In support of the indictments, the crown counsel **Ms Dlangamandla** called P.W.1 Sente Lebona who told the court that in August 1998 he was a principal officer at the Mafeteng Prison where the accused worked also as a principal officer. The deceased and Hlomohang Shoaepane were prison officers at the same institution.

He informed the court that on the 7<sup>th</sup> August 1998 there was a party held in the evening to bid farewell to Mr Sechaba Mokhethi who was going on retirement from the prison service. Certain contributions were determined at a staff meeting held earlier where the type of foodstuff and drink were also discussed. According to P.W.1 though varying the amounts of contribution were raised at the meeting (M15.00 or M30.00) there was no voting nor clash of opinion.

He went on to tell the court that the accused arrived later that evening after the party had started and requested some drink. He says that accused drank a Hunters Dry and then a Lemon Sting – all alcoholic wines. He says he then advised the accused to hold his horses because he would create shortages for other people at their party.

He says that he then saw the accused vomiting next to a window and he asked him, *“Man, why are you doing such a bad thing ... go a bit down.”* He

says the accused did not look drunk but normal. He says he then turned to the deceased and Lekhotla Moshoeshe who had approached him for more beer and remarked that the accused was vomiting because he had been mixing his drinks. He then heard accused say "*what are you saying?*" to which he replied "*you mix drink ... that is why you vomit*".

The accused then retorted saying "*you are talking shit.*" He says he then pushed the accused aside going towards the store where drinks were kept. He says as he proceeded thus towards the store he suddenly heard the sound of a gun being cocked and when he turned around to look he saw the accused holding a gun and was saying "*I am ready.*" He admitted that he too was also armed though he in civilian clothing. Then the deceased and Shoaepane, who had been standing by, came in between raising their hands saying "*Please do not do this,*" the accused was pointing the gun at him at the time.

He says as he retreated, the accused then pushed the deceased backwards onto a stoep; and as the deceased tried to regain his balance, he heard a report of a gun; and then another. He heard the deceased exclaim "*U ntsekisang?*" (what have I done to you) to which the accused said "*I told you some day I will get you.*" He says the accused then turned towards Shoaepane and shot again.

He says as people rushed to the scene, he and Moshoeshe pulled Shoaepane from where he had fallen. At the time the accused was firing into the air, and he ultimately departed from the scene.

Upon reaching the deceased, they found that he looked tired and had blood stains on his shirt sleeve. He was unable to talk. The deceased and Shoaepane were quickly transported to the hospital. He observed that Shoaepane had injuries on both his thighs.

He told the court that he undressed the deceased with the assistance of the hospital doctor and then noticed a wound on the left arm and left breast. He says the deceased then died soon thereafter.

He noticed that the deceased had his firearm on his waist as they undressed him at the hospital.

Under cross examination, P.W.1 denied that he was refusing to serve drinks to the accused and maintained that relations between him and the accused had hitherto been cordial during the five years they worked together as colleagues.

He explained that when the deceased was shot he was not near the deceased and there was no reason why the accused shot the deceased because the clash, if any, was between him and the accused over his vomiting on that day. He says the deceased and Shoaepane came only to intervene when they saw the deceased with a gun drawn.

*Question: Accused will say that the deceased and Shoaepane were shot by mistake?*

*Answer: No, they were not ... He will be lying to say that. He shot them deliberately ... He shot deceased at one time and at another angle shot Shoaepane."*

P.W.1 says when they got to the deceased they found a lady officer Ramatobo trying to help him. P.W.1 denied that he ever insulted the accused when he was vomiting or about to.

More importantly, he denies that he punched the accused at the back of the head such that the accused fell backwards on the stoep.

*Question: Accused then asked you why you punched him and you then reached for your gun?*

*Answer: He is lying.*

*Question: You cocked your gun but it slipped out of your hand and fell down?*

*Answer: He is lying.*

*Question: Accused remembered his gun as you were going to shoot him?*

*Answer: No, I could have kicked him if the gun was already down. I would not shoot him.*

*Question: He pulled it out and shot into the air to warn you and cause you to surrender?*

*Answer: He is lying. He did not shoot into the air.*

*Question: You grabbed your pistol?*

*Answer: It is all fabrications. He lies.*

*Question: As you ran towards Shoaepane, he tried to shoot your hand and this was a second shot.*

*Answer: Lie*

*Question: He says he hit nothing but you hit behind Shoaepane?*

*Answer: He is lying.*

*Question: He heard a gun being cocked and looked only to see deceased pointing a 9mm automatic at him?*

*Answer: Lies. The deceased's gun was found at his waist at the hospital and I was with Mothae and Lelia.*

*Question: He was retreating and shooting?*

*Answer: I never ran away*

*Question: He realized that his life was in more danger?*

*Answer: He is lying to say deceased pointed him with a gun.*

*Question: He shot at the deceased's hand to disarm him?*

*Answer: Fabrications*

*Question: He retreated towards the kitchen?*

*Answer: He retreated after firing many bullets.*

*Question: He then ran away having climbed and jumped over the security fence?*

*Answer: I cannot dispute that.*

It should be noted that P.W.1 denies that no fight occurred in which punches were delivered; he says that the deceased and Shoaepane had raised their hands beseeching the accused who then had his gun cocked.

Next called was Hlomohang Shoaepane P.W.2. He informed the court that he also attended the farewell party in the prison compound that was held for Mr Mokhethi. He was sitting down with colleagues and drinking beer. After a while he went out to ask for more beer from P.W.1. As P.W.1 was explaining that he could not find the keys to the storeroom where beer and other drinks were kept, the accused arrived and vomited somewhere near the

store; he says P.W.1 then asked the accused to do his vomiting further down. P.W.2 then says he later found P.W.1 and the accused engaged in heated argument about the vomiting and the accused was saying "*I see you have shit*" and that the accused then pulled out a gun, cocked and pointed it at the P.W.1. He says that deceased and Moshoeshoe tried to intervene from the side. He says he also joined raising his hands to placate the accused who did not heed their request to put the gun back to holster.

He says he saw when the accused push the deceased with his left hand and as the deceased staggered trying to regain his balance, the accused fired at him. He stated that the time the deceased had no firearm in his hands. The deceased asked "*why do you shoot me*" to which question the accused said "*I told you I will even catch you.*" The deceased then fell down. He says the accused then jumped onto the stoep and shot at him and the bullet hit his left thigh penetrating through to the right thigh. He says that at no time did he see P.W.1 hit the accused at the back of the head with a fist. He says people rushed to the scene and saw officer Ramatobo helping the prostrate deceased.

At the hospital he saw that the deceased had a wound on the left arm and left breast and was gasping for breath. He says he himself spent a few days as an inpatient at the Mafeteng Hospital.

On being cross examined, P.W.2 insisted that when the accused pushed the deceased, the latter was trying to pacify the accused and was not holding any gun. He did not however hear the accused say "*I am ready*" after cocking his gun.



*Question: Accused shot you because P.W.1 had cowered behind you?*

*Answer: No, Lebona (P.W.1) was then about ten to twelve paces from me when I was shot through the thighs. Accused shot me from a distance of about six paces. He shot the deceased and then me.*

Next called was Lekhotla Moshoeshoe P.W.3 who informed the court that in August 1998 he was a prison officer at Mafeteng Prison and the accused was his principal officer.

He says he also attended the farewell party on the 7<sup>th</sup> August 1998 and was in the company of deceased and Shoaepane. At one stage, they went to P.W.1 asking for more drink. When they got to P.W.1 he heard accused say, *“man, what are you saying about me?”* and P.W.1 replied *“the way you mix your drinks results in you vomiting.”* The accused then retreated and pulled out a gun from his waist, locked it and said *“I am ready.”* He says they then rushed in raising up their hands pleading. *“Sergeant Mōerōsi, how can people of your rank do things like these”?* The accused then pushed the deceased away with his left hand while his right hand held the gun. He then fired at the deceased who held nothing in his hands at the time. The deceased asked *“why do you shoot me”* to which the accused replied *“I told you I will ultimately catch you”*; he was then retreating and shooting into the air. He says he then heard P.W.2 screaming for help; he says he did not see what had befallen him.

During cross-examination, the following questions were put to him.

*Question: Deceased was not searched at the hospital?*

*Answer: It happened and the gun was found at his waist.*

*Question: If it is true that deceased took out his gun at the prison compound and flashed it, it would not be possible for the gun to be found at his waist at the hospital?*

*Answer: I was near him.... I could have seen him draw the gun.*

He denied that he was falsely implicating the accused and admitted that the preparatory examination he did not mention that the accused said “*I told you I will eventually catch up with you.*”

P.W.4 Ntlalane Ramatobo was then called to give evidence. She told the court that on the 7<sup>th</sup> August 1998 she attended a farewell party for Mr Mokhethi who was retiring from the prison service.

At one time she was on her way to the toilet at about 7 pm. As the toilet was then occupied she had tried to squat nearby to pass water. As she was about to squat, she heard the sound of a gun being cocked; on looking she saw that it was the accused doing the cocking of the gun ten paces away. She says she shouted “*Moorosi, what are you doing?*” and ran towards him but before she reached him she heard a gun report and people scattered. She heard deceased ask “*why are you shooting us*” and accused said “*I told you I will ultimately catch you*” after which she heard another report. She says she saw the deceased stagger and she caught hold of him. Hlomohang Shoaepane was on

the ground and was crying in pain. The deceased then said "*Morena Ramatobo, he has finished me.*" She encouraged him say "*please be brave like a man.*" She then noticed a hole in his lumber jacket on the left arm. She says at the time he was shot, the deceased had nothing in his hands.

Under cross-examination she says she heard the cocking of the firearm as she was trying to squat to pass water but she admits that she had not heard any altercation that preceded this; nor did she hear the accused say "*I am ready*", she did not see any pushing. She denied that she is falsely implicating the accused because the accused had been annoyed by her failure to transmit his message his of bereavement earlier that week.

The crown then closed its case.

The accused then gave evidence on oath. He informed the Court that in August 1998 was a principal officer at the Mafeteng Prison; and that on the 7<sup>th</sup> August 1998 there was a farewell party held to celebrate the retirement of Mr Sechaba Mokhethi. Before the party was held, there had been a meeting to discuss the party issues e.g. contributions, and types of refreshments. Regarding the amount of contribution to be made differing amounts had been suggested e.g. M15, M25 and M30.00. The last sum carried the day to the acute disappointment of P.W.1 who was then a senior principal officer, who was out-voted. He was not happy at all, he says. He says that on the 7<sup>th</sup> August 1998 he had gone off duty at 2 pm and having changed into private attire at his "open Camp" residence, he then walked to the party with his private firearm on his person.

Having arrived at the party which he found already in process, he went to P.W.1 to ask for a Hunters Gold. He says P.W.1 obliged having opened the container. He says he sat down and drank and after some time he then went to ask for another drink.

He says that at one stage, the lights in the storeroom where liquor was kept went out and he asked P.W.1 to give him money in order to buy candles at the café just outside the prison compound. He went and bought the candles. Having lit the candle, he looked for his half-drunk can of beer but could not find it. He therefore asked for some more drink from P.W.1 who grudgingly gave him another. After some time, he went for another Hansa can. He says that P.W.1 was now totally opposed to serving him liquor as he requested. He says P.W.1 was scolding him all the time but gave him a Hansa quart, which he again drank also belching loudly. He then heard P.W.1 remark "*nyoa mae enoa ... ke ile ka hla ka u bona hore u tla qetella u entse tjena.*"

He turned back from a rabbits den and asked P.W.1 why he insulted him for belching. He says he had not vomited though he felt nauseous. P.W.1 ignored him and he asked him yet again. He says P.W.1 then hit him with a fist causing him to fall down and kicked him as he tried to stand up. He says he jumped on to the stoep but fell down. He says he saw P.W.1 draw a gun which however slipped out of his hand and fell to the ground. He says he drew his own gun and shot twice into the air to scare P.W.1. He says P.W.1 fired back.

He says he heard someone say "*He has shot me*".

He then saw the deceased on his right with his gun cocked and heard another sound of shooting from where P.W.1 had run to.

He says he then fired in the direction of P.W.1 and then heard the deceased say "*why do you shoot me now.*"

He says he again fired into the air with the "fourth bullet."

He says he again fired the fifth time and started to run away.

He denies ever saying at the time that he said to deceased: "*I told you that one day I will catch you*"; nor did he ever say "*I am ready*;" he further denies saying that P.W.1 was talking shit. He says P.W.1 had been harbouring a grudge against him since P.W.1 had been out-voted on the contribution issue. P.W.3 was falsely implicating him he says because Moshoeshoe was once taken to task for having used his firearm carelessly while drunk at the hotel. P.W.4 was implicating falsely him because he once reprimanded her for suppressing messages of his bereavement. He says he at the time of the shooting he was not drunk but shot in self defence.

Under cross- examination by **Ms Dlangamandla** he denied that he ever said that the deceased and Shoaepane were shot accidentally or by mistake though this could have been suggested by his counsel when cross-examining the crown witnesses. He says when he shot in their direction he shot in self defence.

In this case, the *onus* is as usual upon the Crown to prove its case on these two counts beyond a reasonable doubt; no onus rests upon the accused to establish his innocence and if the accused pleads self defence he needs to show that the defence he raises is under the circumstances reasonably possibly true. The raising of this defence by implication means that the accused admits committing the act charged but did so in self-defence mistake or accident do not feature. If this defence successfully pleaded the accused is entitled to an acquittal because the unlawfulness of his act is thereby vitiated.

In this case, it is common cause that a quarrel erupted between the accused and P.W.1, the latter bemoaning the rate at which the accused was gulping down beers at the farewell party. The evidence showed that at one stage the accused belched loudly or sought to vomit nearby and this prompted P.W.1 to remark that the gluttonous imbibing of the accused caused him nausea or to vomit.

The evidence of the crown witnesses sought to establish that the accused shot the deceased as the latter and Moshoeshoe were attempting to intervene between the accused and P.W.1. What remains to be decided is whether the accused shot the deceased acting in self defence or in a situation **aberratio ictus**.

The concept of **aberratio ictus** is sometimes problematic in our law. Put ideally, it occurs where X shoots at Z intending to kill him but the bullet hits and kills Y whose presence was to X unknown; X in that situation has no intention to kill Y and cannot be convicted of murdering Y – See S. v.

Mtshiza 1970 (3) SA 747 at 751-3 per **Holmes J.A** who, in stating that the doctrine of **versari in re illicita** was outworn, stated that X would however be guilty of culpable homicide where X foresaw the reasonable possibility that Y would be shot yet persisted in his deed. He further reasoned it would be murder if X subjectively foresaw the possibility of resultant death of Y yet persisted recklessly in his deed; in the latter scenario the type of intention is **dolus eventualis** whereas in the former it is **culpa** (**S.v. Sigwahla** – 1967 (4) 566 A.D.) **R. v. Kuzwayo** – 1949 (3) SA 761; **S.v. Nkombani** 1963 (4) SA 877. Where X shoots into a crowd or group of people there is **dolus indeterminatus** and it may amount to murder – **S.v. Mauhunger** – 1981 (1) SA 56 at 67-8.

Coming to the particular circumstances of this case, it is important to note that upon the admitted evidence of Trooper Jane, five 7.65 firearm shells were found at the scene and the accused in giving evidence states he shot five times and the ballistic report of Senior Inspector Mothibeli states that a fired bullet and cartridge cases had been fired in and from the pistol 7.65 serial no.D16191. I do not therefore believe as probable or possible the story of the accused that P.W.1 or deceased fired at him; I also find no good reason to believe that when he was shot the deceased had drawn his gun and was pointing it at him. I believe as true that when shot the deceased still had his gun on his waist.

The facts of this case paint a picture of the accused being infuriated by P.W.1 who had rebuked him for gulping down many drinks and thereafter being about to vomit. It is probable in the circumstances of this case that the accused at the time of the shooting had taken much drink and in highly

exitable state and was quick to draw his pistol at the slightest of provocation. That he did not shoot Lebona that evening was rather fortuitous than planned; I do not however believe that he premeditated killing of the deceased but the accused ought to have reasonably foreseen that his random shooting would have fatal consequences. His utterances that he was ready and had told the deceased that he would one day catch him are more consistent with his dangerously drunken conduct than with any premeditation on his part. On this point some crown witnesses say they did not hear words being uttered by the accused. I therefore find that the crown has not proven beyond reasonable doubt that the accused had the necessary intention – **directus** or **eventualis** – intoxication and possible provocation being taken into account when determining his mental state when he shot wildly.

I do however find that when he shot the deceased the accused did not act in self-defence. Upon his own admission when giving evidence, the accused was not very intoxicated on the day in question; he had however consumed liquor in a manner that rendered him nauseous. I also find that his version of having acted in self-defence as untenable and false. No one hit him with a fist at the back of the head; no one pointed a gun at him on that day. In his wild and sudden fury, he shot at random and ought to have foreseen that his shooting could have the fatal results. Under our law, the dividing line between *dolus eventualis* (legal intention) and *culpa* is rather a thin one and much depends upon the particular circumstances of each case. As **van den Heever J.A.** aptly said in **Julius Pone vs D.P.P** – 1999-2000 LLR 214 at 226 –



*“... If there is a reasonable doubt whether the version of the accused may not be true, the crown has not discharged the onus burdening it of proving all the elements of the offence charged, more particularly the intention to kill.”*

I do find that *culpa* has been established beyond all doubt and I therefore find the accused guilty of the crime of culpable homicide under count one.

Under count two the accused is charged with attempted murder. My views as regards the intention to kill apply in same vein under this count. Section 186 of the Criminal Procedure and Evidence Act (*supra*) reads:

*“Any person charged with attempted murder or with assault with intent to murder may be found guilty of an assault with intent to do grievous bodily harm or of a common assault if such be the facts proved.”*

Section 188 (3) then reads:-

*“(3) If at the trial of any person on a charge alleging that he killed or attempted to kill or assaulted any other person, it has not been proved that he committed the offence charged, but has been proved that he pointed at the person against whom the offence is alleged to have been committed, a firearm, airgun or air pistol, in contravention of any law, the accused may be convicted of having contravened that law.”*

Section 26 of Internal Security (Arms and Ammunition) Act No.17 of 1966 reads:

“26. *If a person has in his possession a firearm or ammunition with intent by means thereof unlawfully to endanger human life or cause injury to any person or property, or to enable any other person by means thereof unlawfully to endanger human life or cause injury to any person or property, he shall, whether death or any injury to person or property has been caused or not, be guilty of an offence and liable on conviction to the penalty prescribed in section 43.*”

I am of the view that under the circumstances of this case, it is appropriate to bring in a verdict under Section 26 of Act 17 of 1966 (*supra*). The accused is found guilty of having contravened the said section.

### **Sentence**

In coming to sentence, I think it is appropriate that this court should voice its concern upon the prevalent and rampant use of firearms in our Kingdom. Many a life has been lost- young and old, male and female – at the barrel of a gun.

In Lesotho to-day, the Court is acutely aware that a section of our people have become “*trigger happy cowboys*” who wield and use guns at the flimsiest of causes. To these individuals the sanctity of human life counts but little. Our society deprecates such undesirable elements who deserve robust punishment for their dastardly deeds.

The accused in this case was a Senior Prison Officer from whom discipline and orderliness were expected; but he acted like a “*bull in a china shop*;” he shot wildly at his own colleagues for a trivial reason. A gun in the hand of a drunken man becomes a dangerously lethal weapon. If he had left the gun

behind at his home before going to the party he could perhaps not be before this court. He has however deprived the Leokane family a son, a husband and a father. In his drunken state he acted most brutishly and with utter disregard to human life. That he is a first offender and has had otherwise an unblemished record stand him in good stead; but he must be punished. In **Rex vs Julius Pone (supra) van den Heever J.A.** having reduced the conviction from murder to culpable homicide, noted that in imposing a sufficiently suspended sentence, the interests of society could be adequately catered for in causing the accused person, in/so far as may be necessary, to be less impetuous in his violent reactions than he was at the relevant episode.

Having considered all the circumstances of this case, the court imposes the following sentences:

Count One: M10,000 or 10 years imprisonment— one quarter of which is suspended for three years on condition that the accused is not found guilty during that period of suspension of an offence involving injury to person for which he is sentenced to six months or more without an option of a fine, or an offence under the Arms and Ammunition law.

Count Two: Four hundred Maloti (M400.00) or one year imprisonment.

It is ordered that both sentences run concurrently.

The 7.65 pistol is declared forfeited to the State and it is ordered that the accused should be banned forever from ever being licenced to possess a firearm of any sort or calibre.

I also direct that the Registrar of this Court dispatch of this judgment to the Commander of the Lesotho Defence Force, the Commissioner of the Police Services, Director of Intelligence and Director of Prisons. This should serve as a stern reminder that service or private firearms should be handled and used with the fullest sense of responsibility and duty by the officers under their command. In future this court will not hesitate to impose the harshest or ultimate of sentences upon any officer who uses a firearm irresponsibly in circumstances where discipline and restraint ought to have been exercised. Human life is always precious but of late it is often violated for the most trivial of reasons and unlawful use of guns occurs with monotonous frequency. This despicable type of criminality must come to an immediate stoppage.



S.N. PEETE

JUDGE

For Crown : **Ms Dlangamandla**

For Accused: **Mr Nteso**