

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**REX**

**VS**

**KHAFA RAPHOKA**

**Judgment**

**Coram:** Hon. Hlajoane J  
**Date Heard:** 8<sup>th</sup> May, 2012, 10<sup>th</sup> May, 2012, 11<sup>th</sup> June, 2012, 6<sup>th</sup> September, 2012, 20<sup>th</sup> September, 2012.  
**Date of Judgment:** 30<sup>th</sup> October, 2012.  
**Date of Sentence:** 9<sup>th</sup> November, 2012.

**Summary**

*Accused charged with murder and unlawful possession of firearm - The crown having proved all essential elements of the crime of murder and failing to produce licence for possession of firearm – Verdict of guilty as charged on both counts with extenuation.*

- [1] The accused herein has been charged on count 1 with the murder of 'Mahlalefang Mokhele, his mother-in-law. The allegations being that on or around February 2007, at Matholeng in Mafeteng district, the accused did unlawfully and intentionally kill the deceased. The second count being that he was found in possession of a firearm in contravention of **section 3 (2) (a) of Arms and Ammunition Act**<sup>1</sup>. The accused pleaded not guilty to both charges.
- [2] The first prosecution witness Tsepiso Mokhele told the Court that she worked at the same factory with the deceased 'Mahlalefang Mokhele and the wife to the accused 'Mapaseka Mokhele. That 'Mapaseka is her aunt's daughter.
- [3] Her evidence was that the three of them were on the day in question, the 20<sup>th</sup> February, 2007, seated outside their place of work enjoying their lunch at around 12 noon. They were seated under the trees facing the tarred road.
- [4] The witness saw the accused coming towards them from across the road. He saw the accused's hand going up to his waist. That was when 'Mahlalefang, accused's mother-in-law, stood up and tried to get hold of the accused. Accused then shot at 'Mahlalefang though the witness did not see where she was hit because she immediately took to her heels.

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<sup>1</sup> Act 17 of 1966 as amended by Act 4 of 1999

- [5] Though no longer certain, but the witness said she heard one gun report before she ran to her work place. She then saw the accused chasing after 'Mapaseka, his wife.
- [6] The second shot was when accused noticed the police van approaching them. Accused then shot himself. The witness had come back to collect her shoes which she had left behind on hearing the first shot. Accused shot himself and fell down. She saw the deceased fallen on her face. But later in the afternoon the witness saw 'Mapaseka arrive home.
- [7] The witness said though she had known the accused and 'Mapaseka to be husband and wife, but 'Mapaseka was then staying at her maiden home which was not far from her home.
- [8] P.W.1 knew the accused to be working as a security officer at the time. When told in cross examination that accused was going to say he was always armed with a gun whenever he was on duty, the witness said she had not realized that.
- [9] According to P.W.1 as the deceased stood up she never took any steps towards the accused as the accused was already there. P.W.1 also said she never heard any exchange of words between the deceased and the accused prior to the shooting.
- [10] It was put to the witness that since it was at lunch time there were many people who were at the scene who even approached the accused and surrounded him. That one of those people even

invited others to get hold of the accused to assault him, but all that was denied by the witness. The witness said she had prior to that day never seen the accused visiting his wife at her work place.

[11] The witness showed that she was not aware that the accused was at the time having problems with his wife and that the accused as he returned from his home in Maseru had one day found his wife having taken all their property to her maiden home.

[12] But the accused did not deny that he had fired a shot. He said he fired out of panic and frustration but the witness still denied that people who were there approached the accused.

[13] The second prosecution witness was 'Mapaseka Mokhele, the wife to the accused. The deceased was her mother. Her evidence was similar to what was said by P.W.1 in that she saw the accused crossing the road and coming towards them as they were seated and enjoying their lunch.

[14] What was different in her evidence was that, she said accused insulted her by her mother's private parts and showed he had found her. She said it was after the accused had taken his gun and fired that P.W.2's mother fell down and P.W.2 then took to her heels.

[15] The witness then said accused started chasing after her. He managed to catch up with her near Bereng High School. The accused then said to her, I have killed your mother and am now

finishing with you. The witness somehow managed to take the gun from the accused and threw it into the factory's yard.

[16] P.W.2 said the people who were around rescued her by taking her into the factory's premises. She must have lost consciousness as she then said, when she woke up she found herself in hospital. She then said she only came to know that her mother was dead when she arrived home and that she had died the same day.

[17] It was P.W.2's evidence that when she went for work that day she was from her maiden home as the accused was in the habit of chasing her around with a gun, though she had never reported him to the police. She said she left the accused as he had bitten her ear whilst sitting on top of her and pointing a gun at her.

[18] The witness and the accused had a child together before they formally married but the child stays with accused's parents. She said once they had quarrelled the accused would always follow her to her maiden home. P.W.2 never denied that accused as he came home from work had some two days before the incident found her at home with another man and the witness ran away.

[19] The accused had followed P.W.2 to her home. This was when P.W.2's father wanted to fight the accused but accused managed to calm him down somehow. The matter was resolved and the two were asked to go back to where they stayed and make peace.

- [20] P.W.2 did not deny that she had left the accused without notifying him as he had gone to Maseru. She however denies that she also took away with her everything that was in their house. She said she only took her clothes. She said the accused had taken their child to his parents in Maseru as accused wanted P.W.2 to go and work in Maseru.
- [21] It was put to P.W.2 that because the accused was unable to reach her on her phone he decided to go to her at her work place over lunch hour, and P.W.2 agreed with what was said, though she said he had only gone there to kill them.
- [22] Unlike P.W.1, this witness said accused insulted her by her mother's private parts when he was some three paces away from them. Her mother the deceased, had also asked accused that she hoped he was not coming to them but accused showed he was coming to P.W.2. The deceased had further said she did not know why the accused was after P.W.2 yet both were working.
- [23] Though P.W.2 said she never heard any voice from people who were around inviting others to catch the accused and assault him, she however said people around wanted to get hold of the accused but they feared the gun. That the people around dispersed as the accused pulled out his gun.
- [24] P.W.2 however denied that when the accused fired a shot he was only scaring the people away, but that by mistake the shot landed

on the deceased. P.W.2 said she saw the accused shoot straight at the deceased who was in front. P.W.2 showed she only noticed that the accused had a gun on the day he pointed it at her at home. She said the accused approached them in a fighting mood.

[25] The third witness Thabo Ntsie's evidence was that he used to work with the accused at that time for Tsoeunyane Security Services. He was the man in charge at Half Price Shop Mafeteng. The only thing that was given to them by their employer for work was their uniform but not firearms. They were even not allowed to bring their own weapons at work. He was certain that their company had no firearms.

[26] The woman 'Mamorena Makoko who had been coming to the said factory on daily basis with the hope that she would one day be called for work was also around the scene on the day in question. It was at around 12.00 when she saw the deceased and some two girls seated outside the factory enjoying their lunch.

[27] 'Mamorena said she saw a man coming from across the road and was in a hurry. She said the man was coming towards them as he had crossed the road. In describing that man she said he was dark and short.

[28] As the man approached them he saw him take out a gun from his waist. The man said something which the witness did not hear well. She noticed the man going straight to where the woman was

seated with the two girls. The woman stood up as the man came closer. She approached the man and that man shot her and she fell down.

[29] The witness then saw the man chasing one of the girls pointing his firearm at her. When the man came back he was waving his gun. The witness and other people who were there ran away and the witness fell in the process.

[30] When 'Mamorena stood up, she noticed a police vehicle coming. She then went back to where the woman had fallen. When the man with a gun saw the police he pointed the gun to himself and fired a shot. The police ran to where he had fallen and took him to hospital. They came back and also took the woman who had been shot away. The witness though she was seeing the person who shot the woman for the first time that day she was able to identify him in Court as the accused person.

[31] 'Mamorena was never called by the police to go and identify the accused, but was able to identify him in Court.

[32] The witness confirmed that there were other people besides them at the scene on that day. She estimated the number to more than twenty. She denied when it was suggested to her that the woman who was shot had invited the people who were there to get hold of the accused and teach him a lesson. She also denied that people had as a result rushed towards him in an effort of arresting him.



- [33] This witness also showed that it was not by accident that the bullet landed at the woman who was shot, but it was by design as the man shot straight at the woman.
- [34] There were six pieces of evidence which were handed in by consent. The first document was the post-mortem report. The cause of death has been given as due to the head injury following a gun shot wound to the head. That the deceased sustained a single gun shot to the head just above the right eye brow. The bullet did not exit.
- [35] The second statement was the identifying statement of Mareka Mokhele who identified the deceased before the doctor performed the post mortem examination. The deceased was the wife to his younger brother.
- [36] The third admitted evidence was the statement of No.11724 D/Tpr 'Mabathoana. The statement was made a day following that of the incidents. He was on his normal duty at Matholeng around 12.00 noon that day near P&T Textiles. He heard some workers at that factory shouting "No, he has shot him," or words to that effect.
- [37] The witness was in the company of some other police officers. They stopped their vehicle on hearing that remark and asked the factory workers what the matter was. He was directed to a place where they found a woman lying down dead.

- [38] As the police were about to examine the dead body, the workers shouted once again saying, “there comes the person who has shot the woman”. The witness saw a man waving his gun and coming to the direction where the deceased had fallen. When the man was some paces away from them, he shot himself on the right side above the eye and he fell down.
- [39] The witness rushed him to hospital taking the 9mm tan folio S/NoAB20077. The man was still alive when he was rushed to hospital where he was admitted. They were with D/Tpr Mokhachane as they conveyed the man to hospital. On their return he found a 9mm shell at the scene where the deceased had fallen. The 9mm and 14 rounds were handed in as part of the evidence and were marked as such.
- [40] D/Tpr Mokone’s statement also confirmed what has been said above by D/Tpr ‘Mabathoana, as they were together on duty that day. He had also heard when it was remarked, “He has shot him”. He also heard when voices said, “there comes the person who has shot her.” He then looked at that direction and saw a man coming waving his gun.
- [41] The witness must have looked away from the person said to have shot, as he then said, he heard a gun report and then heard a voice saying, “he has shot himself. When looking at the direction the gun report came from he saw a man lying on the ground. They

rushed to him and found a 9mm Tan folio near him. He did not go with those who took him to hospital but remained behind. He remained examining the scene and found a 9mm shell near where the man had fallen.

[42] The witness then went to where the woman had fallen and examined the body. He observed an open wound above the right eye on the forehead. The body was taken to the mortuary and no further injuries were sustained on the way to the mortuary.

[43] D/Tpr Mokhachane was the one who met the accused at Mafeteng hospital on the 7<sup>th</sup> March, 2007. It was on the day of accused's release from hospital. He introduced himself to him and gave him the necessary caution. He said the accused gave him his explanation after which he was given a charge of murder, arrested and taken to custody.

[44] The last admitted piece of evidence was the report by the firearm examiner. The report showed that S/Insp/M. P. Pali has been trained as a firearm examiner. That on the 27<sup>th</sup> February, 2007 D/Tpr Motlohi handed over to him.

1. 1×9mm×19mm Tanfoglio Pistol. S/N AB 20077
2. 2×9mm fired cartridge cases.

[45] On examining the pistol that was handed over to him he found it in good working condition. He fired cartridge therein for test and comparison purposes. It was on microscopic examination that he

found out that the fired cartridge cases had been fired from the same pistol that he tested.

[46] The accused in his evidence had told the Court that they used to quarrel with his wife 'Mapaseka, P.W.2. 'Mapaseka would leave him and go to her maiden home. He said they usually quarrelled over 'Mapaseka's drinking habits. He said 'Mapaseka would always be in the company of boys unknown to him.

[47] 'Mapaseka would run to her maiden home and the accused would follow her. Parents would talk to them and they would leave that place having made peace.

[48] Accused then said one day as he was from work during the day time he found his wife, 'Mapaseka with a man at their place of residence. The man ran away and his wife boarded a 4+1 and left for her home. It was on a Friday.

[49] Accused tried to contact his wife by phone but could not get her. As he said he was afraid of going to her wife's place, he decided to go to her at her work place.

[50] Accused said he was afraid of going to her wife's place as her father had one day attacked him with a stick though he said had later made peace with him. He said as his wife left their child had visited his parents in Maseru.

[51] The next day on a Saturday when accused arrived home from work he found their house empty. He said his wife had taken away all

the household property including the clothes for the accused. There was nothing left in the house.

[52] Accused said he became frustrated. On Monday as he was on duty as usual, accused said his boss Thabo Ntsie instructed him to go and fetch a gun from Makaung. He got the gun from one security by the name of Likhoele with whom they were working together. Ntsie was their employer. The gun was a 9mm.

[53] After collecting the gun the accused decided to go via his wife at her work place since it was during lunch break. He said he found his wife with her mother, P.W.1 and that boy whom he had found at their place with his wife. There was also an unknown woman with them. All those people were eating.

[54] Since it was at lunch time there were many people around, both men and women. Accused said the other people were about 8 paces away from where his wife and group were.

[55] Accused said as he came closer to his wife and those with her, the deceased said to him, "I hope you are not coming to us. 'Mapaseka is working for herself and you too are working'". Accused was then six paces away when the words were uttered.

[56] Accused said the deceased rose up from where she was seated and faced him. The rest of them also stood up, Accused then responded and said he was not coming to them but to 'Mapaseka, his wife.

- [57] He said the deceased then shouted at him so that people who were around started looking at them. He then heard a voice from the crowd saying they should get old of him, and beat him up. He saw the crowd coming towards him. That was when he took out his gun to scare the people away as the deceased was also coming towards him to hold him.
- [58] Accused said his intention was only to scare people away. He said he was confused, and in that state he thought of the nearest item in his possession which happened to be the gun.
- [59] He said the only thing that came to his mind was that those people were going to kill him. Accused then said he fired in the air but unfortunately killed the deceased. He said he had nothing against the deceased that day.
- [60] He denied that he shot the deceased as she tried to stand up. He said he never insulted anybody. He showed that it was a mistake that he never cross examined his wife, P.W.2 on the issue of her drinking habits and going about with boys. He denied that his intentions were to go there and kill his wife and her mother.
- [61] Accused denied that he shot himself as he saw the police van approaching. According to him it was the gun which was in his possession that shot him. In explaining how the gun shot at the deceased he said he pulled the trigger before raising or pointing his gun in the air.

- [62] As can be seen from above, the accused himself has shown that it was his gun which was at the time in his hands that shot the deceased. He said he pulled the trigger before pointing his gun in the air, whatever that means, but he is the one who caused the death of the deceased.
- [63] Now therefore, looking at the essential elements of the crime of murder, can it then said the accused acted unlawfully and with intent to kill the deceased.
- [64] The crown witnesses may have given different versions of how the accused had approached the deceased and his wife P.W.2 where they were seated enjoying their lunch. P.W.1 had said there were no exchange of words between accused and deceased before the shooting but P.W.2 and 4 said there were exchange of words between both the accused and the deceased.
- [65] What was common in the three crown witnesses' evidence was that the accused shot straight at the deceased and that when P.W.2 ran away accused had chased her away still holding his gun. Even accused himself said he pulled the trigger before pointing the gun in the air.
- [66] P.W.3, the person who used to work with the accused at the time as the man in charge, showed that they were not issued with any firearms at the work place. Accused wanted the Court to buy his story that he came to be in possession of the firearm as he had been

sent to collect the firearm from somewhere, which turned out to be not true.

[67] It was only when giving his evidence that the accused mentioned that he had been sent by his boss to go and collect a gun for him. But his boss, P.W.3 in this case, showed that they had no guns at their work place. This was to say that the accused was not telling the truth when he said he had been sent to go and collect a gun from Makaung. Even as P.W.3 Thabo Ntsie gave evidence, he was not cross examined on having sent the deceased to collect the firearm for him.

[68] This therefore showed that the accused collected the firearm from wherever with a clear intention of coming to attack his wife. He has shown in evidence that he was not happy with his wife because he had found her at home with another man. He was again not happy with the fact that his wife had taken all their property to her maiden home.

[69] It was only unfortunate that the deceased was there and she tried to come between them that she was the one who was shot and killed in the process.

[70] Accused did not fire in the air but as he said, fired a shot even before pointing his gun in the air. Later chased his wife still holding his gun.



[71] Accused's acts clearly point at the person who had an intention to kill. He must have been aware that using a lethal weapon like a gun would result in death.

[72] The accused wanted the Court to believe that he fired the shot in desperation as the crowd was rushing at him, but that was denied by the Crown witnesses. But even if that had been the case firing in the air would have scared the crowd away, not shooting directly at the deceased.

[73] In **S v Munyai**<sup>2</sup> the Court had this to say that;

*“Even if the state case stood as a completely acceptable and unshaken edifice a Court must investigate the defence case with a view of discerning whether it is demonstrably false or inherently so improbable as to be rejected as false”.*

The accused's story cannot be believed that he was in possession of the firearm merely because he had been sent to collect it by his boss. He got himself fully armed because he had intended to kill.

[73] The accused's acts were unlawful as the killing was not justified. It is wrong to take someone's life without any justifiable cause. He was not acting in self defence, nor was he acting out of necessity.

[74] May the accused please stand up.

The Court having considered the evidence presented before it finds that the accused committed an unlawful act of killing the deceased. The weapon and the manner of using a lethal weapon showed that

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<sup>2</sup> 1986(4) S.A 712 at 715

the accused intended to kill the deceased and his wife P.W.2 though his mission against P.W.2 never materialized. The accused is thus found guilty of murder of 'Mahlalefang Mokhele as charged.

[75] Accused has also failed to produce a licence for the firearm that he used in killing the deceased. He is thus found guilty of unlawful possession of firearm in **Contravention of section 3 (2) (a) of the Arms and Ammunition Act<sup>3</sup>**.

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<sup>3</sup>Arms and Ammunition Act No.17 of 1966 as amended by Act No.4 of 1999

## SENTENCE

[76] The Court was addressed in extenuation of sentence. These, as rightly pointed out by the crown are surrounding circumstances that would make the crime appear less serious, less aggravated and warranting a more lenient sentence.

[77] The crown conceded that for the accused to have done what he did must have been due to some powerful influence operating on his subjective state of mind at the time. That from the evidence given before this Court the only possible source of that influence was anger and/or frustration arising from finding his wife with another man, coupled with the fact that his wife had left him for her maiden home.

[78] Counsel for the accused also directed the Court to what should be taken as extenuating circumstances. He relied on the case of **S v Letsolo**<sup>4</sup> where it was said;-

*“extenuating circumstances have more than once been defined by this Court as any facts, bearing on the commission of the crime, which reduce the moral blame – worthiness of the accused, as distinct from his legal culpability.”*

[79] Counsel wanted the Court to consider that there has been no premeditation as the accused had said in evidence that he had gone

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<sup>4</sup> R v Letsolo 1970 (3) S.A 476

there to talk to his wife. Accused said he had nothing against the deceased.

[80] The Court on appeal in **Monatsi and Others v R**<sup>5</sup> said;

*“It has been held that the absence of premeditation and the absence of a direct intention to kill, depending on the circumstances of each case, constitute an extenuating circumstance.”*

[81] The evidence has shown that the accused shot the deceased once and that was confirmed by the fact that on examining the body of the deceased, only one gun shot wound was discovered. The defence therefore submits that that has to be considered as an extenuating circumstance.

[82] Again to be considered has been the fact that the accused at the time was frustrated and stressed by having found his wife with another man and thereafter leaving him for her maiden home. That also to be considered as an extenuation.

[83] In **Letuka v R**<sup>6</sup> the Court on appeal showed that,

*“Each factor must be weighed and assessed in the light of the evidence as a whole and its relevance to the conduct and the state of mind of the accused as well as cumulatively with the commission of the offence.”*

The defence therefore submitted that the accused’s mental state at the time of the shooting must be considered as an extenuating circumstance.

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<sup>5</sup> Monatsi v R C of A (CRI) No.4 of 2005 Page 5

<sup>6</sup> Letuka v R

[84] There had been according to the defence heavy confrontation between the accused and the deceased as they exchanged words before the shooting. He submits that the emotional conflict between the accused and the deceased be considered as an extenuating circumstance.

[85] The Court thus weighed the submissions on both sides on extenuation and concluded that extenuating circumstances as ably pointed out by both sides existed.

The accused is thus found guilty of murder with extenuation.

My assessor agrees with my findings.

### **MITIGATION**

[86] In mitigating of sentence the accused has been said to be a first offender. The offence has been hanging over accused since 2007 after the offence was committed. He has been attending Court religiously without fail as an indication of remorse and the accused has not contributed to the delay in disposing of this case.

[87] The accused has been separated from his wife even before the commission of the offence to date. The events of the shooting lengthened their separation.

[88] The accused took the witness stand and explained to the Court of how the shooting took place and why. Also the fact that the accused even shot himself demonstrated how frustrated and

stressed he was. Counsel said that accused's act must be taken as a sign showing that he was regretting his actions. That must have been punishment enough to himself (the accused).

[89] The Court having considered all the mitigating factors, but not losing sight of the seriousness of the offence and that accused ought not to have approached his wife armed with a gun, still maintains that what the accused did was wrong and unlawful. You do not threaten a person with a gun. He had no reason to have been in possession of that gun as he went to see his wife. The weapon that one decides to arm himself with demonstrates the person's intentions.

[90] Though the accused said he had nothing against the deceased, he could not have been happy with the fact that the deceased had allowed P.W.2 to be staying with them away from her husband. Evidence has shown that the deceased said to the accused there was no reason for him to be after P.W.2 as both of them were working.

[91] Had the accused not been angry with the deceased too, he could have cried out to her for help to talk to her daughter, P.W.2, to make peace with him. Instead, the accused fired a shot aware that it was the deceased who was in front and not his wife. Accused thereafter chased after P.W.2, his wife, with his gun, and P.W.2 luckily managed to take the gun and threw it away.

[92] The accused is still bitter though he has killed his mother-in-law. P.W.2 we are told, has not been having access to her child since that time, as the child has been staying with accused at accused's home. All those mitigating and aggravating circumstances have been considered in passing sentence.

May the accused please stand.

The appropriate sentence in the circumstances of this case is the term of 10 years imprisonment, which it is hoped it is going to deter the accused from similar acts in future.

Order: The weapon that was used to be confiscated.

**A. M. HLAJOANE**  
**JUDGE**

**9<sup>TH</sup> NOVEMBER, 2012.**

For Crown: Ms Motinyane

For Defendant: Mr Mokoko

Assessor: Mr Penane