

**IN THE HIGH COURT OF LESOTHO**

**HELD AD BOTHA-BOTHE**

**CRI/T/78/07**

In the Matter between:

**REX**

**CROWN**

**VS**

**TS'EPO RAPHOKA**

**ACCUSED**

**SUMMARY**

*Criminal Law – murder – circumstantial evidence – evidence not connecting accused to the crime – whether defence of alibi belatedly put affects accused's case – crown's failure to prove its case beyond reasonable doubt – accused acquitted.*

## **JUDGMENT**

**Delivered by the Honourable Madam Justice L. Chaka –**  
**Makhooane on the 13<sup>th</sup> December, 2010**

- [1] The accused person, Ts'epo Raphoka, was charged with the crime of murder in that upon or about the 4<sup>th</sup> September, 2006 and at or near Maputsoe, St. Monica's in the district of Leribe the said accused did unlawfully and intentionally kill on Sephoko Matasane.
- [2] The accused pleaded not guilty to the charge. **Mr. Molefi** Counsel for the accused, informed the court that the plea was in accordance with his instructions.
- [3] The crown tendered the following depositions which were read into the recording machine and were admitted as evidence before the court; the post mortem report, the ballistic report by MP Pali, a report by NO. 6758 Inspector (Ins) Molapo, a report by Detective Trooper (D/Tpr) Motloli

and the statement by Lineo Mokhahlane. They were handed in and marked Exhibit “A” to “E” respectively. Later during the course of the proceedings, two (2) other statements were also admitted, that of ‘Malesole and the indentifying statement of Cheli Matasane and they were marked Exhibit “F” and “G” respectively.

**[4]** The crown led the evidence of three (3) witnesses namely, Raselepe Raselepe PW1, Cheli Matasane, PW2 and NO 9023 Detective Sergeant (D/Sgt) Jankie, PW3.

**[5]** PW1 testified that it was on the 1<sup>st</sup> of September, 2006 when the deceased invited him to join her at the Metro business center, to drink some alcohol. They drank the whole day and at around 9:00pm, the deceased called one ‘Malesole and they arranged to have a meeting at Tsikoane. On arrival at Tsikoane, PW1, the deceased and ‘Malesole together drank Amstel beer while ‘Malesole and the

deceased chatted. PW1 further testified that he left with the deceased to her house to dine. The deceased and PW1 were lovers. The deceased asked PW1 to sleep over but PW1 declined as he had to go to his house where he lived with his other girlfriend.

**[6]** It was PW1's evidence that although the deceased was dissatisfied, she accompanied him to Maputsoe Ha Masele and turned at the gate. It turns out that the deceased was supposed to have slept at Likhetlane, her home, but she did not want to sleep alone. She therefore indicated that she was going to look for Raphoka, the accused. PW1 informed the court that he attempted to dissuade her from going because she was already drunk and also because she used to tell him that she and the accused end up fighting every time she goes to him drunk. PW1 and the deceased parted with the understanding that they would meet on the following day, being Saturday.

**[7]** PW1 mentioned that the deceased did not call on Saturday and Sunday as she usually did. He finally called her cell phone on Sunday evening when he came back from Matlameng, his home village, however, it was not available. PW1 went to the deceased's home and he was informed that she had passed on. He did not know what had happened to her.

**[8]** PW2, Cheli Matasane is the deceased's father. He knew the accused as her daughter's lover who, at some point had lived with her at St. Monica's. He testified that on the Sunday he received a call from Thaba-Tseka, directed to his chief to the effect that the deceased could not be seen even though her car was found dumped near one Dr. Phalanyane's place. PW2 reported to the Maputsoe police that the deceased was missing and he requested them to remove her car and trace her through her cell phone. They were unable to find her that day. On the following day which was Monday the 4<sup>th</sup> September, 2006 PW2 took a

key from the deceased's daughter and went with his wife to St. Monica's where the deceased resided. Upon entering he found the deceased lying dead on the floor close to the door. The deceased was naked. He called the police to inspect the scene. It was discovered that the deceased had many wounds on her body, chest and thighs and the floor had bullet holes. The body was transported to the mortuary and PW2 removed the deceased's clothes from that rented house. Some of the accused's clothes were found at the deceased house. It was PW2's evidence that he informed the police that he suspected that the accused was responsible for the death of his daughter, as the shooting seemed to have been done by someone skilled. He was also skeptical because the accused had not reported to him that the deceased was missing albeit they stayed together.

**[9]** PW3, No. 9023 D/Sgt Jankie, stationed at the Maputsoe police post, informed the court that he and Supt Ts'ita who was the officer commanding then received the report of the

death of one Sephoko Matasane on the 4<sup>th</sup> September, 2006. PW3, D/Tpr Motloli, Trp Nomo, and other police officers proceeded to the scene of the crime at St. Monica's, where they found a lot of people already gathered. They discovered the deceased's body lying on the floor with gun shot wounds. PW3 informed the court that he found a dead bullet and a shell in the kitchen unit. The kitchen unit, pots, and the plates had been damaged. The deceased was then, taken to the mortuary.

**[10]** It was during the investigation of the case when PW2 communicated his suspicion that the accused must be the person responsible for the murder of the deceased. D/Tpr. Motloli and PW3 informed the accused of PW2's suspicion. The accused was ordered to surrender his firearm to the Maputsoe police. The gun was taken for ballistic tests together with the dead bullet and shell. The results were positive, meaning that the bullet had been fired from the gun taken from the accused. According to PW3, the gun

was a 9mm parabellum with a rubbed off serial number. The gun, the dead bullet and the shell were handed in and marked Exhibit “I” collectively. The dead bullet was not brought before the court. The explanation was that it was possible it might have been misplaced. The accused was issued with another service pistol. The accused’s docket was passed onto Insp Molapo at Hlotse police to continue with the investigations.

[11] The crown then closed its case. The defence applied for the discharge of the accused in terms of **section 175 (3)** of the **Criminal Procedure & Evidence Act 1981** (“CP&E”). The application for discharge was dismissed and the accused gave evidence on his behalf.

[12] The accused’s evidence was that he is currently stationed at Peka. He was stationed at Maputsoe in the CID section in 2006. He further testified that he knew the deceased.



They had been lovers for four (4) years though the relationship had ended sometime in April, 2006. During the course of their relationship, he stayed at his place at Ha Chonapase and the deceased's stayed at her own place at St. Monica's. They eventually stayed together at the deceased's place, St Monica's. Their relationship went sour at some point and he had to return to Ha Chonapase. They had not reconciled up to the time of her death. The accused narrated that he was forced to leave his clothes behind at St. Monica's and he was unable retrieve them with ease due to the deceased's aggressive and violent conduct towards him.

**[12]** He further informed the court that he came to know about the deceased's death on the 4<sup>th</sup> September, 2006 when he reported to work. He was further informed that the deceased's father suspected him of the murder. He was ordered to hand over his gun which was a 9mm Tangfolio with a serial number he had forgotten. According to him,

the gun was issued to him by one D/Insp Mofolo in 2002 and he had signed for it. It was this gun that he had handed over to the Maputsoe police. He denied ever being issued with a 9mm parabellum which was alleged to have been seized from him. On the 28<sup>th</sup> September, 2006 PW3 informed the accused that the ballistic test results had come back positive. He alleged that he was ordered to go to Hlotse to report to Insp Mahanetse and Insp Molapo respectively on the same day that he was going for a remand.

**[13]** The accused testified that on Friday the 1<sup>st</sup> September, 2006 he was on duty from 7:00am to 5:00pm and he had not seen the deceased. After he had knocked off, they were instructed by PW3 to patrol at the Metro and Mohahlaula business complexes with Tpr Mofaso. They patrolled that street until they arrived at a business place called Lehafing, where they decided to drink and play snooker. At around 8:00pm, one Tpr Ntaha who stayed close by arrived and had

a soft drink with them. He left and came back at around 9:55pm and told them that Sgt Pheko had ordered them to patrol the Maputsoe border gate area, which had become riotous because of the month end rush. He ultimately knocked off at 6:00am and they were taken by Tpr Ntaha to their respective places. He stayed at his house until Monday morning when he went to work where PW3 informed him about the deceased's death.

**[14]** DW2, No. 9038 Detective Police Constable (D/P/C) Ntaha stated that he is presently stationed in Botha-Bothe. He was on night duty on the 1<sup>st</sup> September, 2006 at Maputsoe police Post. He went to Lehafing where he found the accused and Tpr Mofaso playing snooker and drinking alcohol. He joined them and at around 9:00pm he left to prepare to go on duty at 10:00pm. He found Sgt Pheko at the office who assigned him to go on patrol at the border area. They went to Lehafing to pick up the accused and Tpr Mofaso as reinforcement for the border patrol. They

knocked off between 6:00am and 7:00am in the morning. He drove the accused and Sgt Pheko to their respective homes which are not so far apart at Ha Chonapase. He showed that Tpr Mofaso got separated from them much earlier during the course of the patrol. He came to know of the deceased's death on Monday the 4<sup>th</sup> September, 2006 at work.

- [15]** The post mortem report showed that death occurred due to severe blood loss resulting from multiple destruction of internal organs following gun shot. The Doctor remarked that about five (5) gun shot entry wounds were around the chest, the abdomen and the pelvic areas, with severe blood loss. Further entries showed that the heart muscles had been ruptured and there was multiple destruction of the small intestines.

**[16]** It is common cause that the deceased and the accused were lovers for some four (4) years. It is also common cause that PW1 and the deceased were also lovers. It is further common cause that PW1 was the last person to see the deceased before her untimely death. It is also not in dispute that the deceased was last seen on the night of the 1<sup>st</sup> September, 2006. Thereafter she could not be located any where, not even on her cell phone. What made every one worried was that her car was found abandoned. The deceased was only discovered dead in her house on on the morning of Monday the 4<sup>th</sup> September, 2006 by her own father PW2.

**[17]** PW 1's evidence in my view, did not connect the accused to the crime with which he was charged. PW1 did not know whether the deceased and the accused actually met, on the night that she had said she was going to see him, which was the 1<sup>st</sup> September, 2006. PW1 said he did not talk to the deceased for the rest of that week end and as such, he did not know

what the deceased got up to after they had parted. He learnt of the deceased's death on Monday the 4<sup>th</sup> September, 2006. Any reference to the accused by PW1 is in no way in connection to the killing by the accused.

**[18]** PW2 being the father of the deceased justifiably only wanted to see justice done in relation to the death of his daughter. He was the one who was confronted with the gruesome scene at the deceased's house. He discovered the body of his daughter naked and riddled with bullets. According to PW2 the person who had killed his daughter must have been a skillful and knowledgeable person in firearms. This conclusion was brought about by the fact that the crime scene had been carefully cleaned of dead bullets and shells save for the only one dead bullet and shell found in the kitchen unit, obviously left by mistake by the shooter.

**[19]** It was PW2's firm belief that the only person who could have killed his daughter is the accused. He knew of their relationship, and according to him they still lived together even though we know there was evidence to the contrary. The accused denied that he was still staying together with the deceased when she met her untimely death. He alleged that when their relationship went sour he left to go to his house at Ha Chonapase. This evidence was corroborated by DW2 who actually drove the accused to his house at Ha Chonapase after they had knocked off duty on the night of the 1<sup>st</sup> September, 2006. PW3 also testified that the accused was staying at Ha Chonapase. Unfortunately PW2's strong suspicion that the accused must have been the one who had killed the deceased, did not actually point at the accused as the killer.

**[20]** The evidence of PW3 was crucial. He attended the scene of the crime. He found the dead bullet and the shell at the scene. He was the one who confronted the accused with PW2's suspicion. He then seized the accused's gun and together

with the dead bullet and shell, sent them for ballistic testing. The results showed that the dead bullet was fired from that gun. The accused denied having handed over a 9mm parabellum, with its serial numbers rubbed off. He insisted that he gave PW3 a 9mm Tangfolio with its serial numbers intact. The crown was unable to disprove his version since no registers were brought as part of the evidence. This means PW3's evidence materially differed from that of the accused. The question of how there can be two (2) guns, a 9mm parabellum and a 9mm tangfolio when only one, a 9mm parabellum was used at the scene, remains a mystery.

**[21]** The crown's case rests on circumstantial evidence. The relevant legal principle applicable in cases of circumstantial evidence was aptly outlined in **R v Blom 1939 A.D 188** at 202 – 203 in the following terms:

- (1) *The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.*



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

**[22]** The next central issue is whether it would be correct to draw an inference that the accused must have shot the deceased in the light of the above contradictory disputed set of facts. We ought to be reminded that the crown is the one that bears the burden of proof.

**[23]** There was no evidence that was placed before the court to support the crown's allegation that the accused had been issued with a 9mm Parabellum service pistol, with its serial number rubbed off. There is also no reason for PW3 to say he seized a Parabellum and not a Tang folio from the accused. The firm evidence before the court which is also common cause is that, the deceased was killed with a 9mm parabellum whose dead bullet and shell were found at the scene. This

brings us to the conclusion that it would be fair to infer that there might have been another person(s) who used a 9mm parabellum to kill the deceased. If that is so it means therefore, that the accused cannot be said to have killed the deceased. The crown failed to prove that indeed it was the accused who had committed the murder.

[24] In articulating the principles for the reasoning by inference as was pointed out in **R v Blom** (supra), in particular in dealing with the second cardinal rule of logic, the full bench in **Acres International Ltd v The Crown 2000-2004 LAC 677** at **688** remarked as follows:

*“The investigation into other possible hypothesis is not an academic exercise. It is conditioned by the nature of the task in hand-the practical business of deciding a criminal trial.*

The court further remarked:

*...And in considering whether there are other reasonable inferences, the fact that the accused has given an explanation, or the fact that, although an explanation was called for in the circumstances, the accused failed to give one, may considerably narrow the inquiry...If the explanation is a reasonable one, then unless it is negated by the*

*State (or it can be said that it cannot reasonably be true), the inference of guilt cannot be drawn.”*

[25] The accused has in my view given an explanation about the gun issued to him. His explanation was not negated by the crown. It would be a dangerous exercise to engage in speculations and the court refrains from so doing.

[26] The crown when addressing the court contended that the accused failed to put his defence of *alibi* to PW1 and PW2 and only put it to PW3 at some late stage of the proceedings. The crown challenged the credibility of the accused's defence of *alibi* on that account as being an afterthought.

[27] The pertinent issue is whether a defence disclosed late in the proceedings has a negative bearing on the accused's case. In **S v Thebus and Another 536; R v Hlongwane 1959 (3) SA 337** Moseneke J (as he then was) remarked as follows:

*“The rule of evidence that the late disclosure of an alibi affects the weight to be placed on the evidence supporting the alibi is one which is well recognized in our common law...Firstly, the late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi. Standing alone it does not justify an inference of guilt. Secondly, it is a factor which is only taken into consideration in determining the weight to be placed on the evidence of the alibi.”*

**[28]** In **Lefaso v R 1990-1994 LAC 44** at **48**, **Shultz P** addressed the issue of the disclosure of the defence. The court held as follows;

*“The need for the defence to put the salient parts of the defence case to the relevant Crown witnesses has been stressed by this court over and over again. One reason for putting the defence version is to give the Crown witnesses a chance to counter it. Another is that Crown is entitled to assume that a fact is not in issue if it has been deposed to and is not challenged in cross-examination.”*

**[29]** Crown argued that the accused concocted his defence of *alibi* at the last moment. The defence counter argued that there was no burden on the accused to prove his *alibi*, see **S v Mohlongo**

**1991 (2) SACR (A) 210.** When asked for an explanation why he only disclosed his *alibi* to PW3, the accused responded that PW1 and PW2 did not give evidence which would have necessitated him to disclose of *alibi*. He put it to PW3 because he had to explain his whereabouts on Friday, the day allegedly mentioned as being the one when the deceased disappeared. It is important to note that it is not known as to when the deceased was actually killed. It can only be assumed from the post mortem report where the doctor estimated that the deceased could have been dead for three (3) days when he performed the post mortem.

**[30]** Even though it is true that the accused delayed to disclose his *alibi*, it is my opinion that the accused's failure to put his defence initially had no negative bearing on his evidence. The Crown still had an opportunity to call on evidence to rebut the accused's defence of *alibi*, but they chose not to challenge it.

**[31]** I find on the basis of the forgoing, that the evidence placed before the court did not connect the accused to the crime with which he is charged. Having concluded thus it is my finding that the crown did not prove its case beyond reasonable doubt. The accused is accordingly acquitted.

My Assessors agree.

Exhibit "I" to be forfeited to crown.

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**L.CHAKA-MAKHOOANE**  
**JUDGE**

**For Crown:     Mr. Letsie**

**For Defence:   Mr. Molefi**