

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

v

CHECHILE MALUNGA MATEE
SEFAFE RAMOSENENA

For the Crown : Mr. L. Moqhali

For the Accused : Mr. L. Molefi

GENTLEMEN ASSESSORS:
Messrs Matete and Loko

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi
on the 19th day of June 2002

Lebohang Akhente (Deceased) of Lesotho Mounted Police died at Peka on the 19th June 1999. He was allegedly shot in a tavern owned by one Mpasa. He suffered a gun shot wound. It was in the morning of that day around the hours of 10.00-11.00. There had been beer drinking at the tavern since the hours of about 7.00 am if not before. There had also been a lot of noise from carousing

customers and the sound of music from a hi-fi set which was said to have been playing loudly.

Arising out of the above circumstances were four charges (separately) against Accused One (A1) Chechile Malunga Matee a male adult Mosotho aged about 46 and Accused Two (A2) Sefare Ramosena, a male adult Mosotho aged about 32 both of Headman Thobela Mathealira under Chief Lechesa Mathealira at Peka in the district of Leribe.

The charges were as follows:

Count I

"Chechile Malunga Matee (hereinafter called the Accused) is guilty of the crime of murder. In that upon or about the 19th day of June 1999 and at or near Peka, in the Leribe district the said accused did unlawfully and intentionally kill Lebohang Akhente".

Count II

"That Chechile Malunga Matee (hereinafter called the Accused) is guilty of the crime of contravening section 3(2) A of Act No.17 of 1966. In that upon or about the 19th day of June 1999 and at or near Peka in the Leribe district, the said accused did unlawfully and intentionally have in his possession a 7.65mm S/N 04937 and six

rounds of ammunition without holding a firearm certificate as required under this Act”.

Count III

“That Chechile Malunga Matee (hereinafter called the Accused) is guilty of the crime of contravening section 3(2) of Act No.17 of 1966. In that upon or about the 19th day of June 1999 and at or near Peka, in the district of Leribe, the said accused did unlawfully and intentionally have in his possession a .38 S/N W 264674 and one round of ammunition without holding a firearm certificate as required under this Act”.

Count IV

“That Sefafe Ramosena (hereinafter called the Accused) is guilty of the crime of attempted murder. In that upon or about the 19th day of June 1999 and at or near Peka, in the Leribe district the said accused did unlawfully and with intent to kill point a firearm at Trooper Mahase”.

To these charges the two Accused pleaded not guilty.

The evidence of the following witnesses at the Preparatory Examination (PE) was admitted at the trial and the depositions were read into the machine to form part of the record. Their names are preceded by the numbers at the PE.

PW 1 (No. 7851 Det. Trooper Komanyane) PW 3 (Khotso Mathanyane) PW 5 (Lebohang Koto) PW 6 (Khotso Moremoholo), PW 12 (Sgt Makoae) PW 14 (No.9346 Trooper Letuka). PW 16 (No.5 631 D/L Sgt Mopeli) PW 11 (No. 9284 Trooper Makoetlane) PW 15 (No.3185 Inspector Matala) PW 10 (Policeman/Senior Inspector Mothibeli).

The following witnesses testified and were sworn in support of the Crown case. **PW 1 No. 4981 Trooper Mahase** (who was PW 9 at the PE); **PW 2, Trooper Mahloko** (who was PW 3 at the PE); **PW 3 Mokoatle Mahase** (who was PW 2 at the PE); **PW 4 Ntabejane Ntabejane** (who was PW 4 at the PE); **PW 5 Separola Letsipa** (who was PW 7 at the PE); **PW 6 No. 9010 Det. Trooper Mahloko** (who was PW 13 at the PE). After that, then, was close of the Crown case.

Then followed an application for discharge relating to certain counts in the indictment which I briefly dealt with as follows: That only in Court II did I find that there would be no case to answer. In others there were *prima facie* cases. It had been only with respect to Count I (murder) that there had been no challenge. See my ruling of the 20th March 2002 - "Appendix I".

The postmortem Examination Report that was also exhibited and whose

contents was read into the recording machine revealed that death was due to “..... shock and excessive internal haemorrhage” due to gunshot. The external appearance showed an entry wound at the area of the 5th intercostal space” and an existing wound at the “mid auxillary right flank;” And “the heart had been perforated with haemocardium. It clearly meant that a single wound had injured the heart and resulted in loss of blood. It became clear therefore that what remained for this Court was to decide, the Accused having admitted the fatal assault, whether he had the requisite *mens rea* (intention) to kill the Deceased.

Trooper Komanyane who was stationed at Hlotse was given three guns and ammunition for ballistic tests in Maseru. It was a 7.65 pistol serial number 046937, a .38 firearm serial number W 26474 and a 9mm pistol serial number 101116. There was also a spent bullet of a .38 calibre. He could not remember how many bullets of that calibre were there in all.

He then took the firearm to Maseru for ballistic tests. After that all the firearms and rounds of ammunition were returned to the police officer. They were exhibited in this Court as exhibits except the 7.65mm which was handed over to some alleged owner before commencement of this proceedings.

The statement of Senior Inspector Mothibeli who is attached to the Ballistic Tests Unit confirmed receipt and examination of the firearms and ammunition (7.) as stated by Trooper Komanyane. These included three .38 special fired cartridge cases, one .38 special fired jacket and one .38 special fired bullet jacket. His report was exhibit "A" which also stated that a ballastic examination of the said items was done. He explained the attributes of the .38 Special Rossa (SR) revolver serial no. W 26474 and associated himself with the report. The result was that he was able to determine that the .38 revolver had been previously fired. The two other firearms were however still in good working condition. He tested them but he was not able to determine whether they had previously been fired or not.

Khotso Manthanyane (Khotso) worked in the tavern as a waiter and he knew both Accused before Court. On the 19th June 1999 he had been on duty and there were already customers present since the hour of 7.00 am when he opened. Khotso said he had seen the two Accused at the tavern drinking some beer. They had sat at different tables. Accused had however testified that they had come at different times especially that at the time of the fight A1 was present when A2 arrived. The Deceased had also been present. He was also drinking some beer.

Khotso said A1 had come to the counter with a M20.00 note in order to pay for the beer he had bought. He said he went to get change for the cash paid from a cash register. The witness did not speak of his having seen Deceased approach or facing A1 with a gun held. It was then that he heard a sound of a broken glass. To this he did not pay attention. When he returned to A1 he saw the Deceased and A1 wrestling. The Deceased was holding a pistol. Khotso did not say whether at that stage he saw PW 1 around or was the two wrestling men. A1 was not holding anything. Khotso then ran out of the tavern. Before he had ran out of the tavern he heard one gun report.

Khotso went to the owner of the business to give him a report of the events that had just occurred. He did not find the owner. He came back to the tavern. He then saw a white van and asked the owner to call the police. He went to the police who responded later and attended at the scene.

A1 was consequently arrested while still in the tavern. Deceased's body lied at the floor. It was not at the spot at which Deceased and A1 wrestled. When Khotso was about to give a report to the tavern owner he saw A2 getting back into the tavern. Khotso did not see what he was holding. The impression borne by this testimony was that A2 was seen quite before the fight and later after A1 was arrested.

Khotso observed that when A1 paid for the beer he was not drunk. This corroborates A1's statement that although he started early to drink he had gone to his home and had breakfast and in no way was he inebriated. Khotso said A2 was drunk. This was confirmed by Lebohang Koto. He "looked moderately drunk." This was much against what A2 said that he was not at all drunk although he had visited another drinking place called Mashaphe's. One wondered why Khotso would suggest that A2 was drunk. It appeared that he was not the only witness who spoke of A2 having been drunk. Khotso had not heard any argument from any of his customers prior to this incident.

Lebohang Koto (PW 5) who knew both Accused had also been at the tavern on the fateful day. He had accompanied A2 to the bus stop with whom they were to proceed to Kolonyama. They decided to go into the tavern. A2 was already under influence of liquor as the witness testified. In this respect the evidence of Khotso is confirmed.

While they were on the way they heard a gun report emanating from inside the tavern. They proceeded on. At the main door Lebohang heard another gun report. It must have been a second gun report according to this witness. The witness however said he heard two gun reports only. The important thing would be his corroborating that except A2's shot there had been

another gun report before. A2 got into the tavern "despite the commotion that was taking place." Lebohang also entered. He disconnected wires from hi-fi set which was turned off. He heard another gun report. He saw A2 holding the firearm in his hands.

When the witness saw A2 holding a gun in his hands he had just turned his back away from the Deceased who was below the counter with PW.1. As I immediately observed this was not quite in conflict with A1 and A2 and PW1's statements which suggested that when A2 got possession of a gun he had just removed from the vicinity of A1 and PW 1 who had been engaged in a struggle for the possession of this gun which presumably was the one referred to by Lebohang. Indeed A1 and PW 1 confirmed that A2 discharged a bullet from this gun. This was explained later by A2 in his testimony.

Lebohang went on to say he turned his back away from the Deceased who was below the counter with trooper Mahase. The latter was on top of A1 and left them still wrestling. Lebohang must have been positioned in such a way that he was able to see A1, PW 1 and Deceased at the same time. That is why he had the impression that A2 had moved away from the Deceased. A2 in his testimony did not however suggest that he had ever approached the Deceased.

Lebohang further saw A2 when he was already out of the tavern with "his firearm". He was trying to stop vehicles which were heading in the direction of the police station. He succeeded to stop and board one vehicle which later came back with him and some police officers.

Lebohang had said he had, himself, not got into the tavern. When A2 came back with the police he still retained possession of the firearm which he gave to Lebohang. Lebohang handed over the gun to his brother Hape. It was the revolver that was exhibited before Court. Lebohang had been with A1 on that day but had not realized whether he had been drunk or not. A1 was later arrested by police.

Patso Moremoholo (Patso) was with A1 in the tavern. A1 came back later and gave the waiter some money. When he turned back he saw Deceased with a gun in his hand. He had been four paces away from A1. They had never spoken to each other before. A1 had approached the Deceased and they fought for the possession of the firearm. The witness had not seen A1 holding a gun. He was not aware if he had been drunk or not. During that struggle the witness had heard a gun report. He then went out of the tavern and peeped through the window. He saw Deceased on the floor. He saw PW 1 on top of A1. A2 was next to them holding a firearm. He ultimately got out of the tavern. Patso was

able to give a report to policeman Makoetlane who arrived later.

Morokhane Mafereka (Mafereka) was also in the tavern on the day of the shooting. As he testified it was between 11.00 and 12.00 noon. His account of the event was a little different from the others already discussed. It revealed that it was the Deceased who stood up and approached A1. The witness said before then there had not been any discussion when then the Deceased then said "Stand still do not move." It is perhaps more enlightening to quote from the witness' deposition as to what then later happened. It was that:

"The deceased then wrestled accused first and then latter fought back. The deceased's firearm dropped on to the floor during the ensuing fight. I then saw accused 1 holding a firearm and then shot the deceased with it.. They were both on their feet when accused 1 shot the deceased."

I noted from this account that it was not as if both men approached each other at the same time. Secondly, when the Accused shot the deceased it cannot have been with Deceased's firearm which had dropped to the floor. In the situation as described no other people as yet, besides the Accused and Deceased were involved.

The witness continued to say that when the Deceased dropped to the

ground it was only then that one police officer wrestled with and overpowered the Accused.

One report of a gun was heard by the witness after he ran out of the tavern. He said it was "in fact three gun shots." A2 was seen by the witness enter the tavern and come out after a shot with a small firearm. He came out with a surprised look A1 was later seen by the witness "hand cuffed with ropes." The witness was not in a position to say whether A1 or Deceased were drunk.

Trooper Makoetlane was ordered by PW 1 to take out the firearm that had been "located at the chest of A1" inside his shirt. It is the firearm that was exhibited at the PE but released before commencement of the trial when the witness surprisingly described as a .38. He assisted to tie A1 with wires from Hi-fi musical equipment.

Trooper Makoetlane had later seen A2 in possession of a firearm which he was using to stop vehicle to take A2 to Peka Police Post.

Sergeant Makoae was one of the officers who ultimately attended at the tavern following from A2's report at the charge office. Information from A2 led to discovery of a .38 silver revolver. He found Trooper Makoetlane already in

the tavern attending to the arrest of A1. He also hand cuffed A1 and charged him with murder of deceased whose dead body was laying in the tavern. It had two gun-shot wounds. I believed that it could only have been that one wound was an entry wound and the other one an exit one. The body was later taken to the mortuary and sustained no further injuries.

After the admission of the evidence of the said depositions then followed the oral evidence of the following witnesses: PW 1, Detective Trooper Mahase, PW 2, Detective Trooper Mahloko, PW 3 Mokhethi Mahase, PW 4. Ntabejane Ntabejane and PW 5, Separola Letsipa.

PW 1 testified that on the 19th June 1999 during the morning he went to Maphasa's tavern at Peka where he found Deceased Lebohang Akhente who was a fellow police officer. There were other people present who were drinking beer. The witness testified that Deceased and the witness had been sent out to effect an arrest on A1 for some alleged offences. Deceased was said to have been the officer in charge of the operation. A1 entered the tavern after the witness and the Deceased. A1 was seen by this witness approaching the counter. Deceased followed immediately thereafter. I thought it must have been after A1 had made an order and offered the cash payment. The witness went on to say that Deceased approached towards A1 holding an ID card in his left hand and

his service pistol in his right hand. PW 1 said he was three paces from the Deceased and A1 and he heard everything that transpired. As I concluded there was no reference to the ID by any witness except PW 1. I noted that PW 1 was not able to recite any words that came out between A1 and Deceased. I noted furthermore that one witness was able to say that he heard Deceased say "stand where you are."

PW 1 further stated that after the Deceased had identified himself A1 withdrew a .38 revolver and the Deceased held A1's hand holding the revolver. PW 1 then joined the Deceased in order to overpower A1. He said when he had joined in the struggle A1 who was the tallest of the threesome pulled a trigger and Deceased fell down immediately. PW 1 explained that due to the fact that A1 was taller the witness could not reach the gun except the wrist or end of A1's arm and that left free movement from A1's hand. The struggle for the gun continued even after the gun report and the fall of the Deceased. A1 did not deny that it was during the struggle that the gun went off. The two wrestled for the gun until PW 1 managed to overpower A1 still clutching with PW 1 on top. A1 had then pleaded with the witness to release him and let him go. He refused.

PW 1 further testified that after a considerable length of time and during the struggle A2 who was well known to PW 1 appeared having just entered into

the tavern approaching PW 1 and A1 where they were struggling on the floor. A1 then ordered A2 to take away the gun from the witness. A2 complied and wrested off the gun from A1. The two remained holding on the floor.

PW 1 went on to state that A2 tried to pull him away from A1 but failed. A.1 then ordered A2 to shoot the witness but did not comply even though he looked furious. Instead A2 took two steps backward and pointed PW 1 with the .38 pistol while ordering him to release A1 or else he would shoot him. PW 1 did not oblige despite the threat.

PW 1 went further to testify that after refusing to the release A, A2 came back to him and started hitting with the firearm on the cheek. Still A1 did not budge despite being hit. PW 1 said at this juncture he felt that another firearm was located in the inner pocket of A1's shirt. He said A2 went some steps backwards, shot in the air. He then came back to point the gun at the witness ordering the witness to release A1. PW 1 still refused to let go. This movement of the gun and the pointing made towards PW 1 was corroborated by PW 3. A2 was otherwise seen leaning or stooping towards the two contestants while on the floor. It was acknowledged by witnesses that all moved out of the tavern when the fracas started. It must have resulted in a confusion such that people and some who were peeping into the tavern through the window could not have

seen clearly what was happening inside. I believed that A2 who developed interest in the matter obviously on the side of A1 could have been seen stooping bending down as aforesaid but shot of having pointed the gun at PW 1 and hitting him with the gun with the obvious intention of forcing PW 1 to let go of A1. This could be positively deduced from the order given by A1 that A2 must extricate the witness from A1.

The witness continued and said that A2 then ran out of the tavern leaving the witness still on top of A1. It was moments that Trooper Makoetlane arrived and was ordered by PW 1 to take away the firearm from A1's attire. He said it was a 7.65 pistol. He said Trooper Makoetlane helped the witness to tie A1 with a rope. It was after the two contestants had both started let go of each other.

PW 1 went on to conclude his evidence-in-chief by saying that he saw Deceased lying dead on the floor and his service pistol being next to him and that pistol was a 9mm. He said the Deceased was lying face down bleeding from the mouth and nose.

The Crown next called Detective Trooper Mahloko who became PW 2. He said he was a member of Lesotho Mounted Police and was stationed at Hlotse. On the 19th day of June 1999 he had been at the village at Peka. It was between

the hour of 10.00 and 12.00 midday when he met a vehicle driven by Sergeant Makoae when the vehicle stopped next to him he was asked by one of the people on board to join them into the vehicle. He did. It was explained that the vehicle was on its way to the bus stop where Trooper Akhente (Deceased) had been killed. They drove towards the shops.

While they got to the bus stop the vehicle was stopped. The witness, together with other officers who were in the vehicle entered one of the shops (tavern) and found Deceased's corpse. The witness found officers Mahase and Makoetlane who were in the process of tying A1 with some plastic roping. Handcuffs were provided and as a result A1 was handcuffed.

The witness testified that he had been made aware of the body of Deceased which was lying face down in the tavern. The witness said he examined the corpse. It was bleeding from the nose and there was a pool of blood nearby. The corpse was turned and then the witness found that the Deceased had already died. The witness removed the Deceased's jacket and discovered what seemed to be a gun entry on the left side of the chest. The exit wound was on the right side below the ribs. Some three(3) paces away from the Deceased there was a 9mm pistol. The witness further stated that the pistol was loaded with 10 bullets and the chamber was empty. The serial number of the pistol was S10116. He

identified it to be one of the guns which had been exhibited in Court. He seized the gun for purpose of it being exhibited before Court. The witness also took Deceased's skipper which had a "burn mark" which corresponded with the entry wound on the body.

PW 2 went further to say that they took the corpse to the mortuary and while on the way, the corpse did not sustain any further injuries. The witness said that while they were at the scene, he took Deceased's gun (Exh.1) and found that it was not corked. Thereafter Trooper Letuka handed over to him a .38 mm revolver (Exh.3). The witness opened the revolver and found that it had three (3) shells. He kept the firearm with the intention of exhibiting it in Court. At a later stage the guns were taken to Maseru where they underwent ballistic tests.

The witness said he met A2 and identified himself. He asked A2 to give him an explanation. The explanation given did not satisfy him. He cautioned him and gave him a charge of attempted murder and unlawful possession of a firearm having asked him to furnish him with a certificate for possession of the gun which A2 failed to produce. The witness then said he was not able to ask for any explanation from A1 as he was no longer at Hlotse when he went to seek for an explanation. PW 2 handed in .38 revolver (Exhibit 3), 9 mm pistol (Exhibit 1) as well as Deceased's skipper (Exhibit 2) as exhibits. A spent bullet had also

been discovered in the shop which was handed in as "Exhibit 4" before this Court. An explanation was given by the witness that the 7.65 pistol found on the body of A1 was handed over to someone to whom it was said to have belonged.

PW 3 testified that on the day of Deceased's death he had paid his brother PW 1, a visit at Peka Police Post during the morning hours. He had decided to go back home at Tsifalimali. When PW 1 was taking him half way they decided to go via Mphasa's tavern. On their arrival they found people, including the Deceased already present. They also joined and partook of beer. They also shared a table with the Deceased who was facing the main door. The witness and PW 2 were facing in the direction of the counter.

While still drinking and after a short while, the witness saw Deceased standing up and going to the counter. As the witness testified, after the Deceased had gone to the counter he heard gun a report. People who were inside the tavern ran out of the tavern. He did the same. While outside he saw people peeping through the windows and he also peeped in. He saw the Deceased lying prostrate on the ground. He looked closely. He realized that he was bleeding from the nose.

While outside the witness said he saw PW 1 wrestling with and was on

top of a man he did not know. He decided to go in after a short while but someone he did not know stopped him from doing so. He went back to the window and continued to look inside.

The witness then saw a person entering into the tavern. That person then pointed a gun at PW 1. He identified the gun to be Exhibit "3". He identified the person who was pointing the gun at PW 1 as A2. He was also able to identify the person who was wrestling with PW (as A1. A2 went outside after a moment.

While A2 had gone out a man was heard calling out or shouting that a police officer had already died (fallen down). This was directed at a person the witness did not know. Eventually someone who turned out to be a policeman came into the tavern. He handcuffed A1. Afterwards a police vehicle came. A1 was taken off apparently to the police Charge Office.

PW 4 Ntabejane Ntabejane testified that at about 10.30 am on the fateful day he went to Mphasa's tavern for a beer drink. He found a number of people already present and drinking beer. They included PW 5. A1 and Deceased were not there then. He went on to say that Deceased arrived a few minutes later. He alone. PW 1 later arrived and joined him. He further stated that after sometime A1 arrived in the room and proceeded to the counter. Deceased immediately

approached where A1 had positioned himself at the counter.

PW 4 stated further that when Deceased approached A1 the former was holding a firearm in his hand. He did not hear what was said but realized that A1 and Deceased were fighting over Deceased's gun. He confirmed that A1 and Deceased had been involved in some conversation although he did not hear what was being said. They then approached each other in a forceful and violent motion. During this struggle he heard a gun report. And he saw PW 1 joining the two (A1 and Deceased) trying "to separate" the two. He continued to say that he saw A1 turning back holding his own firearm which was a silver firearm. The Deceased's firearm was on the floor. A1 was still holding his firearm. All people then ran out of the tavern except A1 and PW 1. The witness suggested that before PW 1 joined in there had already been the first gun report. He was not aware where it came from. The witness then said he heard a second gun report. This time he was aware that it came from where PW 1 and A1 were.

A2 was then seen entering the tavern. It was at the time when PW 6 had joined people who were outside peeping into the tavern through windows. He was able to see the Deceased who was lying on the floor. A1 and PW 1 continued wrestling on the floor with PW 1 on top of A1. He was able to see A2 when he had approached and closed in where PW 1 and A1 were. The witness

had moved a few paces from where he was when he saw A2 emerge from the tavern holding the silver gun. The witness must have gone away from the area because he said when he returned to the tavern he found police officers already present. A1 had been tied up with roping. A2 was no longer at the scene.

I noted that the evidence of PW 1 corroborates all others with regard to the silver gun having been firstly in possession of A1 and later in possession of A2. Secondly that there had been a struggle over the silver gun. All further agreed that Deceased's gun had been lying next to him on the floor. And that PW 1 and A1 were seen struggling for possession of the silver firearm.

PW 5 was **Separola Letsipa** who was the last Crown witness. He testified that he resided at Peka. He had been drinking beer at the tavern. He was seated alone and not sharing his beer with anybody.

While so drinking A1 entered the tavern and went straight to the counter. He produced M20.00 note. The witness was not aware whether A1 bought anything. The Deceased rose from where he was seated. He went towards A1 and then produced a gun. He rushed when he approached A1. A1 had already turned towards Deceased. He said Deceased had not said any word when he rushed to A1. He said if there had been any exchange of words he could have

heard even if he could not have heard clearly what was being said. A1 and the Deceased then struggled over Deceased's gun. A1 had also drawn his own gun.

It was during the said struggle that the witness rose and ran away towards the door. When at the door he looked back and saw A1 holding the silver gun. When just outside he heard a gun report from inside the tavern. He was only aware that the report came from inside the tavern. He and others went to the window and peeped into the inside of the tavern. He then saw Deceased having fallen and with Exhibit 1 (9 mm gun) next to his right hand. At that time PW 1 was holding A1. All had rushed out of the tavern except PW 1 and A1.

While peeping at the window the witness said he saw A2 then enter into the tavern. He took the gun from A1's hand. He then pointed the gun upwards and shot. Immediately afterwards A2 went outside the tavern. While still holding the firearm which he was using to stop vehicles one of which was a taxi he ultimately stopped. A van approached but A2 did not board the vehicle. He got into the van which took the direction of the police post.

A2 later came back with the police officers. The officers then got into the tavern. It was not clear whether there and then A2 was asked about the silver gun. Deceased's body was later carried away in vehicle which A1 also boarded.

A1 was already handcuffed.

A2 was asked about the silver gun. Although he did not hear what A2 said the witness knew that the gun was said to be with one Lebohang Kofo. This Court already knew that through the evidence of Lebohang Kofo the gun ended up in possession of Hape Kofo, Lebohang's brother. The Crown then closed its case. I need to observe immediately that it increasingly became unclear until the close of the Crown case as to what the Accused's defence would be. At the end the only material conflict would be about the identity of the gun referred to by Ntabejane Ntabejane (PW 4) in the PE as against what he said in the box. The only aspects being uncorroborated being whether the Deceased had had an identity card and what statement he made when he approached A1.

An application for discharge at the end of the Crown case was made in terms of section 175(3) of the CP&E by the Accused. This was in respect of the last three (3) counts. Only in respect of Count II (about 7.65 pistol) did the Court find that the Accused had no case to answer. See Appendix I (Ruling of the 22nd March 2002)

Both Accused then testified in their own defence as DW 1 (A1) and DW 2 (A2) who will continue being called A1 and A2 respectfully.

A1 said that he stayed at Peka. On the day of the death of the Deceased, at about 7.00 am he went to Mphasa's tavern. He asked PW 3 and PW 6 (at the PE) to give him two (2) quarts of beer. He would pay later. They obliged. He partook of his beer and went back to his home which was not far.

Later on A1 left his home and went back to the tavern with intention of paying for the beer which he had consumed earlier that morning as already said. He had in his possession a 7.65 pistol which had belonged to his friend. When he got into the tavern he had a M20.00 in cash with which he approached the counter to pay. He was expecting to be given back some change money.

He leaned over the counter to deliver the money to Khotso Matlanyane (PW 3 at the PE). When Khotso was on his way to the cash machine, Moremoholo (PW 6 at the PE) told A1 to watch out. This Court noted that this was not corroborated by the evidence of the said Moremoholo. A1 said since he did not suspect anything he ignored the warning that he should watch out but insisted on receiving his change money. As A1 said he observed that both Khotso and Moremoholo who were at the back of the counter were in fear and hesitated to approach the cash box. They told A1 that someone was pointing a gun at him.

When A1 heard this warning he looked back and realized that a light complexioned gentleman (Deceased) was pointing a gun at him. The gentleman was in private clothes. He was then about six (6) paces from A1. A1 said he was then able to see both hands of the said gentleman. He was able to see that he held a gun in his right hand and nothing else. Neither did the gentleman show him anything. I however at this juncture noted that the admitted evidence of Morokhane Mafereka had been to the effect that the Deceased had said to A1 that he must "stand still and not move." The gentleman said nothing but approached.

Deceased then had taken some two(2) to three(3) steps towards A1. At this stage he realized that everyone was running out of the tavern. He then approached towards the Deceased. He had felt threatened by the pointing of the gun. When they met A1 got hold of the gun and they struggled over its possession. They struggled over it for a long time until PW 1 approached. He pointed a gun at A1. The gun they were struggling over with Deceased fell down. He got hold of the one held by PW 1. He says PW 1 was holding Exhibit 3. As he was struggling with PW 1 he heard a gun report. He does not know which gun had shot. I noted that PW 1 had not been challenged in his evidence when he said he and A1 struggled over Exhibit 3 (the silver gun) which had been produced and drawn by A1 before the struggle for its possession.

A1 continued to say that while he was struggling for possession of the gun with PW 1 he was tripped by a case of beer lying on the ground and he fell down with PW 1 when then became on top of him. He was asking PW 1 what they wanted from him. PW 1 vouchsafed him no answer. Then later A2 came into inside the tavern. Other people except A1, PW 1 had gone out of the tavern. It is to be remarked that A1 would say that it was only much later when he realized that the Deceased lay prostrate in the same room not quite far away from A1 and PW 1 where the two had been struggling.

A1 said after some time he heard another gun report. And then there arrived a tall policeman who was in uniform as against PW 1 who was also a policeman but in private. PW 1 ordered the uniformed police officer to take a 7.65 mm gun which A1 had had in his jacket. The policeman searched A1 and found the gun. A1 was then tied hands and feet with a cords or this plastic roping. Other police officers arrived. They produced two sets of handcuffs. One was used to tie his wrists and the other was used to tie his hands across the palms. He was then pulled to the vehicle and was placed at the back of the van. He was taken to Peka Police Post and later to Hlotse Charge Office where he was later informed that he had killed a police officer. He was eventually taken to Court where he was remanded in custody. I would observe that at the time of trial he was no longer in custody having been allowed out on bail which

remained extended.

The upshot of A1's evidence was that they struggled for the .38 gun with PW 1. He heard a gun report. He did not shoot the Deceased. Neither does he know who shot the Deceased. After the gun report he did not see where the Deceased was. It was those aspects of A1's account which the Crown submitted false beyond a reasonable doubt.

The defence then called A2. He testified that he lived at Peka. In 1999 he was a student at National Health Training College in Maseru. On the day of Deceased's death he was at Peka where he had gone to see his family. He had left Maseru on the previous day. On the fateful day he had accompanied his wife who was going to work. He went up to the bus stop. From there he went to the tavern of one Mashape where he drank with one Koto (PW 5 at PE)

From Mashape's tavern A2 and the said Koto went to the bus stop with the intention of boarding a taxi to Kolonyama. He said at this point they were moderately drunk. A2 then asked Koto that they take some more beer before as transport to Kolonyama was not yet available. They went across the road to Mphasa's tavern. Having just crossed the road and before getting to the tavern A2 said they heard a gun report.

A2 said when he reached the outside of the tavern there were many people crowded outside. He immediately entered the tavern. He found PW 1 on top of A1 and both were clutching at a gun. A2 had known PW 1 to be a policeman. Before this date they had not had a quarrel or a clash. PW 1 then looked back and told A2 to come and help him to take away the gun A2 then told PW 1 and A1 to let go of the gun because they were both holding on to it. They agreed and slowly released the gun. He bent over in order to pull the gun. They had held the gun along the chamber while A2 held it by the butt and left.

After retrieving the gun he turned away and had had the gun pointed upwards. He proceeded towards the door and as he said he inadvertently pulled the trigger hence the gun blasted into the ceiling and hence the gun report that followed. He had not had any experience with guns. That is why the gun went off as it did. His intention had afterwards been to alert the police at their station.

A2 then went out of the tavern towards the bus stop. He asked one taxi owner to take him to the police station. He refused. He proceeded to the tarred road. A van emerged. He stopped the van. The driver agreed to take A2 to the Peka Police Station.

At the police station A2 made a report to one police officer about the events at Mphasa's tavern. Other officers were summoned to go to the tavern in accompany of A2. They reached the tavern and entered. A2 had still retained possession of the silver gun he retrieved from PW 1 and A1 at the tavern as said before. He gave the gun to one Koto whose evidence was admitted in the proceedings. A2 then went home. He was later fetched from his home back to the tavern by the police. He was then asked about the silver gun. He reported that he gave the gun to the said Koto.

A2 was later taken to the police station where he was told that PW 1 had reported that he (A2) pointed and hit him with a gun as a result of which conduct a charge would be laid against him. He denied having committed the offence. He was however taken to Court where a charge was read to him. He was remanded in custody. I would observe that at the time of trial he was no longer in custody having been allowed out on bail which remained extended to-date.

The evidence of the last Crown witness Separola Letsipa corroborated the testimonies of PW 1, PW 2, PW 3 and PW 4 on the fact that both Accused had possession of the silver gun. That furthermore PW 1 and A1 struggled over possession of the silver firearm and that the Deceased's firearm was found lying

next to him on the floor. And none of the witnesses suggested that the Deceased had ever used his.

The Crown submitted that the evidence outlined proved beyond a reasonable doubt that the first Accused killed the Deceased unlawfully and intentionally with a .38 revolver while the second Accused unlawfully and intentionally assaulted PW 1. I have already dealt with the aspect of the 7.65 pistol in my ruling on application for discharge. I also took account of the admitted evidence of Morohlane Mafereka.

The Court believed on overwhelming evidence that the silver gun came from A1. Indeed he did not venture to say that it did not belong to him but to someone else. Secondly, there was no reason suggested by A1 as to why the Deceased ended up sprawled on the ground with his gun near him except that he came short of admitting that he was shot through the gun that he A1 and PW 1 had in their possession during the struggle.

A1 did not suggest that Deceased was shot through his own gun. The evidence was therefore overwhelming that he got into a struggle with the Deceased for the latter's gun but that was not the gun which discharged. As A1 himself said when he realized that the Deceased was approaching with his gun

became difficult to speculate nor was it suggested that PW 1 could have shot his fellow officer. Any doubt cannot linger in the absence of any suggestion in that regard.

The inference is irresistible that the first gun report was the time when A1 and the Deceased were struggling. I found it difficult to disbelieve PW 1 that he had already joined the struggle. How the gun in A1's possession activated A1 was not able to explain. I had no alternative but to believe the account of PW 1 as the truthful one and the most inherently probable in the circumstances.

Defences to do with self defence or provocation would have been worthy of consideration if the initial response by A1 was that he owned the gun and he used the gun in circumstances such as to justify those defences. His attitude was to distance himself from the silver gun while offering no explanation as to how the gun released the fatal bullet.

A2 was a strange proposition. He had been drinking before going to the tavern. One witness said he could have been moderately drunk. A2 denied this. When people were streaming out of the tavern after the gun report A2 boldly stepped into the tavern and was seen approaching the two gentlemen who were fighting over the gun. This he did without hesitation. He was itching to get into

When people were streaming out of the tavern after the gun report A2 boldly stepped into the tavern and was seen approaching the two gentlemen who were fighting over the gun. This he did without hesitation. He was itching to get into action despite that he was not a party to the original events.

I found it not difficult to believe that A2 was persuaded by A1 who was his friend if not an acquaintance to extract the gun from the two gentlemen and cause PW 1 to release A1 at the urging of A1. His actions indicated compliance. He ended up with the gun and was seen bending over. He did all or either of the following: pointing the gun at PW 1 and hitting with the gun. All these were an assault and an unlawful one at that. In the regard to the act of pointing PW 1 was corroborated by PW 3. No motive was ascribed to why this witnesses would fabricate against A2. The Crown correctly conceded that A2 would only be convicted of assault common as against the verdict of attempted murder for which (the latter) he did not have any intention.

This Court has already commented about the problem of the defence of self-defence by A1. The Defence Counsel sought to persuade this Court that there was more in that defence in favour of the A1 brought about by the following factors.

the Deceased was holding a gun and nothing else. That the Deceased never ever said a word to A1. That besides PW 1 who was a police officer himself, none of the other witnesses saw or was able to observe the Deceased identifying himself.

This Court has believed that a witness observed and heard Deceased make a statement to the A1. Even if A1 was to be believed in what he said in this regard he did not explain to the Court as to how this was significant or contributed in anyway to his defence. If the Deceased did not introduce himself how, by that alone, did it conduce to A1's behaviour and his alleged defence?

It is correct that there were conflicting versions in relation to how the Deceased approached A1. One version was that he did that gently. The defence said if it was so the rest of the witnesses would have seen the Deceased identify himself. This is difficult to conclude on. Other things would still get into the picture. For example whether the witnesses were attracted to the movements of the Deceased at that time. And secondly were there not other things attracting attention of the witnesses. I did not see why necessarily if the Deceased was moving slowly or gently towards the A1 he had to have had all his movements observed.

The other difficulty was that the Court was not told nor did A1 seek to

explain why he acted the way he did merely because the Deceased had not identified himself. If he had it would have made sense to look into whether that would be a defence in favour of A1 and how so. I however observed that Deceased approaching A1 in the way he did, in a place full of people and unexpectedly so could have precipitated action on the part of A1. May be a better approach would have done. But that is the best I can say about this aspect because it remains purely speculative.

The evidence of PW 1 was unchallenged that during the struggle between the Deceased and A1 the latter produced Exhibit 3 (the shining gun). PW 1 testified so and he was unshaken in his testimony that it was that gun that was used to shoot the Deceased in the circumstances that PW 1 described. This Court would have no reason to disbelieve PW 1.

PW 1 said he was himself unarmed. The defence contended that it was not in accordance with the dictates of common sense that PW 1 could have been unarmed. That he could not have gone about looking for a suspect like A1 as he has been described without himself being armed. The problem was that PW 1's testimony went mostly unchallenged with respect to the issues of whether he himself had a gun. In any event I believe that what was the real issue was not that he himself did produce any gun. A1's denial that he himself carried the

testimony went mostly unchallenged with respect to the issues of whether he himself had a gun. In any event I believe that what was the real issue was not that he himself did produce any gun. A1's denial that he himself carried the shiny gun would be false beyond any reasonable doubt.

It was also correct that PW 4 said that during the struggle he saw that A1 was holding exhibit 3. It was admitted by the Crown at the PE the same witness had said that he saw A1 holding a different gun. I did not see how this conflict worked in favour of A1 when the evidence was overwhelming that he had a firearm and it was Exhibit 3. And since PW 4 admitted that he could have made a mistake. Even if there was a doubt it was not explained to me how it would affect the finding that A1 did not deny having been of possession of Exhibit 3. If not he should have come out to say where the gun came from and forthrightly he should have said so. In the result the absence of a reasonable explanation by A1 made the Crown's version is most worthy of acceptance as the truth.

This Court did not see why PW 5's powers of observation could have been affected merely because he looked back when he was running out of the tavern. It was granted that there was already confusion and people were rushing towards the door to exit. PW 5 said he realized then that A1 was armed with Exhibit 3. I observed that there was more than sufficient corroboration that A1

was armed with Exhibit 3. Despite that Khotso Manthanyane had said when he rushed out A1 was not holding anything the evidence on this aspect was overwhelming. I concluded that this was proved beyond a reasonable doubt.

I was not persuaded that a demand for a certificate for an unlawful possession need to coincide or be contemporaneous with the accused being in actual possession of the unlawful firearm. As Defence Counsel said "There was no evidence or record that a firearm certificate was demanded from A1 and he failed to produce it." Much as it was proved that A1 had a firearm the onus has since been on him to produce a certificate. He failed. I disagreed that there was room for any doubt once A1 has failed to date to produce the certificate of a gun that was retrieved from him. It is because he did not "hold firearm certificate in force at the time."

I had a serious problem in accepting that while it was not disputed that the gun that shot the Deceased was Exhibit 3 (silver gun) I could accept any other version where no version was offered by A1. Furthermore I did not see that there had been any conflict in the Crown case regarding the shooting of the Deceased except that one witness said he did not see what happened in that regard. I accepted that once it was proved that the silver gun came from A1 and it was the gun that fired inferences inclined to the Crown's version as the real one when A1

had none.

A1 was not able to venture as to who shot the Deceased. Not even that he (A1) shot Deceased in self-defence. I accordingly found no merit in the Defence Counsel seeking by inference that if Deceased did not identify himself and that A1 did not possess the silver gun it would result in A1 having acted in self-defence. That would amount to serious and bad speculation inasmuch as A1 did not say, when he testified, that he acted in self defence. He did not suggest that the killing was negligent and unintentional. It is because intention can be spontaneous. There would necessarily be no need to prove premeditation. I concluded that A1 had intention to kill in the manner of *dolus eventualis*. The struggle as testified by PW 1 can only indicate that A1 was reckless. As van Blerk JA said *R v Horn* 1958(3) 457 at 466, F-H.

“It is clear that in the case of *dolus eventualis* intent to kill will be present where the wrong-doer pursued that act with recklessness as to whether or not his is fulfilled in death. The natural concomitant of his recklessness is that the wrong-doer must in fact have (not ought to have) preconceived death as a result. However difficult it may be for the Crown, there must be proved as an actual fact by inference from all the circumstances.” (My emphasis)

The Court agreed that A1 having testified on his own behalf the test to be applied was whether the defence story might reasonably possible be true. If the answer was in the affirmative he was entitled to their acquittal. I was referred to **R v Difford** 11937 AD 370,373 and **Tšeliso Lempe v Rex** 1997-1998 LLR-LB 1959. The problem in seeking to decide the issue, in the way the defence proposed, lies in the fact that one did not learn in the first place what the Accused defence would be nor what his versions would be.

I concluded that the Crown has proved beyond a reasonable doubt the following charges:

- (a) of Murder in Count 1 against A1.
- (b) of Contravention of section 3 (2) of Act No.17 of 1966 in count III against A1.
- (c) of Assault in count IV against A2.

My assessors agreed.



T. Monapathi
Judge

19th June, 2002

EXTENUATING CIRCUMSTANCES

Delivered by the Honourable Mr. Justice T. Monapathi
on the 26th day of June 2002

I have considered that there is extenuation in this case in favour of A1, I have to give the following reasons. There may be many including that one has to rely on the evidence or the findings of the Court in the judgment. One of the things being that the Accused had the kind of intention to kill which is said to be a legal one of *dolus eventualis* meaning that it was not the kind called *directus* meaning that this man had no pre-meditation and was not proved to have meant to kill the Deceased.

I spoke on Accused's behalf in my judgment when I said this thing seem to be precipitated by the way the police approached him and the attempt to arrest him in the circumstances while much more cautions could have used. Accused was in an enclosed place it was easy for the police to take their time to arrest him. They would have been able to ask for reinforcement but they did not. The Accused was a person who could not hide that he is a very short tempered man, intelligent as he appears to be.

Accused remains a person who belongs to that community of Peka where



T. Monapathi
Judge

SENTENCE

Delivered by the Honourable Mr Justice T. Monapathi
on the 26th June 2002

I am starting this thing from the end because I am dealing with Counsel who appear not to be ready to assist me who appear to freeze when they are supposed to stand up and assist the Court with regard to the difficult matter of sentence. They don't know that this system is run by Attorneys and Counsel who are there to assist the Court.

This A2 is a young man of 32 years old. I have been told that he has no previous convictions. He is a first offender. He has two children, a wife and two other dependants. I noted that he was a student at the NHTC and he even conducts afternoon classes. He is a responsible man. I agree that a bit of time has elapsed before this case was finalized. I go back to note that it was said one of his brothers was mentally ill. That is a man who supports dependants.

These proceedings bear out that A2 was a fairly confused man. It might be due to drunkenness. He must not allow himself to be placed in a position like

he comes from and this I must take it into consideration in determining whether there is extenuation. Although the aspect of drunkenness does not come out clearly one would strongly suspect that it had an influence in the way he behaved. He may not had been very drunk but one would strongly suspect that that which he had taken must have some influence in the way he behaved.

I do not want to make a specific finding but my suspicion could have been that Accused suspected that police were after him. I am saying I do not want to make a specific finding. This could have added to some frustration on his part. On the other hand one could have suspected that it was brought the kind of a sensitive person he became when he was approached. In his favour it must have frustrated him the fact that things were against him. That is why I thought police should have approached him in a better way and I am sure that they would have easily arrested him if for example they waited for him outside the tavern. I do not even want to prescribe how police should behave but there was just no caution in the way they approached him.

I find that there is extenuation and I will therefore not have to speak about the sentence of death when I sentence him. I am not bound to do that. And I may not choose that because there is extenuation.

this. His actions were very strange. I suspect that soon thereafter he must have been ashamed of what he did because his actions were all contradictions. Here is a man who suddenly gets into a tavern in the way he did and suddenly here is a man who is able to sought the support of the police and here is a man who was seen going about with a gun and who made attempts to hide a gun and in the process of asking for a transport to the police he was wailing about this gun. The way he was behaving with a gun in hand cannot be minimized.

I have taken all these things into account more especially him as an individual and the crime that he has committed and that the society would expect him to be punished for what he did but I am prepared that I should be as lenient as possible with a warning that in the future he must behave. Here is a man who is at school. Here is a man who is able to tutor children. He must be a very strong man academically but that will be of no use if he has got a weak character and shows that he must do a lot of checking on himself and this is a warning. Stand up Sir. You are sentenced to prison for three (3) years and the whole sentence is suspended for three (3) years on condition that you don't get yourself involved in crimes involving violence. I am warning you. You are very lucky.

I now come to you A1. Before I say anything I have to note that where the

death of a human being is involved it is a serious thing. And although I have not been told very much about the Deceased he must have dependents, and he must have relatives, he must have those to whom it is a serious loss.

Deceased was involved in public duty and serious kind of work that involves the security of everyone of us here. He was a police officer. It is significant that he died on public duty and that I note seriously. The two things make his death very serious and aggravating towards sentence.

Deceased will not come back he has gone forever. Again the loss is a remarkable one it has to touch the way the Court is going to sentence the accused. Thirdly, the Accused was having a dangerous weapon. It was a dangerous weapon in the form of a gun which was unlicensed and he was carrying it about in public and he ended up using it in public and how he came to use it I have already commended. All in all it indicates that he has committed a serious offence.

It is in serious offences like this where the Courts must show responsibility much as a Court has to impose a reasonable sentence it has to be a sentence that makes sentence that drives the point home that the Courts are serious in their responsibilities to punish wrongdoers. Indeed a sentence need not be too harsh

or inhumane. Neither should it be too lenient. I may as well indicate that sentencing is a difficult exercise as Mr. Molefi pointed out in referring to that case of **R v Lefa Moloi & Another**.


The Court in meting out a sentence has to take into account so many things. I agree with Mr. Molefi in that regard I take into consideration those aspects that he has pointed out. The death of a human being touches on the feelings of not only the society but those of the relatives as I have said.

One of the sentences that a Court has to consider is the one that concerns whether he should be imprisoned or not. I note that the modern trend is not to send people to prison unless it is very necessary. Although people who argue for sending to prison speak of imprisonment as having certain benefits. One of them is that a person is sent to prison so that he may be rehabilitated. So that rehabilitation is emphasized nowadays so that it is emphasising rehabilitation disadvantages of imprisonment are brought to background other emphasis of imprisonment such as retribution and deterrence are brought into the background because rehabilitation is the most important aspect.

In my judgment I have spoken about things that belong to the circumstances of the commission of this crime things that belong to how this

gentleman was arrested. Most of these things have been dealt with when Counsel was addressing me including things like relatives of the deceased are likely to sue Accused person for damages and so forth. I have noted the personal circumstances of this accused person. That he his a married man, he has two wives and he has four children to support, that he is the only breadwinner, that he is a first offender. That as I have found in my judgment this crime was not premeditated, he lost his job, he acted out of frustration. One of the things that were not emphasized during judgment was that the gentleman could have been intoxicated and that his case has taken a long time to resolve since 1999. These I have considered.

I considered mostly the three aspects that I have spoken about which make this crime a very serious one. That seem to attract a sentence that I will pass. Accused stand up. My sentence is that you will be sent to prison and it will be for a period of twelve (12) years without an option of a fine. That is with regard to the count of murder. The other count was that of possession of the firearm. For that one you will be sent to imprisonment for one (1) year. The two sentences to run concurrently.



T. Monapathi
Judge