

CRI/T/40/97

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

and

**LIPHOTO LIPHOTO
LEHLOHONOLO PELEA**

**Accused No.1
Accused No.2**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
On the 20th day of August 2002

The night of the 18th day of August 1995 will no doubt go down as one of the bleakest days in the history of a tiny, but apparently popular, restaurant known as Roberto Restaurant at Roma in the district of Maseru. It was on that day that Edward Fobo (the deceased) was shot and killed while enjoying beer drinking with his friends. Following this incident, the two accused, Liphoto Liphoto (A¹) and Lehlohonolo Pelea (A²) have appeared before me charged with the murder of the deceased.

I should mention at the outset that A¹ was discharged at the end of the Crown case on the ground that there was no evidence

upon which a reasonable man might (not should) convict and Miss Mofilikoane for the Crown very fairly and properly conceded this point.

At the commencement of the trial the defence made the following formal admissions in accordance with Section 273 of the Criminal Procedure and Evidence Act 1981:-

- (1) The facts as deposed to in the preparatory examination depositions of PW² Motloang Mohapi, PW⁴ Lineo Ramokoena, PW⁵ Louis Fobo, PW⁷ Detective Trooper Mahlehla and PW⁸ Detective L/Sgt. Tšiu.
- (2) The post mortem report Exh "A" in terms of which it was admitted that the deceased had sustained a "gunshot wound at the cervical neck, fracture of cervical bone seen". It was further accordingly admitted that the cause of death was the gunshot wound to the neck.

In brief the facts as deposed to by PW² Motloang Mohapi at the preparatory examination disclose the following:-

He lives at Roma and is employed at the National University of Lesotho (most probably as a night watchman – He himself did not explain). He knew A¹ and the deceased "very well". He usually saw A². On the night in question he was on duty at the university and was standing under an electric light about 35 metres across Roberto Restaurant. He saw people coming out of the restaurant and standing outside. After sometime he heard a gun

sound. He did not count how many times the gun sounded but there were two different sounds. After the gun sound the deceased went out of the group of people who had come out of the restaurant and ran away. He subsequently fell down after coming down the stairs of the restaurant. The deponent then approached the deceased and was “aware” that the latter was no longer breathing. He went to report the incident at Roma Police Post. He came back to the scene of crime with the police who examined the “corpse” and took it to the mortuary. The deceased was bleeding from the head and there was blood on his chest. He had bled “heavily”.

The admitted facts as deposed to by PW⁴ Lineo Ramokoena at the preparatory examination are briefly that she lives at Mafikeng. She knew both the accused and the deceased. On the night in question at about 8.00 p.m. or 9.00 p.m. she was at Roberto Restaurant to buy food. She then heard a gun sound following which she went outside where she saw the deceased running and falling down under an electric light. PW¹, Bonang Maama came running after the deceased and said to him “let us go”. The deponent then realized that the deceased was too heavy for PW¹ to carry. She came closer and saw that the deceased was bleeding from the neck. PW² Motloang Mohapi came with a car to

the scene of crime and he went to fetch the police who came and examined the “corpse” and took it to the mortuary.

Briefly stated, the admitted facts of PW⁵ Louis Fobo at the preparatory examination show that he lives at Roma, Mafikeng. He knew the deceased who was his younger brother. He also knows the accused. On the 23rd August 1995 he went to Queen II (apparently Queen Elizabeth II Hospital) and on arrival there he examined the deceased's corpse in the presence of the hospital employee before a post mortem examination was performed. He saw a wound on the deceased's forehead and on the neck. He had always been with the deceased who was a healthy person.

In brief the admitted facts as deposed to by PW⁷, No. 7509 Detective Trooper Mahlehla show that he is a member of the police force stationed at Roma and he is one of the investigators. He knows the accused. On the 18th August 1995 he was at home at Roma Police Station when one Setlolela arrived and gave him a report which he followed. He went to Roberto restaurant where he found a corpse with many people gathered thereat. Examining the corpse, he saw that it had an open wound on the neck. He looked for the cause of death but was unable to find anything. He then

took the corpse to Queen II (once more presumably Queen Elizabeth II Hospital) mortuary. Before taking it away he realized that it had bled “heavily”. The deceased had fallen face down and the corpse did not sustain any other injuries on the way to the mortuary.

The admitted facts emanating from PW⁸ No. 3326 Detective Lang Sgt. Tšiu show that he is a member of the police force stationed at Roma. He is the investigating officer in this case and he knows the accused before court. Lehlohonolo Pelea is employed as a soldier. On the 21st August 1995, while on duty, he received a report that a person had been shot at Roberto restaurant. He proceeded there on the 22nd August 1995 and saw blood outside the house where he learned the deceased had been lying (he was no longer there). He found a gallil shell and another shell belonging to a pistol 7.65. His investigations led him to the suspects A¹ and A². He arrested Lehlohonolo Pelea (now A²) at Lesotho Defence Force camp on the same day namely the 22nd August 1995. He then went to Katlehong to arrest Liphoto Liphoto (now A¹). Lehlohonolo Pelea (A²) handed over to him the rifle No. L701753 with 19 rounds of ammunition while Liphoto Liphoto handed to him “rifle” 7.65 No. 5853344 with 8 rounds of ammunition. It is

however common cause that the deponent was in fact referring to a pistol and not a rifle as suggested.

The deponent then took the accused to the police office. He warned them and they made an explanation after which he gave them a charge of murder. The exhibits were kept by the police and they were taken to Makoanyane camp where they were examined. The gallil rifle with its 19 rounds of ammunition and the empty shell, as well as that of 7.65 pistol were marked Exhibit "1" collectively.

Three witnesses were led at the trial in support of the Crown case namely PW¹ Bonang Maama, PW² Relebohile Liphoto and PW³ Dyke James Thaanyane.

The evidence of PW¹ Bonang Maama discloses that he is 28 years old and lives at Roma, Ha Mafefooane. He is single and literate having gone as far as COSC at school. He is a driver and he knew the deceased in his lifetime as they lived in the same village. He also knows both accused. A¹ is his own co-villager while A² was his schoolmate.

It is the evidence of PW¹ that on the fateful night in question he was at Roberto Restaurant in the company of the deceased and one Zimbabwean called Farai. It was at 8. o'clock in the evening. The latter had a discussion with a certain girl (no doubt Lineo Ramokoena referred to above) and in due course a decision was made by the group to go and make a "sit in" within the University Campus. As they left for this place however a little problem arose in that the girl in question went and sat in a motor vehicle driven by one Matsoso. It was at this stage that Farai, who could not speak Sesotho, asked PW¹ to confirm with Matsoso whether the girl in question was still going to the "sit in".

It is PW¹'s evidence that Matsoso opened his window so that he (PW¹) could speak to the girl in question but that even before he could talk to the latter, Matsoso hit him with the door of the vehicle. PW¹ fell to the ground. Matsoso alighted from the vehicle and fought PW¹ with fists. The latter fought back assisted by his companions.

At this stage A¹ and A² appeared on the scene and inquired whether PW¹ and his companions were the ones who could fight their friend Matsoso. A² went to the boot of the vehicle and took

out a big gun and shot at the deceased who fell down. Yet in the same breath he says that when the deceased was aware that A² was going to fetch the gun he (the deceased), ran away. I should therefore state at the outset that for me these may be early warning signs of an untruthful witness.

To return to the evidence of PW¹, it turned out that, according to his own evidence, at the time A² allegedly took out the gallil rifle from the boot of Matsoso's vehicle he (PW¹) was actually "wrestling" with A¹ in a bitter fight. It was during this time when the gunshot went off.

Asked whether he saw where the gun was pointing, PW¹ was emphatic that he did not see the direction where the gun was pointing adding: "I just heard the sound". If that is so, I cannot understand then why earlier on PW¹ claimed that A² took out a big gun and "shot at the deceased". I have no doubt that he was exposed as a liar on this point even before cross-examination began.

Predictably PW¹ was taken to task in cross-examination about his allegation that A² shot the deceased. The very first question put to him by Mr. Ntlhoki for A² went as follows:

“Q: Before we go any further, A² says he never shot at the deceased that night. What do you say to that?

A: I would say he shot him.

Q: You did not see A² shoot at deceased?

A: That is so

Q: In fact you were so busy yourself engaged in a fight with Liphoto (A¹) that you didn't see?

A: That is incorrect.

Q: So you were fighting and at the same time trying to take stock of what was happening around you?

A: I was not fighting.

Q: In your own words you said you were wrestling with Liphoto (A¹)?

A: Yes that is correct.”

In my view, the little exchange referred to above clearly exposed PW¹ as an untruthful witness. However he was ultimately driven to concede, under the pressure of cross examination, that his wrestling with A¹ went on until after the gunshot in question and that they only separated after the gun report. Yet despite this concession he still persisted in his denial to the defence suggestion

that he was so busy wrestling with A¹ that he could not see what was happening elsewhere.

PW¹ did further concede in favour of A², and for the first time in cross-examination though, that both A¹ and A² came on to the scene “trying to stop the fight.” He concedes furthermore that the first thing A2 did was to get hold of the deceased “to separate him from Matsoso”. Indeed to drive the point home the following question was put to PW¹ by Mr. Ntlhoki:

“Q: Really all, he (A²) was doing was to try to stop the skirmish, the fight?

A: That is correct.

Q: A² says on that day there was nothing that went wrong between them (i.e. A² and the deceased). That is they didn’t even fight or exchange verbal insults?

A: I said they had come to intervene. They didn’t fight.”

PW¹’s response quoted above must be judged in the light of his earlier version that A² went to the boot of the vehicle, took out a big gun and simply shot at the deceased. This seems highly improbable if, as PW¹ himself now says, A² and his companion had come to intervene and were in fact not fighting. It should, for that matter, be noted here that PW¹ himself concedes that A² and the

deceased were such close friends that they used to call each other “motsoall’aka” (my friend).

PW¹ does not dispute the defence version that a lot of people had gathered at the scene of crime at the time the deceased was injured. Nor does he deny that this crowd of people approached A² “belligerently” despite the fact that the latter duly identified himself as a soldier and was by then holding a gallil rifle. More importantly PW¹ does not seriously dispute the defence version and sequence of events that indeed A² seized Matsoso’s gallil rifle from the vehicle in question and fired in the air once “as a warning shot.” All PW¹ could say is that he heard “about” two sounds.

Finally, PW¹ is adamant that A² is the only person who discharged a firearm at the scene of the crime on that fateful night. As will become clear in the course of this judgment, I do not believe him on this issue in the same way as I do not believe him on his version that he saw A² shoot at the deceased. I bear in mind two further factors that count against PW¹ namely that he concedes that it was dark on that night (apart from some electric light coming from the university campus) and that he had consumed beer, although he was conveniently evasive as to what amount of beer he

had taken, hiding almost arrogantly behind the reply that he does not count cans of beer when he is drinking.

The material facts testified to by PW², Relebohile Liphoto, are brief and can be summarized as follows:-

He is an unmarried man of 28 years of Roma in Maseru district. He presently resides at Moshoeshoe II in Maseru urban area. He knew the deceased in his lifetime. He also knows both accused. Significantly A¹ is his own elder brother.

It is the evidence of PW² that on the evening of the 18th August 1995 he visited Roberto Restaurant at about 8.30 pm. There he sat in the company of A¹, Matsoso, Chabeli Moeletsi, Potsane Lelala and A². They were drinking beer.

At around 9 o'clock the same evening PW² heard a scuffle outside as if there was a fight taking place. It was then that he realised that Matsoso was no longer in their company. He went outside with Potsane Lelala and Chabeli Moeletsi to investigate what was happening. It was then that they found Matsoso lying prostrate and unconscious on the steps leading to the restaurant.

It was at this stage that PW² and his companions tried to stop the fight by separating those who were fighting. Both accused then appeared on the scene and it is the evidence of PW² that A² became very angry when he realized that Matsoso had sustained injury. He says that he (A²) took out a big gun from the vehicle and pointed it at all the people who were gathered there including the deceased. The gun was similar to the gallil rifle Exh “1” before court.

PW² testifies that while A² was pointing the gun at the people gathered there he (PW²) became aware that A¹ was having a fight with PW¹ a few paces away from him. Significantly, he testifies that A¹ was armed with a “small gun” which he further describes as a pistol.

At this stage PW² tried to stop the fight between A¹ and PW¹ by separating them. While in that process he heard a sound of a big gun “about” two times. The sound came from behind and as he turned around, he saw A² holding a gun which was pointing in the direction where the deceased was subsequently found lying down.

To the extent that the Crown seeks to rely on circumstantial evidence on the issue of the alleged shooting of the deceased it

must be noted here that PW² contradicted himself badly under cross examination by Mr. Ntlhoki and thus seriously dented the impression he had created in the preceding paragraph. It proves convenient to reproduce the line of questions on this point:-

“Q: He (A²) goes further to say that you did not see him pointing at anybody with the rifle because according to your evidence in chief you were now too busy trying to separate PW¹ and A¹?

A: Before I separated them he had pointed the gun.

Q: Assuming that is correct, without conceding, when A² fired a warning shot you didn't see where his gun was pointing because that was the time you were separating PW¹ and A¹?

A: He did not fire a warning shot.

Q: My question is: At the time you heard a gun report of a big gun you did not see where the gun was pointing because you were busy separating PW¹ from A¹?

A: That is true.”

Thus encouraged, Mr. Ntlhoki naturally delivered the following killer blow in the next two questions in his attempt to expose PW² as a liar:

“Q: So you cannot even say with any measure of conviction that when the big gun was fired it was pointing at the deceased?

A: That is so.

Q: At that time when the big gun (the gallil rifle) rang you cannot even say exactly where the deceased was because you were busy separating these people?

A: That is so.”

And yet when the same question was subsequently repeated in a different form it produced startling results as follows:-

“Q: A² says by the time he went to take the gun in the car and long before he fired the warning shot, the deceased was nowhere in the immediate vicinity, he had left.

A: That is not true.

Q: And he says the deceased left the scene of the fight as a result of A²'s persuasion.

A: That is not true.”

Now if, as PW² himself concedes he did not know the whereabouts of the deceased at the material time, I cannot understand why he should suddenly pretend to know that he had not left the scene. I was certainly not impressed with his evidence.

Although PW² did testify in chief, as previously stated, that his own elder brother A¹ was armed with a pistol he did not however say what he did with it. It was only under cross-examination by Mr. Ntlhoki that he disclosed, for the first time, that A¹ actually discharged his firearm. It will, in fact, be recalled that the admitted facts emanating from PW⁸ No. 3326 Detective Lang Sgt. Tšiu show that an empty shell belonging to a 7.65 mm pistol was subsequently found at the scene of crime.

I am satisfied therefore and do hereby make a finding that two different firearms were discharged at the scene of crime on the fateful night in question. Once that is so, the salient question for determination in my view, is: *which of the two firearms (the gallil rifle or the pistol) killed the deceased?* I will return to this aspect later.

The evidence of PW³, Dyke James Thaanyane, shows that he too lives at Roma, Mafikeng in Maseru district. He is employed in the Lesotho Defence Force as a soldier since 1987. He knows both accused “very well”. A¹ is his neighbour at Roma while A² is his co-worker in the Lesotho Defence Force. He knew the deceased in his lifetime. They resided in the same village and grew up together at Roma.

PW³ was also present at Roberto Restaurant on the fateful night in question. He says that he was playing a game of chess with the owner of the restaurant at around 9 to 9.30 in the evening. He then heard a gun report from what appeared to him to be a gallil rifle from outside. He proceeded outside and found his co-worker, Matsoso, seated and bleeding from the face. He says he saw A²

about 5 paces away holding a gallil firearm. He also saw A¹ who was holding a 7.65mm pistol.

At this stage someone shouted, drawing attention to a person who had fallen to the ground. PW³ proceeded to this spot where he found the deceased lying dead in a pool of blood. He was bleeding from a “hole” in the neck.

In cross-examination by Mr. Ntlhoki for A2, it emerged that PW³ did not actually hear a gun report from a small firearm or pistol. As will be recalled, it is common cause that there was in fact such a gun report fired in the vicinity of the restaurant. In fairness to the witness, however, he was inside the restaurant when the gun report went off. He says the noise inside the restaurant prevented him from hearing the gun report. There was radio music playing. In these circumstances there is no reason to doubt the witness on this issue.

That completed the Crown case and, as I have stated previously, A¹ was discharged at this stage on the ground that there was no *prima facie* case against him.

A² did not call any witnesses but duly gave evidence in his own defence as DW¹. He is aged 35 years old and lives at Ha Ralejoe in Maseru district. He went as far as C.O.S.C. at school and he is employed at Lesotho Defence Force as a soldier since 1992. He holds the rank of private.

It is A²'s evidence that he knew the deceased in his lifetime and that they were "big friends". The friendship began around 1988-89. He also knows Matsoso who is his co-worker.

In a nutshell, A² denies any suggestion that he pointed the gallil rifle at the deceased or in his general direction. He denies pointing the rifle at the people gathered at the scene of crime and in particular he denies shooting the deceased.

According to A²'s version, on the fateful night in question, namely the 18th August 1995, he left Maseru for Roberto Restaurant in the company of Matsoso and the latter's girlfriend Lineo Ramokoena as well as A1. They were travelling in Matsoso's car in which there was an army service rifle belonging to the latter. It is the gallil rifle referred to above. He denies that it

was placed in the boot of the car. According to him it was placed under the back seat of the car.

At Roberto Restaurant Matsoso and his girlfriend, Lineo, developed a quarrel to such an extent that Matsoso tried to strip her of the jersey which he had lent her. The couple eventually went outside to the car which was parked next to the restaurant. The time was between 9 and 9.30 at night. Matsoso was drunk.

About five minutes after Matsoso and his girlfriend had left A² heard that there was a fight going on outside. He proceeded there in the company of A¹ and he says that he found the deceased and PW¹ Bonang Maama “trampling” upon Matsoso who was lying on the ground. A² successfully persuaded the deceased who, as earlier stated, was his friend, to leave the place and that he would still get his girlfriend (Lineo). The deceased was complaining to A² that Matsoso had taken his girlfriend. There was no exchange of angry words between A² and the deceased nor was there a quarrel or fight between them. Indeed A² is unchallenged on these issues and I accordingly see no reason to disbelieve him.

At this stage Matsoso appeared to be unconscious. He was still lying on the ground with blood covering his face and the whole body. His clothes were also stained with blood.

It was then that A² saw that A¹ was fighting with PW¹. They were fighting with fists and at this stage A² realised that Matsoso's car which they were travelling in had its doors open. He rushed to it in order to retrieve the gallil rifle in question in case it fell into "bad hands." He "slung" the rifle on his shoulder and proceeded to where Matsoso was lying down. He then heard people shout "hey man he is a soldier. He might fire. Let's burn this vehicle." Thus threatened, he moved backwards and removed the rifle from his shoulder. At this stage some people were throwing tins and bottles at him. He then cocked the rifle "so as to scare them."

It is the evidence of A² that these people were in a fighting mood. Asked how he felt at that moment he replied:- *"I was in trouble my Lord."* Given the unchallenged circumstances he has set out, I have no doubt myself that he felt seriously threatened.

A² then says that as these people came closer to him, he fired in the air once and some moved back while others ran away. He

never fired again. It will be recalled that the admitted evidence of PW⁸ No. 3326 Detective Sgt. Tšiu shows that only one gallil shell was found at the scene of crime. I accordingly accept A²'s version that he fired only once. The real question, therefore, is whether in so doing he shot the deceased. In this regard it requires to be determined whether his explanation that he fired in the air may possibly reasonably be true. I shall deal with this aspect in due course. But first, one has to deal with the complication brought about by the fact that A1 also admittedly discharged his firearm. As I have pointed out previously it becomes pertinent therefore to determine which of the two firearms killed the deceased.

To return to the evidence of A², on this point, he says that after he had fired in the air and the crowd had either moved back or dispersed, he approached Matsoso where he was lying down and tried to carry him. Just as he tried to lift him up, he heard a gun report from a 7.65mm pistol four times. He then saw A¹ holding a firearm and in his own words he says: *"I saw A¹ that he was the one who was firing with the 7.65mm firearm."* He is unchallenged on this version and I accordingly believe him.

A² testifies that he then approached A¹ from behind and succeeded to immobilize A¹'s pistol by knocking off the magazine from it. As a result A¹ stopped shooting. He then carried Matsoso to hospital in the company of Lelala. They were using Matsoso's vehicle. He only learnt of the death of the deceased the following day.

It is not disputed that as a soldier A² was fully trained in the use of firearms including a gallil rifle and was fully conversant with its effect as well as that of a 7.65mm pistol.

More importantly A² is unchallenged in his evidence that at a distance of 20 – 35 metres and having been shot in the neck, a gallil rifle would have either decapitated the deceased or the damage would have been such that the deceased was left with little flesh on the neck. The bullet would have broken the bones. As will be recalled there was no such extensive damage in the deceased's neck and A² testifies that in his experience the deceased's injury was consistent with a pistol shot. Once more he is unchallenged on this version. The Crown could only suggest that the deceased's injury was a miracle. Miss Mofilikoane for the Crown put it this way in her cross-examination of A²:-

“Q: But can you deny that miracles do happen?

A: I haven’t seen miracles.”

This Court too does not subscribe to miracles as suggested.

To the extent that the Crown witnesses seek to implicate him, A² puts this down to bias in as much as these witnesses come from the same village adding “*they play together, they reside together and they drink together.*” This is indeed common cause and, as will be recalled, PW² is in fact the younger brother of A¹. I consider therefore that there is merit in the defence criticism of the Crown witnesses. In this regard it is to be regretted that the Crown chose to lead the evidence of interested witnesses when there was a “crowd” of people at the scene of crime on the fateful night in question.

I have watched A² as he gave evidence before me. He impressed me as a truthful witness and remained completely unshaken in cross-examination. I would accordingly have no hesitation in preferring his evidence to that of the Crown witnesses where there is a dispute of fact. I find that his merit as a witness far outweighs the demerits of the latter.

The Law

There is no credible and direct evidence that A2 shot the deceased. As I see it, therefore, the Crown case rests on circumstantial evidence of which the age-old cardinal rules of logic as propounded by Watermeyer JA in R v Blom 1939 AD 288 at 202-3 must come into play. There the learned judge of appeal laid down the two rules in the following terms:-

- “(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

Applying rule (1) to the facts of the instant case it is, in my view, evident from the foregoing considerations that the inference sought to be drawn cannot be consistent with the proved facts namely that there is no direct evidence that A² shot the deceased coupled with the fact that A¹ also discharged his pistol and may thus well have been the cause of the deceased's death himself.

Similarly, and, as rule (2) is in my view largely an extension of, and is indeed complimentary to rule (1), I consider that this rule (i.e. rule (2)) has also not been satisfied by reason of the fact that two different firearms were discharged at the scene of the crime on the fateful night in question. Immediately thereafter the deceased was found lying dead with a bullet wound in the neck. In my view, therefore, the proved facts do not exclude the reasonable possibility that the deceased was shot by A¹'s firing. Significantly there is no evidence that the two accused acted with common purpose or in concert. On the contrary, the acts of one are completely independent of the other.

At this stage I regret to observe that the Crown's case was either badly investigated or was poorly presented. In this regard it will be recalled that according to the admitted facts emanating from the depositions of PW8 No. 3326 Detective Lang Sgt. Tšiu, the gallil rifle (Exh "1"), its 19 rounds of ammunition (Exh "2") (collectively) together with its shell (Exh "3") the 7.65mm pistol No. 5853344 with its 8 rounds of ammunition as well as a 7.65 mm shell (Exh "4") were taken to Makoanyane Camp "*where they were examined*" no doubt by a ballistic expert. Amazingly, however no evidence of ballistic examination was presented to the Court. The

7.65 mm pistol was inexplicably handed over to A1 by the police before the case had even started.

In the circumstances set out above, I have no doubt that a valuable opportunity to connect the accused with the death of the deceased was lost and the question posed earlier in this judgment as to which firearm actually killed the deceased shall ever remain a mystery. Of course the Crown must shoulder the blame for this costly lapse.

The accused's explanation

Both in her written submissions and in argument before me Miss Mofilikoane for the Crown submits that “A²’s” story is not true” and that the Court should disbelieve him. He must therefore be convicted on that score alone, so it is argued. I regret to say that this is a wrong approach which this Court is unable to subscribe to. In this regard I need do no more than quote from my own judgment, if I may, in Rex v Lepogo Seoehla Molapo 1997-98 LLR 208 at 237:-

“Now the law as I have always perceived it to be is not whether the accused’s explanation is true but whether it may possibly reasonably be true. That is the real test. Conversely the test is not whether the Court subjectively disbelieves the accused. Indeed the Court does not even have to reject the case for the Crown in order to acquit the accused. That remains so even where the case for the Crown is overwhelming against the accused. The court must still determine whether the defence

case is so demonstrably false or inherently so improbable as to be rejected as false. It is also pertinent to bear in mind that in embarking upon this exercise it is a wrong approach to reject the accused's explanation merely because the Court is satisfied as to the reliability of the witnesses for the Crown. It is only after the merits and the demerits of the two sides have been analysed and weighed together with the probabilities of the case that a Court would be justified in reaching a conclusion one way or the other regarding the question whether the Crown has proved its case beyond reasonable doubt. Authorities in this regard are indeed legion.

See for example *S v Singh* 1975 (1) S.A. 227 at 228 per Leon J (now Judge of our Court of Appeal)

S v Kubeka 1982 (1) S.A. 534 at 537

S v Jaffer 1988 (2) S.A. 84

S v Munyai 1986 (4) S.A. at 714

Indeed in *R v Difford* 1937 AD 370 at 373 Watereyer AJA succinctly stated the law in the following words:

“It is equally clear that no **onus** rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false.”

Davies AJA reaffirmed the legal position in *R v M* 1946 AD 1023 at 1027 in the following words:


“.... The Court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.”

Applying the above mentioned principles to the facts of the instant case I have come to the conclusion, therefore, that the explanation of A² that he merely shot in the air and that the deceased may well have been killed by a shot fired by A¹ may possibly reasonably be true in the circumstances. That being the

case, A² is in my view, entitled to the benefit of doubt. I find that the Crown has failed to prove its case beyond reasonable doubt.

A² is accordingly found not guilty and acquitted.


My Assessors agree.


M.M. Ramodibedi
 JUDGE
 20th August 2002

For the Crown:	Mr. Semoko (replaced by Miss Mofilikoane)
For A ¹ :	Mr. Matooane
For A ² :	Mr. Ntlhoki

ORDER

The gallil rifle No. L701753 Exh “1”, with its 19 rounds of ammunition, Exh “2”, shall be returned to Lesotho Defence Force.


M.M. Ramodibedi
 JUDGE
 20th August 2002