IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) NO.5 OF 2007

In the matter between:

THABISO MOTHOBI	**1ST APPELLANT**
BOKANG MOLONGOANA	**2ND APPELLANT**
KUTOANE KORI	**3RD APPELLANT**
MOLAI MOSOABOLI	**4TH APPELLANT**
NOKOLI HLOLOANE	**5TH APPELLANT**
LESAOANA MOLOMO	**6TH APPELLANT**

AND

REX	**RESPONDENT**

CORAM: **GROSSKOPF, JA**
SMALBERGER, JA
SCOTT, JA

Heard: 5 October 2009
Delivered: 23 October 2009

Summary

Criminal law and procedure – ballistic evidence – requirements – accused entitled to statement made to police – accessory after the fact.

JUDGMENT

SCOTT, JA

[1] The six appellants were charged in the High Court with the murder of Mr. Peter Mokheseng. Their numbering as appellants in this Court differs

from their numbering as accused in the High Court. In order to avoid confusion I shall refer to them as the 'accused' and by the numbers ascribed to them in the High Court. All six accused were found guilty of murder. In the case of accused 1, Mr. Lesaoana Molomo, extenuating circumstances were found to exist and a sentence of 15 years imprisonment was imposed. No extenuating circumstances were found to exist in the case of accused 2, 3, and 4 and they were sentenced to death. They are respectively: Mr. Thabiso Mothobi, Mr. Bokang Molongoana and Mr. Kutoane Kori. In the case of both accused 5 and 6 extenuating circumstances were found to exist. Accused 5, Mr. Molai Mosoaboli, was sentenced to 20 years imprisonment and accused 6, Ms Nokoli Hloloane, to 10 years imprisonment. The accused appeal both against their convictions and the sentences imposed.

[2] At the time of his death the deceased was the regional manager of Lesotho Precious Garments, a large textile manufacturing company which carries on business in Maseru and elsewhere in the Kingdom. Save for accused 1, all the accused either were, or had been, employees of Precious Garments. Accused 2, until shortly before the deceased's death, was employed as a security officer. Accused 3 was employed as a plumber. Accused 4 was the personnel manager, a senior managerial

position with approximately 4,000 employees under him. Accused 5 was a personnel officer on probation and Accused 6 was a production manager.

[3] It is common cause that shortly after 7 pm on Sunday, 21 March 2004, the deceased was shot and killed by two gunmen as he neared his home on his way back from work. The incident was observed by three witnesses. It appeared that a maroon coloured motor car stopped in the vicinity of a speed bump in the road allowing two persons to alight. The vehicle then turned off at an intersection and disappeared. The two persons were wrapped in multi-coloured blankets. They separated and took up positions on either side of the road. Shortly thereafter the deceased's BMW motor car arrived on the scene. As it slowed down to negotiate the speed bump the two persons opened fire, shooting at the vehicle continuously until it collided with a lamp post. The gunmen then ran away in the same direction as that taken by the maroon motorcar.

[4] One of the eye witnesses was Ms Masentle Mabelebele (PW4). She testified that although it was late afternoon she was able to identify the gunman who had taken up position on the side of the road nearest her. She knew him well. He was, she said, her sister's son, ie her nephew.

She was unable to identify the other gunman. The other eye witnesses could identify neither of the gunmen.

[5] The police arrived on the scene shortly thereafter. The deceased was mortally wounded and was pronounced dead on his arrival at hospital. His vehicle was riddled with bullet holes. On the front seat next to the driver's seat they found a fully loaded 7.65mm pistol still in its holster. It is common cause that it had been issued to the deceased by his employer. The motive for the killing was clearly not robbery.

[6] The first police officer on the scene was Trooper Sengoatsi (PW15). A brief search in the vicinity of the deceased's vehicle produced nine 9mm cartridge cases (shells). He handed these to Trooper Seeko (PW12) who arrived shortly thereafter. The latter looked and found four 7.65mm cartridge cases on the road. He also found a spent bullet on the dashboard of the deceased's vehicle. On Wednesday 22 March, Trooper Moepi (PW13) and Trooper Mathaba (PW16) examined the deceased's vehicle more closely. They found a further five spent bullets in the vehicle.

[7] In due course and on 29 March 2004 the six spent bullets and 13 cartridge cases were handed to Senior Inspector Motlatsi Mothibeli

(PW17), a ballistic expert, together with three firearms. The first was a 7.65mm calibre pistol having a serial number 016837 and which was the one found in the deceased's vehicle. The second was also a 7.65mm calibre pistol. Its serial number was 065339. It is common cause that this weapon had been issued to accused 4 and that it was in his lawful possession when he was arrested on 26 March 2004. The third firearm handed to Mothibeli was a 9mm calibre parabellum pistol with serial number U561331. It had previously been issued to Mr. Mohlauli Thupa on the instruction of the deceased. Thupa (PW3) was one of three accomplices who testified on behalf of the Crown. It is not in dispute that on Monday 22 March, ie the day after the death of the deceased, the 9mm pistol was recovered from PW13 and handed to Mr. Thabiso Motloha, an employee of Precious Garments whose function it was to 'protect' a director of that company, Mr. Jon Leu. The circumstances in which the pistol was recovered from PW13 were much in dispute and I shall return to this issue later in this judgment. It is sufficient at this stage to record that it was subsequently recovered from Motloha and ultimately delivered to Mothibeli for ballistic examination.

[8] Mothibeli testified that he fired cartridges with the three pistols for comparison purposes and "on microscopic examination" concluded (a) that

the nine 9mm cartridge cases and three of the spent bullets referred to above had been fired from the 9mm pistol U561331, and (b) that the four 7.65mm cartridge cases and one of the bullets referred to above had been fired from what I shall refer to as accused 4's pistol, ie the pistol bearing the serial number 065339. Mothibeli explained that by reason of damage and lack of comparison marks two of the spent bullets could not be matched with the 9mm pistol. Subject to what I shall say later in this judgment regarding the value of Mothibeli's evidence, its effect was therefore to link accused 4's pistol and the 9mm pistol to the shooting of the deceased.

[9] Apart from the identification of accused 3 as one of the gunmen and the link between the shooting and accused 4's pistol, the prosecution case rested largely upon the evidence of the three accomplices. It is necessary at this stage to summarize their evidence.

[10] Mr. Malisa Malisa (PW2) was a transport manager at Precious Garments. He testified that on Friday 19 March 2004 accused 3 told him that the deceased had hired people to kill accused 4 and that the latter, in turn, was in the process of hiring people to do away with the deceased. Two days later, on Sunday 21 March 2004, he spoke to the deceased at work. As a consequence of their conversation he instructed the security

officer at the gate to search accused 4 when entering and also to report to him in the event of accused 4 and 5 coming to work. PW2 said he later phoned accused 5 and suggested that he should not come to work. He also phoned accused 4 and told him to be vigilant and that it would be better if he stayed away. Accused 4, according to PW2, then said that he, PW2, should not be bothered "as they were going to discipline [the deceased]". PW2 testified further that at about 6 pm on the same day, the deceased returned to work. He agreed to accompany the deceased to his home. Before leaving, however, PW2 received a call from accused 4 inquiring as to the whereabouts of the deceased. Shortly thereafter PW2 and the deceased left for the deceased's house. They travelled in separate vehicles. On the way, PW2 said he received another call from accused 4 who told him to open up the gap between his and the deceased's vehicles and added "we have a mission". PW2 said that shortly thereafter he heard what he thought were crackers. He then came upon the deceased's vehicle which had collided with a lamp post. The deceased was slumped over the steering wheel. He conveyed the deceased to hospital and sometime thereafter he received a call from accused 5 who said that he had heard what had happened and asked PW2 if he could take him to the deceased's house to see what could be done. PW2 proceeded to collect accused 5 who asked PW2 why he was upset and added: "we are happy".

On the following day, Monday 22 March 2004, accused 5 also said to him "[the deceased] has shit today; he thought he was going to lay a charge against us and expel us". Later the same day accused 5 said to PW2 in the former's office: "it's finished and its lucky; all is well and done".

[11] PW2 testified that still later on the same day he said to accused 3 that he seemed to know who killed the deceased. Accused 3, he said, responded by first denying all knowledge of the affair but later "opened up" and told him that accused 2 had been used to kill the deceased. I pause to observe at this stage that this evidence was admissible against accused 3 only. It was inadmissible hearsay against accused 2.

[12] I turn to the evidence of PW3. He was a security manager at Precious Garments. He testified that for some while before 21 March 2004 accused 4 used to complain to him about the deceased's disregard for the rights of workers and his habit of preferring charges against them. On Friday, 19 March, at about 7 pm accused 4 came to his office to ask the whereabouts of the deceased. PW3 told him that the deceased had gone home.

[13] PW3 testified that on Saturday, 20 March 2004, accused 4 phoned him to offer him a lift to work. When he was picked up he found that accused 4 was accompanied by accused 3 and 5. He said that while they travelled to work accused 5 said that he had quarrelled with the deceased and wanted to resign. According to PW3, accused 4's response was to say: "wait and see what happens on Monday".

[14] PW3 said that the following day, Sunday 21 March 2004, accused 4 again phoned him and arranged to meet him at the bus- stop. In the course of the telephone conversation accused 4 asked him about the company's 9mm pistol which he had in his possession. He said that when accused 4 arrived at the bus-stop his car was being driven by accused 3. He repeated in his evidence the various utterances which he alleged both accused 3 and 4 made while they drove to work. They were of a highly incriminating nature. What accused 4 was alleged to have said included the following: "if he [the deceased] escapes today I will know that his mother is a witch"; "he [the deceased] makes me uncomfortable at work", "the issue between [the deceased] and me has to be resolved and I am going to use [accused 2]". Accused 3, he said, remarked: "I can even get him at his place". Before arriving at their workplace accused 4, he said, asked him for his 9mm pistol which he handed over, telling him that it had

15 rounds. On arrival accused 3 and 4 dropped PW3 and drove off. When PW3 got to his office he phoned accused 4 to tell him that the deceased was not at work.

[15] I interpose again that the reference to accused 2 in what accused 4 is alleged to have said is inadmissible against accused 2. I should add, too, that the witness tendered no explanation as to why the accused should have taken him into their confidence and why he willingly reported on the whereabouts or non-whereabouts of the deceased.

[16] To continue the narrative, PW3 testified that at 5 pm on the same Sunday accused 4 phoned him to report that he was following the deceased. After the deceased arrived at work, he said, accused 4 phoned him again to tell him that they had been at the railway line but the police had come past and that they had had to abandon everything. Still later and after the deceased had left the office with PW2, accused 4 again phoned to report that he had phoned PW2 who had advised him where they were. Again, there was no explanation tendered why accused 4 should have reported to PW3 in the manner he allegedly did.

[17] PW3 testified that shortly thereafter he received the news that the deceased had been shot and that he had thereupon gone to the scene of the shooting. While there, he met accused 4 who said to him: “we have killed his mother’s vagina; where did he think he was going to end up”.

[18] The following day Mr. Konyana Ramarothole (PW8), the manager of the security guards, asked PW3 for the 9mm pistol. As previously indicated it was required in order to give it to Motloha, Leu’s bodyguard. PW3 testified that he told Ramarothole that the pistol was with accused 4 and that accused 4 had then directed PW3 and accused 3 to go to accused 2’s house to recover it. He said they went in accused 4’s car and stopped near where accused 2 lives. There they found accused 1 who was unknown to PW3. According to PW3, accused 3 said to him: “tell that gentleman that the parcel is needed at work”. Accused 1 went in a door of a flat and returned with accused 2. The latter, he said, opened the rear door of the car, pulled out the 9mm pistol and handed it to accused 3. He said accused 2 patted accused 3 and said “man you are a bull”. PW3 examined the pistol and found that it was empty. He said they then drove to his house, ie PW 3’s house, for more bullets, reloaded the pistol and after driving back to work, handed the pistol over to Ramarothole.

[19] Shortly thereafter, so PW 3's evidence went, he and accused 5 and 6 were called by accused 4 into the latter's office. Accused 4 announced that no one was going to reveal the secret. Accused 5 added that if anyone did so he would be treated like the deceased. Accused 6 said she was aware of the gossip doing the rounds, she was no "sweet potato" and would clash with whoever was gossiping.

[20] It is common cause that on Friday, 26 March 2004, PW2, PW3 and accused 3, 4, 5 and 6 were arrested and taken into custody. Subsequently PW3 was locked in a cell together with accused 1 who had been arrested a few days earlier. PW3 said that in response to his inquiry as to what role accused 1 had played in the affair, the latter explained that he had been asked by accused 4 to take accused 2 and 3 to the border post and to follow the car in front of him, but that when they reached the railway line the two had asked to be dropped off. He added that he had no idea that they were going to kill someone. It is again necessary to emphasize that this explanation, which PW3 testified was given to him by accused 1, was admissible only against accused 1. It was not admissible as evidence against accused 2, 3 or 4.

[21] The third witness to testify as an accomplice was Mr. Lebohang Mohato (PW9). He was a production manager at Precious Garments. He described in some detail how he had spent the afternoon of Sunday, 21 March 2004, with accused 4 and 5 watching football on television at a restaurant and drinking. He said accused 5 had remained with him until after dark and in fact had driven him home. Accused 4, on the other hand, had left them some while before.

[22] He testified that on Tuesday, 23 March, he spoke to accused 6 who told him that she, together with accused 3 and 4, had the previous day visited a traditional doctor, Mr. Phatsisi Thamahane. PW9 said he told accused 6 that he was worried about rumours in the village concerning him. Her response was to suggest that he should also consult Thamahane. The following day accused 6 told PW9 that there were rumours circulating that people in management had killed the deceased and that accused 4 and 5 were accordingly going to consult Thamahane that evening. It was arranged that accused 6 and PW9 would meet the others at a shop. When the others arrived accused 3 was also present. All five then travelled to Thamahane's house in accused 4's car. On the way there was talk of the deceased's death. PW9 testified that accused 5 remarked: "It's over and so be it, and so far so good". Accused 3 said: "I'm not satisfied; I wish the

act could be repeated. I heard Peter [the deceased] crying like a goat when I shot him". He added that accused 2 had praised him and said: "well done". On arriving at Thamahane's house the latter took accused 3, 4 and 5 into the veld. PW9 said he and accused 6 remained behind. Eventually the others returned. Thamahane then took PW9 into a room where he was 'scarified' all over his body. Thamahane told him it was a good thing that he had come as "people come only when things had already got out of hand".

[23] PW9's evidence regarding the visits to the traditional doctor was corroborated by Thamahane himself who testified as PW10. He said he knew both accused 6 and PW9 as former patients. Shortly after 20 March 2004 he was visited, he said, by accused 6 who was with two men. The one was said to be involved with personnel, the other he observed to be short. He testified that the two men wanted him to "entrench them at work", but as they did not have his fee of M1 500 they left. The following night the same three returned together with two additional men. One of them was PW9 . He said he took the three whose names he did not know into the field and did his "services on them". They told him that their boss at work had been shot. On hearing this he informed them that it was beyond his powers to help. Accused 6 nonetheless asked him to proceed with his services which he reluctantly did.

[24] It is convenient at this stage to deal with the Crown case against each accused in turn. Accused 1 did not testify. However, the only witness to implicate him was PW3. Before considering the evidence in question it is necessary to make certain general observations regarding PW3. As is apparent from the summary of his evidence, it comprised in the main a series of incriminating utterances by the various accused. None of these was made in the presence of any other witness and each stands alone. Evidence of this nature is easy to fabricate and difficult to refute. PW3, moreover, would have had good reason to lie. The 9mm pistol had been allocated to him and was known to be in his possession at the time of the shooting. It is also clear, I think, that he was far from forthcoming. As previously noted, he advanced no explanation for why the accused should so readily and willingly have taken him into their confidence and incriminated themselves in the way they did, nor was any reason advanced why accused 4 should have frequently reported to him on his progress in the execution of the plan to kill the deceased. The inference that arises is that PW3 was more involved than he was prepared to disclose. In these circumstances the court *a quo* was obliged to approach his evidence with particular caution.

[25] The evidence implicating accused 1 relates to two incidents. The one was his conversation with PW3 in a police cell. It will be recalled that, according to PW3, accused 1 said he did not know that the two men he conveyed in his (maroon coloured) motor car were going to kill someone. As counsel for accused 1 stressed, the statement was exculpatory.

[26] The other incident was the alleged recovery of the 9mm pistol from accused 2 and the presence of accused 1 outside the former's flat. But even if PW3's version were to be accepted – and I shall return to this issue when dealing with accused 2 – I am not persuaded that the incident justifies the inference that accused 1 was privy to the plan to kill the deceased. It will be recalled that according to PW3, accused 3 motioned to accused 1 and said something like: "Tell that gentleman that the parcel is needed at work". The very use of the word "parcel" is indicative of accused 1 not being an accomplice. Had the position been otherwise, one would have expected accused 3 to say simply something like "we've come for the gun". Why, one may well ask, conceal from accused 1 what they had come to collect? It is true, as the court *a quo* observed, that accused 2 drew the pistol from his "waist" and handed it to accused 3, complimenting him at the same time. But the evidence was that accused 3 remained in the vehicle and accused 2 opened the door to hand him the pistol. There is no

evidence as to where accused 1 was at that stage and whether he would have seen the handing over of the pistol or, if he did, whether he would have heard the exchange of the incriminating statements.

[27] The court *a quo* also inferred from the fact that the two gunmen fled in the same direction in which the maroon vehicle had taken after dropping them off that accused 1 must have waited for them. There was no justification for this inference. This is particularly so in the light of the fact that there was another car involved which accused 1 was asked to follow.

[28] In the circumstances, I am satisfied that the conviction of accused 1 cannot be justified and his appeal must be upheld.

[29] I turn to accused 2. There was much evidence by PW2, PW3 and PW9 of statements made by accused 3 and 4 implicating accused 2 as the second gunman. These statements were made in the absence of accused 2 and, although admissible against the accused making them, constituted inadmissible hearsay evidence against accused 2. This trite principle was overlooked by the learned judge *a quo* who made liberal use of these statements in her reasons for convicting accused 2. Indeed, apart from certain police evidence to which I shall refer later, the only Crown evidence

implicating accused 2 was that of PW3 concerning the recovery of the 9mm pistol.

[30] It is trite that a court should warn itself of the danger of convicting upon the evidence of an accomplice. But the warning is of little consequence unless reference can be made to some factor which can properly be regarded as reducing the risk of convicting an innocent person. I have previously made the point that much of PW3's evidence comprises incriminating statements made by one or other of the accused in the absence of any other corroborating witness and that such evidence stands alone. However, on the one occasion when there could have been corroboration of his evidence in a material respect, his evidence was contradicted by a Crown witness who could have had no reason to be untruthful. Significantly, the evidence relates to the circumstances in which the 9mm pistol was recovered and which, on PW3's version, implicates accused 2. It will be recalled that on the day after the shooting Motloha (PW6) asked Ramarothole (PW8) for the 9mm pistol as he required it for the protection of a director, Jon Leu. Ramarothole said it was in the armoury. He was, of course, mistaken. When Ramarothole did not immediately produce the pistol Motloha phoned him to ask the reason for the delay. Ramarothole said that he had had to fetch the key to the

armoury which was normally kept by Masokela PW7 but who was not at work that day. Eventually Ramarothole discovered his mistake and asked PW3 for the pistol. Ramarothole denied that PW3 explained that it was with accused 4. He said that when asked, PW3 produced the pistol at once. There was no question of him having to go and fetch it. His evidence in cross examination reads as follows:

> "DC: When you retrieved the firearm from Thupa [PW 3] did he produce it at once?
>
> PW8: Correct.
>
> DC: If anyone were to say Thupa disappeared and brought the gun after some time?
>
> PW8: that would not be true.
>
> DC: When you retrieved the 9mm from Thupa did he make mention of accused 4 (Kori)?
>
> PW8: No."

Accused 4 was apparently present when the pistol was handed to Ramarothole. In cross examination of PW3 accused 4's counsel put it to PW3 that upon being asked for the pistol, he immediately retrieved it from his 'waist' and handed it over. This was also the evidence of accused 4. Accused 2 denied all knowledge of the affair.

[31] Given the need for caution before accepting PW3's evidence, particularly in relation to his possession of the suspected murder weapon, I

can see no justification for accepting his evidence on this important issue in preference to that of Ramarothole. In my view therefore the court *a quo* erred in doing so.

[32] I turn next to the evidence of Trooper Moepi (PW13) who testified as to an incriminating statement which accused 2 is alleged to have made subsequent to his arrest. Moepi's evidence was shortly that on Wednesday, 24 March 2004, he and Trooper Sekoati arrested accused 2 at his home and brought him to the CID office where he was interrogated by no fewer than eight policemen at the same time. He said before this took place accused 2 asked to speak to Detective Inspector Makoae alone. Shortly thereafter the others were called back into the room and it was then that the interview took place. It is necessary to mention in passing that Makoae's version was somewhat different. He said that he and one Lebasa interviewed accused 2 and it was to them and to them alone that accused 2 tendered an explanation. This contradiction is of some significance in view of what follows. In the course of the cross examination of Moepi by accused 2's counsel, the latter asked Moepi what explanation accused 2 had given. His reply was: "He told us he was the one who had killed the deceased – Mr. Mokheseng – together with accused 3". Moepi added that this was written down and signed by accused 2 and that it, the statement, was in the police docket. The cross examiner denied on behalf

of accused 2 that such an explanation had been given and applied to the court to be given the statement or presumably a copy thereof. The application was vehemently opposed by the Crown prosecutor who argued that counsel for the defence was entitled only to witnesses' statements in the docket, he was not entitled to "go on a fishing expedition" and that, as I understand the argument, he was not entitled to the statement as it was not tendered by the Crown as part of its case. In the event, the application was refused. The court's reasons were as follows:

> "I have said in my ruling that we are still at the prosecution case and it is for the crown counsel to say what she wants from her witnesses so that things that the witness eventually said about accused 2 and 3 came under cross-examination, the crown could not therefore be asked to produce something which did not come out through her leading her witnesses, she never led her witness into revealing that kind of evidence so for that reason, the application fails."

[33] A statement of the kind in question, even if otherwise inadmissible, will become admissible if elicited in cross examination, see eg **S v Olifant** 1982 (4) SA 52 (NKA). But the ruling refusing defence counsel sight of the statement was clearly wrong. Even before the decision in **Shabalala and Others v Attorney-General, Trnsvaal and Another** 1996 (1) SA 725 (CC) and when the so-called 'docket privilege' was still good law (see **R v Steyn** 1954 (1) SA 324 (A)) statements made by the accused, whether exculpatory or otherwise, were as a matter of course made available to defence counsel. In **Shabalala** the whole question of "docket privilege"

was revisited and relaxed. Mahomed DP, with whom the other justices concurred, observed in para 55 at 750 E:

> "It is difficult to conceive of any circumstances in which the prosecution can justify withholding from the accused access to any statement or document in the police docket which favours the accused or is exculpatory."

The refusal of the Crown to afford defence counsel access to the statement in question can give rise to only one inference, and that is that it favoured accused 2. There could hardly have been any objection if the statement did otherwise. In my view, therefore, the incorrect ruling of the court *a quo* had the effect of seriously prejudicing accused 2 in his challenge of Moepi's evidence in relation to the contested statement. For this reason the statement must be ignored. Indeed, not to do so would result in a violation of accused 2's fundamental right to a fair trial.

[34] The only other evidence tendered by the Crown involving accused 2 was that of Makoae (PW18) who testified that the explanation given by accused 2 led to the arrest of accused 3, 4, 5, 6 and PW3. However, by 24 March the town was abuzz with rumours of who was responsible for the killing. This much is apparent from the evidence of PW9. In these circumstances, and in the absence of accused 2's statement, this evidence is of little, if any, weight.

[35] Accused 2 elected to testify. In short, his evidence was that he had been arrested in October 2003 on suspicion of having helped Phakiso Molise to escape from custody. Molise had apparently led police riots in 1995. Accused 2 said that in November 2003 he had fled to South Africa and had only returned on the morning of his arrest. He said his interrogation by the police was directed at ascertaining the whereabouts of Molise, not the murder of the deceased. He referred to a newspaper report of a politician's speech at the funeral of the deceased in which the allegation was repeated that he, accused 2, had assisted Molise in his daring escape and that it was thought that Molise was hiding somewhere in South Africa.

[36] Accused 2 denied having had anything to do with the murder of the deceased. And in particular he denied having made any statement to Moepi or Makoae and having handed the 9mm pistol to accused 3 as alleged by PW3.

[37] It is well established that an accused does not bear the onus of proving his alibi; it is for the Crown to disprove it. See **R v Biya**1952 (4) SA 514 (A). In the present case, however, counsel for accused 2 did not

challenge the Crown witnesses on the ground that the accused had an alibi. Whether this was due to a failure on the part of counsel or otherwise need not be considered. The point is that an alibi "does not have the same weight or the same persuasive force" if it is disclosed too late to give the police an opportunity for checking it. See **R v Mashelele** 1944 AD 571 at 585.

[38] Nonetheless, it is clear that an alibi is not to be considered in isolation but in the light of the evidence as a whole; **R v Hlongwane** 1959 (3) SA 337 (A) at 340 H – 341 B. Ultimately, the inquiry is whether the Crown has established the guilt of the accused beyond reasonable doubt.

[39] Given the large amount of hearsay evidence incriminating accused 2, the suspicion that he was the second gunman is strong. But hearsay evidence of the kind in question is inadmissible and the court *a quo* clearly misdirected itself in relying upon it. Once that evidence is disregarded, what remains in the light of the aforegoing analysis of the Crown case is in my judgment insufficient to justify a conviction. Accused 2's appeal must accordingly be upheld.

[40] Before leaving accused 2 it is necessary to comment on an exchange that took place at the end of his evidence when he was being questioned by the judge. He was asked:

> "Can you produce to this court proof that you crossed the border, by way of passport or other document?"

Accused 2 answered:

> "That is so my Lord, my passport would reflect that even though it is not with me now."

The response of the judge was simply to say 'thank you' and there the matter was left. Accused 2, who was in custody, was not asked where his passport was or whether he wanted assistance to have it produced. For all we know both accused 2 and his counsel may simply have overlooked its existence and probative value until the matter was raised by the judge. The issue of the passport should not simply have been left in the air. At the very least accused 2 should have been afforded the opportunity of having it produced in court. It is appropriate to repeat the much quoted passage in the judgment of Curlewis JA in **R v Hepworth** 1928 AD 265 at 277 with regard to the role of a judge:

> " ….. a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he [or she] is not merely a figure head, he has not only to direct and control the proceedings according to recognized rules or procedure but to see that justice is done."

[41] I turn now to accused 3. He was identified as one of the gunmen by Mabelebele (PW4) whom accused 3 described as his sister-in-law. It is common cause that the two were well known to each other. It was also not in dispute that Mabelebele would have had ample opportunity to observe the gunmen immediately before and while the shooting was in progress. Counsel for accused 3 attacked her credibility solely on the ground that there had been a rift between her and accused 3 which dated back to the death of her husband three years previously. This was repeated by accused 3 in his evidence. In my view the court *a quo* correctly rejected the suggestion that Mabelebele would for this reason have falsely implicated accused 3. Moreover, all three accomplices implicated accused 3 as one of the gunmen. In these circumstances I am unpersuaded that accused 3 was wrongly convicted and his appeal must accordingly fail.

[42] Accused 4, too, was implicated by all three accomplices. His response was to deny each and every alleged statement made by him or a fellow accused in his presence. As far as the visit to the traditional doctor is concerned, he testified that he did so only once and on that occasion he did no more than provide transport for accused 6 and PW9 who wished to consult the doctor for health problems. In this respect, he contradicted not only the evidence of PW9 but also that of the traditional doctor.

[43] Accused 4 was also the person who was in possession of the 7.65mm pistol, serial number 065339, at the time of the shooting. It will be recalled that the ballistic expert, Mothibeli expressed the opinion that this weapon had fired the four 7.65mm cartridge cases and at least one of the bullets found on the scene shortly after the shooting. This evidence was attacked in cross examination on various grounds, none of which was of any substance save for one. That was that the expert had failed to produce photographs to demonstrate the comparisons he had made and had in fact failed to explain to the court how he arrived at the conclusion he did. There is merit in this criticism. As long ago as 1940, Ramsbottom J in **R v Jacobs** 1940 TPD 142 at 146 stated:

> "… it is of the greatest importance that the value of the opinion should be capable of being tested and unless the expert states the grounds upon which he bases his opinion, it is not possible to test its correctness so as to form a proper judgment upon it."

In **R v Nksatlala** 1960 (3) 543 (A) Schreiner JA at 546 C warned that a court :

> "should not blindly accept and act upon the evidence of an expert witness, even a fingerprint expert, but must decide for itself whether it can safely accept the expert's opinion."

More recently in **Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH** 1976 (3) SA 352 (A) at 371 G-H, Wessels JA had this to say:

> "As I see it, an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds are disclosed by the expert."

[44] The failure of Mothibeli to produce photographs to demonstrate the comparisons he made and to state the reasons for his conclusion does not, however, render the evidence as to his conclusion inadmissible. See **R v Smit** 1952 (3) SA 447(A) at 451H – 452B. But it does materially affect the value of his evidence, so much so that in the absence of other evidence implicating the accused it would be insufficient to support a conviction. See eg **S v Mkhize and Others** 1999 (1) SACR 256 (W).

[45] In the case of accused 4 there is, of course, other evidence. PW9's evidence is corroborated in material respects by the traditional doctor, Thamahane. The evidence of both is indicative of an attempt on the part of accused 4 to invoke a supernormal power to conceal his complicity in the commission of a crime. This, together with the ballistic evidence, serves to

corroborate the evidence of PW2 and PW3 implicating accused 4 in the murder of the deceased. The cumulative effect of the evidence, in my judgment, is to establish the guilt of accused 4 beyond reasonable doubt. It follows that his appeal must likewise fail.

[46] I turn now to accused 5. It will be recalled that according to the evidence of PW9, on Sunday 21 March 2004, he and accused 5 were together watching television and drinking until after dark. Accused 5 could not therefore have played any role in the actual killing of the deceased. PW3 testified that the previous day, Saturday 20 March 2004, while travelling in accused 4's car together with accused 3, and 4, accused 5 remarked that he had quarrelled with the deceased and wanted to resign. Accused 4, according to PW3, had then said: "wait and see what happens on Monday". This exchange would indicate that accused 5 was not privy to a plan to kill the deceased, nor was there any other evidence that would justify the inference that he was.

[47] What is clear, however, is that upon hearing of the death of the deceased, he expressed no regret but on the contrary appeared pleased. Thereafter, he undoubtedly associated himself with what accused 3 and 4 had done. This is apparent not only from his various utterances but also

from his conduct of accompanying accused 3 and 4 on the occasion of their second visit to the traditional doctor. It is true that he denied in evidence that he had done so, but in the light of the evidence of PW9 and the traditional doctor I am satisfied that the court *a quo* was correct in rejecting this aspect of his evidence. It is also clear that by then he was fully apprised of the role played by accused 3 and 4 in the murder. On the other hand, it was not he who arranged the visit to the traditional doctor, but accused 6. The evidence therefore establishes that accused 5 associated himself with the murder in the sense of approving what the others had done. Apart from that, however, he appears to have done nothing to assist them to escape justice.

[48] The question is whether this conduct renders him guilty of an offence. In **S v Augustine** 1986 (3) 294 (C) Marais J at 298A-B observed:

> "that something more than mere notification or approval of an offence is required before criminal liability will exist. The writer of a letter of congratulation to the killer of a detested member of the community may be associating himself with the crime of murder, but he is certainly not an accessory or an accomplice, and he attracts no criminal liability."

Similarly, in **S v Morgan** 1993 (2) SACR 134 (A) it was held that mere association in the broad sense was not enough and that to incur liability as an accessory after the fact the accused would have had to have helped the perpetrator to evade justice.

[49] It follows that in my view accused 5's appeal must be upheld.

[50] I turn finally to accused 6. The court *a quo* found her to have been an accessory after the fact but nonetheless convicted her of murder. In doing so it erred. The issue debated in this Court was whether she was correctly found to have been an accessory after the fact.

[51] The evidence relied upon by the Crown was that of PW9 and the traditional doctor, Thamahane, to the effect that it was accused 6 who had arranged for accused 3 and 4 and later accused 3, 4 and 5 to visit the traditional doctor in an attempt to invoke a supernormal power to conceal their role in the murder. This was denied by accused 6 who repeated in evidence accused 4's version that he had done no more than on one occasion take accused 6 and PW9 to the doctor's home for medical treatment. The court *a quo* rejected this version and in my view correctly so.

[52] The issue that remains is the extent of her knowledge of the accused's complicity in the offence when assisting them to obtain the benefit of Thamahane's "services". PW9, it will be recalled, testified that he

had told accused 6 that he was worried about “rumours” in the village concerning him. Her response was to suggest that he consult Thamahane. She also told him that there were “rumours” that the people in management were implicated in the murder and that accused 4 and 5 were also going to consult Thamahane. Rumours, of course, are not necessarily true. They are often false. It may well be that initially when accused 6 recommended that Thamahane be consulted she was unaware that accused 3 and 4 were the murderers. However, by the time of the second visit to Thamahane she must have known that at least accused 3 and 4 had participated in the murder of the deceased. Not only would the conversation that took place in the car en route to Thamahane’s house have made this clear, but Thamahane’s reluctance to help on hearing what the others had told him would have removed any doubt she may have had. Indeed, it was clear from Thamahane’s reluctance to help and his assertion that it was beyond his power to do so, that he was not dealing with unjustified gossip. Nonetheless, accused 6 asked Thamahane to proceed with his services, which he did. In doing so accused 6 was actively assisting the perpetrators to evade justice. It follows that in my view she was guilty of being an accessory after the fact.

[53] I turn now to the finding of the court *a quo* that no extenuating circumstances were present in the case of accused 3 and 4. In this court counsel for the Crown very properly conceded that in this respect the court *a quo* erred. The concession in my view was well made. In **R v Fundakubi and Others** 1948 (3) SA 810 (A) at 818 Schreiner JA said:

> "But it is at least clear that the subjective side is of very great importance, and that no factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration."

Indeed, the absence of extenuation compels the imposition of the ultimate penalty and that penalty should as a rule be reserved for the worst cases. Where there are factors, however remote or faint, bearing on the moral blameworthiness of the accused, a court should not lightly disregard them in determining the existence of extenuating circumstances. In the present case, the motive was not robbery or financial gain but rather frustration and bitterness on the part of both accused arising from the deceased's management style. According to PW3, accused 4 complained of the deceased's disregard for the rights of workers and his habit of preferring charges against the workers. Mr. Tankiso Thabane (PW1) testified that accused 4 had some while before the murder expressed his resentment at the manner in which the deceased had interfered with his plan to provide funeral insurance for the workers at Precious Garments. It is clear, too,

from statements attributed to accused 4 by PW3 that accused 4 had allowed his resentment to weigh heavily on his mind. In the case of accused 3, there was evidence that the deceased had insisted on deducting money from his salary notwithstanding accused 4's assurance that the deduction would not be made. In my view these factors justified a finding of extenuating circumstances and this court is accordingly at large to impose an appropriate sentence other than the death penalty. It is true that neither accused has previous convictions. On the other hand, it is clear that the murder was premeditated and callous. I think a sentence of 20 years imprisonment for each would be appropriate.

[54] Accused 6, although found to have been an accessory after the fact, was convicted of murder with extenuating circumstances. For this reason alone this court is entitled to interfere with the sentence imposed. In my view, the sentence is in any event grossly excessive. Accused 6's conduct in assisting the other accused to escape justice was limited to facilitating the services of a traditional doctor. In the event, that assistance was of little consequence. What was asked of Thamahane was beyond his powers. In my view a sentence of three years imprisonment would be appropriate. The accused were convicted and sentenced as long ago as

31 August 2006. Accused 6 has therefore already served a period of 3 years imprisonment and must be released forthwith.

[55] The following order is made:

(1) The appeal of accused 1, Lesaoana Molomo, is upheld. His conviction and sentence are set aside.

(2) The appeal of accused 2, Thabiso Mothobi, is upheld. His conviction and sentence are set aside.

(3) The appeal of accused 3, Bokang Molongoana, against his conviction is dismissed. His appeal against sentence is upheld. The sentence of death imposed by the court *a quo* is set aside and the following is substituted in its stead:

"Accused 3 is sentenced to 20 years imprisonment, which period is to commence on 31 August 2006."

(4) The appeal of accused 4, Kutoane Kori, against his conviction is dismissed. His appeal against sentence is upheld. The sentence of death imposed by the court *a quo* is set aside and the following is substituted in its stead:

"Accused 4 is sentenced to 20 years imprisonment, which period is to commence on 31 August 2006."

(5) The appeal of accused 5, Molai Mosoaboli, is upheld. His conviction and sentence are set aside.

(6) The appeal of accused 6, Nokoli Hloloane, against her conviction and sentence is upheld to the extent that her conviction of murder with extenuating circumstances and sentence of 10 years imprisonment are set aside and the following is substituted in its stead:

"Accused 6 is found guilty of being an accessory after the fact and is sentenced to 3 years imprisonment, which period is to commence on 31 August 2006".

_____
D G SCOTT
JUSTICE OF APPEAL

I agree:

_____
F H GROSSKOPF
JUSTICE OF APPEAL

I agree:

_____
J W SMALBERGER
JUSTICE OF APPEAL

For 1st, 2nd and 4th Appellants (accused 2, 3 and 5)	:	Adv L.D. Molapo
For 3rd and 5th Appellants (accused 4 and6)	:	Adv P.S. Ntśene
For 6th Appellant (accused 1)	:	Adv E.H. Phoofolo
For the Crown	:	Adv M. Tlali