

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CRI/T/70/2008

In the matter between;

REX

CROWN

V

MPOMELELO MBOBO

ACCUSED

JUDGMENT

Coram : **Chaka-Makhooane J**
Date of hearing : **20th October, 2009**
Date of Judgment : **8th May, 2012**

SUMMARY

Criminal law – Murder – Accused charged with four (4) counts of murder and two (2) counts of attempted murder – Accused’s defence of alibi disproved – Crown successfully discharging its onus beyond reasonable doubt in all counts – Accused found guilty as charged.

ANNOTATIONS

CITED CASES

1. Teboho Mohajane and Another v Rex 1982 – 1984 LLR 434
2. S v Governder and Others 2006 (1) SACR 322 (E)
3. S v Bruiners En' N Ander 1998 (2) SACR 432 (SE)
4. S. v Mafaladiso En Andere 2003 (1) SACR 583 (SCA)
5. Phomane & Another v R 1985 – 1990 LLR
6. R v Dladla and Others 1963 (1) SA 307
8. S v Mehlape 1963 SA (2) 29
9. Thabiso Kopano and One v Rex C of A (CRI) NO.1/2011
10. R v Lepoqo Seoehla Molapo LLR 1997 – 98 208 at 237
11. Molapo vs R LAC (1990 – 1994) 140
12. Mabope & Others vs R LAC (1990 – 1994) 150
13. S vs Zitha 1993 (1) SACA 718 (A)
14. Sello vs R LAC (1980-84) 21 at 24
15. R v Mlabobo 1957 (4) SA 727 D-F
16. Frank Lebeta & Another vs Rex 1993 – 94 LLR –LB
17. S v Jaffer 1988 (2)
18. S v Munyani 1986 (4) SA 712
19. Tseliso Lempe v R 1997-98 LLR 195
20. Rex v De Villiers 1944 AD 493
21. Rex v Moroka Mapefane CRI/T/80/81
22. Rex v Mohlerepe 1979 (1) LLR 148
23. Lehoqo v R 1981 (1) LLR 163
24. Broadhurst v R 1964 1 ALL E.R 111 at 119 – 120B
25. S v Guess 1976 (4) SA 715
26. Moshephi & Others v R LLR (1980 – 1984) 57

STATUTES

Criminal Procedure and Evidence Act of 1981

BOOKS

1. The Law of Evidence in South Africa 3rd Ed. By Scoble.
2. South African Law of Evidence 3rd Ed By

- [1] The accused appeared before me charged with four (4) counts of murder and two (2) counts of attempted murder. It has been alleged in counts 1, 2, 3 and 4 that at or near Morifi in Mohale's Hoek, the said accused did unlawfully and intentionally kill Charles Mofo, 'Malimakatso Mofo, Refiloe Molise and Seetsa Majara respectively.
- [2] In counts five (5) and six (6) it is alleged that, the accused is guilty, in that upon or about the 13th day of October, 2002 and at or near Morifi, in Mohale's Hoek the said accused unlawfully assaulted Khotso Lerotholi and Tseliso Bolibe respectively, by shooting at them with the intention of killing them.
- [3] The accused pleaded not guilty to all the six (6) counts. To prove its case, the crown led the evidence of nine (9) witnesses. Exhibits marked by the court "A" to "L", were handed in, some of which were admitted by the defence, as part of the evidence. These exhibits included the identification parade photographs (Exh "C") the police photograph album (Exh "A"), the identification parade form (Exh "G") and four (4) post mortem reports, Exhibits "I", "J", "K" and "L" respectively. Exhibits "B", "E", "F" and "H" were statements originally made at the police by PW1, PW2 and PW7 respectively.
- [4] The first witness to take the stand was one Tseliso Bolibe as PW1. He testified that on the 13th October, 2002 he had boarded a taxi, a blue Venture, as one of four (4) other passengers. The other three (3) passengers were one Seetsa, one Refiloe and one Khotso. After boarding the taxi, PW1 testified that the taxi moved to another stop some 300-400 metres away where two

(2) other passengers joined them. These were one 'Malimakatso Mofo with her husband one Charlie Mofo. The witness further told the court that the taxi had moved some seven (7) metres from the taxi stop when it stopped for someone who was coming from the direction of the river. PW1 who was sitting with the driver in the front passenger seat, had observed the person coming from the river over a distance of about 200 – 300 metres. He actually saw that person reach the taxi. It was at this stage of his testimony that PW1 identified that person as the accused before the court.

[5] It was PW1's evidence that after he reached the taxi, that person remarked that the taxi nearly left him and soon there after, PW1 heard gun report. He turned around and observed that two (2) passengers had been shot and these were 'Malimakatso and Charlie Mofo. He heard more gun report after the initial one and he took cover under the front seat. While he was hiding, he realized that the driver had also been shot and had slumped over the steering wheel. It is PW1's testimony that for a while he could not hear anything because he realized that his ears had been affected by the earlier gun reports. He took sometime hiding until he decided to surrender and as he emerged, he saw the accused retracing his steps towards the river. According to PW1 it took the accused some four (4) minutes to reach the waiting taxi from the direction of the river. In all that time he (PW1) was able to observe the accused as much as he could.

[6] PW1 testified further that on the 24th December, 2003, he attended an identification parade in Sterkspruit, in the Republic of South Africa (RSA), where he was able to identify the accused among other people. In cross-examination it was suggested to PW1 that he had been coached in order to

identify the accused on the identification parade. He vehemently denied being coached and showed that he was only informed that if the accused was on the parade, then he should identify him by touching him on the shoulder. PW1 could not be shaken on the identity of the accused and that he was the one he saw on the day of the shooting and dispelled any suggestion of an *alibi*.

[7] PW2 was Khotso Lerotholi who testified that on the 13th October, 2002 he had gone to Mohale's Hoek town in a Venture taxi. On his way back from town to Morifi, the taxi was taking other passengers along the way, such as one Seetsa and others including a couple. Soon after the couple had boarded, someone stopped the vehicle, indicating that there was yet another passenger coming from the direction of the river. PW2 showed that this person wanted the taxi to stop as if he was going to board. He came towards the taxi limping and as he was about to reach the taxi, PW2 showed further that he alighted from the taxi, and that is when this person pulled out a firearm, a hand gun, and came smiling towards him. PW2 who was standing in the door way which was open, was shot by that person on the chest. After being shot, PW2 testified further that in disbelief he ran away towards the direction that, that person had come from. It was at this juncture that the witness identified the shooter as the accused before the court.

[8] PW2 did hear some more gun report, however, he showed that his hearing had been some what affected by the initial gun report. As he was running, PW2 met one Mpolokeng along the way to whom he related his ordeal. Mpolokeng immediately exclaimed that, "*oh its Mbobo*". Eventually he

returned to the scene of the shooting and there he discovered that other people such as Seetsa and the couple they had picked up on the way, had been shot dead. The witness was eventually admitted to hospital. Exh “D” which is the medical form filled in by Dr L. B. Maama who had examined him, showed that PW2 was admitted from the 13th October, 2002 to the 17th October, 2002. The cause of injury was shown to be gun shot and the report on the injuries was shown as, “superficial wounds on the right and left chest.”

[9] In the same way as PW1, PW2 attended an identification parade on the 24th December, 2003 in Sterkspruit. He was able to identify the accused because, he lamented, that the accused’s picture stayed with him since the day he was shot. In cross-examination he also denied being coached in any way before or at the parade. He was able to describe the light/sky blue short sleeved shirt that the accused had worn and denied that he had been mistaken about the accused’s identity.

[10] PW3, Inspector Chonelanga was one of the investigating officers in this case. He attended the scene of crime shortly after the shooting. He was able to describe the scene and he took the photographs of the area. He showed that the area is open and that from where the taxi was parked, one could clearly see down the hill towards the river. Having examined the scene and confirming that the people he found shot in the Venture taxi were dead, he transported them to the mortuary. The witness also testified that he was there to receive the accused at the Tele Bridge into Lesotho following a formal extradition application. The accused was then duly advised of the charges he was facing.

- [11] Inspector Marakabi was PW4. It was her testimony that she was the parade commander at the identification parade held at the Sterkspruit on the 24th December, 2003. She confirmed that she was not involved in any way in the investigation of the matter and added that she, together with the necessary witnesses and other police officers, travelled from Lesotho to South Africa on the 24th December, 2003. She was unaware of the purpose of their journey until she was informed at Sterkspruit Police Station.
- [12] PW4 confirmed the Exh “G” is the Identification Parade Form. An error occurred in the completion of this Form, resulting in someone else’s name being inserted in the incorrect place. She otherwise confirmed that the contents of Exh “G” were correct and further, that the photographs in Exh “A” were taken in her presence and at her instance. Significantly, she confirmed that the photographs as set out in Exhibit “A” accurately depict the events of the day and were not altered or changed in any way. PW4 confirmed especially that she had not known the accused before the parade, nor did she know the witnesses and that the accused was advised that he had the right to legal representation, but that he elected to attend the parade unrepresented. She added that the witnesses were brought to the parade one by one and that before the parade, they were kept in a separate office under the supervision of one Sgt. Phamotse. She testified that she never told the witnesses that the accused was on the parade, but only that if that person was present, they should point him out. She confirmed that at all stages the accused was satisfied with the parade and that he had elected to be addressed in Sesotho.

[13] Under cross-examination, she denied that the accused was the lightest in complexion of all the people on the parade and stated that in fact there was a person standing right next to the accused who resembled him a lot. Moreover, PW4 added that the accused did not want to change his position at any stage and the suggestion that she did not offer this to him was rejected emphatically. She was adamant that the accused was satisfied at all times with the parade and to the accused's suggestion that he was not so satisfied, she replied firmly that he was not telling the truth. The suggestion that the accused ought to have signed the report was rejected by PW4 showing that there was no place, in any event, for the accused's signature on the identification form.

[14] PW5 Inspector Phamotse testified that he was also part of the group that attended the identification parade on the 24th December, 2003 and that he too was unaware of the nature of his duties until he arrived at the Sterkpruit Police Station. His allocated duty was to guard the witnesses before the identification parade. He confirmed that he was not part of the investigation in this matter and further that he did not know the accused before that day, or even the witnesses.

[15] PW5 confirmed that he guarded three (3) witnesses in a room before they attended the parade. He did not speak to these witnesses, nor did he know anything of this particular case. After each witness left, that witness would not return to that same room. During cross-examination, he stated that one Inspector Seboka was the one who collected the witnesses from the room. Clearly, he erred in this regard and this error, in any event, was corrected and clarified by Inspector Motsamai, who testified later as "PW8". He

confirmed that he did not communicate with the police officer who was collecting the witnesses in any way, nor with the witnesses, but indicated that the police officer would make a hand sign indicating that the witnesses should follow him. He denied the suggestion that he saw the people on the identification parade. He identified his signature on Exh "G".

[16] PW6 Puseletso Hlothoane knew the accused very well and had known him for about two (2) to three (3) year, in 2002. She knew him because he had a farm very close to her village. They were separated by the river. It was her testimony that on the 9th October, 2002 she met the accused on the way to Zastron. He came over to where she was waiting for a vehicle with other people and complained to her about Basotho from Lesotho. Among other things he complained that he extended favours to Basotho such as allowing them to gather fire wood from his farm, instead they return the favour by destroying his property. He explained that he was missing five (5) goats, sofas from his house, as well as bags of dagga.

[17] According to PW6, the accused who appeared to be sad, further said that it saddened him that black people were stealing from him when he could never steal from his fellow men. He showed that he would rather steal from a white person. The accused concluded by saying that he would go to Lesotho to do what ever and Basotho would then say, "*Mbobo, Mbobo, Mbobo*". It was PW6's evidence that in the context of what the accused had said, she interpreted the accused's last statement as a threat against the Basotho.

[18] She testified further that on the 13th October, 2002 on her way back from picking vegetables along the river bank, she saw a person following her and the person she was with. She later heard gun reports and then met a boy by the name of “Khotso” who told her that he had been shot. She also testified that she met a lady who informed her that her parents had died in the shooting. This was a clear reference to PW7. She said that this person whom she saw walking up from the river shortly before the shooting, was wearing a cream-white cap on his head, with a sky blue shirt, and was a male person.

[19] Under cross-examination she testified that after the shooting on 13th October 2002, the people of Morifi no longer went to the accused’s farm. It was suggested to the witness that someone by the name of Shwabati Mbobo resembled the accused closely and could thus be the gunman. This suggestion put to PW6 was vehemently denied and equally she denied that the shooting occurred directly opposite Shwabati Mbobo’s farm as opposed to the accused’s farm. She emphasized that it took place directly opposite the accused’s farm. After the shooting, she added, that the same person she had seen earlier, she saw walking down towards the river, crossing the river and entering a motor vehicle on the farm. This vehicle as it turned out, also happened to be a Venture motor vehicle.

[20] PW7 ‘Maretsepile Motlatsi is the daughter of the deceased Charles and ‘Malimakatso Mofu, who died in the shooting in the Venture taxi on the 13th October, 2002. It was her testimony that on that Sunday, the 13th October, 2002, somewhere between 10h00 and 11h00, she saw her parents off at the taxi stop where they boarded a Venture taxi, at Morifi. Shortly after her

parents had arrived at the scene, she noticed a man approaching from the direction of the river, who called to her and asked her whether that was public transport. She replied in the affirmative and she then saw him approach the taxi, with a rod in one hand which he then threw to the ground. She then turned around and began heading back towards her own home.

[21] As she proceeded away, she heard a sound which drew her attention and she thought it was a bee. She then heard a “boom” noise and looked back to see smoke coming out of the taxi. She ran back to the vehicle calling out to her mother to get out, thinking that the motor vehicle was on fire. As she approached the vehicle, and at a close distance of some 2 to 3 paces, she saw the accused moving around to the front of the vehicle and firing shots at the front of the vehicle. She recalled that the accused was wearing a sky blue shirt with a light coloured cap. She confirmed that he was carrying a hand gun and that it was indeed the accused who did the shooting. She looked specifically at him and that she recalled that person on the day. She stated that she ran away after the shooting but returned later and saw that her parents were dead in the vehicle.

[22] During cross-examination, she conceded that it was the first time she had seen the accused but stated that on that day, she saw him on at least two (2) occasions, the first time being when he spoke to her and the second time when she ran back to the vehicle. She also conceded that she was confused by the shooting but denied vehemently that it affected her identification of the colours of the clothing worn by the accused. As regards her statement wherein it was recorded that she had said the accused was wearing a green T-shirt, she denied this by stating that it was blue. She was also adamant

that she never mentioned the word “green”. She was equally adamant that the accused was lying by saying that he was not present at the scene since she clearly saw him there. She added that she did indeed mentioned the accused’s physical appearance in her statement and is not responsible for the absence thereof in the said statement.

[23] PW8 Inspector Motsamai confirmed that he attended an identification parade at Sterkpruit on 24th December, 2002. His role was to take witnesses from the room where they were being guarded to the parade room. He also confirmed that there were three (3) witnesses, and that he did not try to influence any of them in any way. He added that he never even entered the parade room. He too testified that he did not know the accused before that day but conceded that he had taken statements from two witnesses some fourteen (14) months prior to that. Other than that, he had no contact with any of the witnesses and in fact, he never saw them from October, 2002 until December, 2003 and had had nothing to do with them in the interim. He was not in any other way involved in the investigation of this matter. He confirmed that he signed Exh “G” and that he never in any way tried to influence the witnesses either on the journey, or on the way to the parade room. Cross-examination did not disturb his evidence. He conceded that he had to communicate with the witnesses in order to take them to the parade room and that he even had oral communication with them, but that this was restricted only to what was necessary to get these witnesses to the parade room.

[24] PW9 was Senior Inspector Lelingoana whose testimony was that he was part of the group that had attended the identification parade at the Sterkspruit

Police Station on the 24th December, 2003. He showed that his function was to take photographs as directed by PW4 who was the parade commander.

- [25] He confirmed that Exh “A” are the photographs that he took and that they accurately reflected what he photographed on that day. He also testified that he did not know the accused and was not part of the investigations. In cross-examination the witness conceded that the accused in the parade was actually more light skinned than the other people in the line up.
- [26] The crown applied to the court that PW4 be recall so she could be placed in possession of Exh “G”, to clarify how there could be two (2) identification parade forms. Even though the defence was unsure whether it should object or not, the court allowed that PW4 be recalled to the stand.
- [27] PW4 Inspector Morakabi who was the parade commander testified that she had filled in an identification parade form while in Sterkspruit, however, by mistake she filled in the names of PW8 instead of hers. As soon as she realized this, she put that form aside and filled in another one. Unfortunately she did not destroy that spoiled form and as such it got mixed up with the rest of the documents which eventually formed part of the docket. She explained that presumably that is how the defence got the wrong copy. In cross-examination she further conceded that she made a mistake of filling in the names of her colleague, PW8, only because she was sitting with him at the time.

[28] The post mortem reports that had been filled by different medical officers were admitted by the defence. The first report was that of Charles Mofo whose apparent age was said to be forty six (46) years. According to the report, the deceased died as a result of a gun shot wound on the head. The second report was that of ‘Malimakatso Mofo whose apparent age was thirty eight (38) years. She also died due to gun shot on the head and on the body. The third post mortem report was that of Refiloe Molise. The deceased’s age was between twenty five (25) and twenty seven (27) years. In terms of the report, the deceased had died from severe external bleeding and complete section on the right carotid and jugular vein. The deceased had been shot on the neck. The last post mortem report was that of Seetsa Majara. His apparent age according to the report was forty nine (49) years. The deceased died from multiple gun shot wounds and intracranial bleeding. The four post mortem reports were handed in as exhibits and were marked Exhibits “I”, “J”, “K” and “L” respectively.

[29] At the close of the crown’s case the defence applied for the discharge of the accused in terms of **section 175 (3)** of the **Criminal Procedure and Evidence Act**¹ (“CP&E”). The court having found that the accused has a case to answer, the accused took the stand to testify in his defence.

[30] The accused testified that he owns a farm in Zastron in the Orange Free State. He also told the court that he owns several other properties such as two (2) supermarkets and two (2) stores/cafes. He described that his farm is surrounded by several other farms, six (6) on the right side and another three

¹ Noof 1981

(3) on the left side of his farm. Of the six (6) farms on the right, two (2) belong to his relatives, one Bethuel Mbobo and one Shwabati Mbobo. He also told the court that he himself resides in Sterkspruit, in the Eastern Cape.

[31] The accused testified that on the 12th October, 2002 he had slept at one of his stores with his wife. On the 13th October, 2002 at one of his supermarket he was informed by his herd boy that on the previous day of the 12th October, 2002, two (2) or three (3) people had crossed the Makhalleng river from Lesotho to his farm, where they gathered together his goats. They chased the herd boy with stones, then slaughtered three (3) of the goats and took only the carcasses with them. Following that report, the accused further testified that he quickly got assistance to telephone the police to report the matter. He called the station commander at the Zastron Police who in turn informed him of the shooting in Morifi, Mohale's Hoek.

[32] The accused told the court that the station commander Lt -Col Stapelberg was the one who had informed him about the shooting at Morifi in Mohale's Hoek. He explained that his farm was about five (5) km from Morifi. He showed that there was no road from Morifi to his farm, only a fence separated them. The proper route to take to get to his farm if you were not trespassing, would be to travel some thirty five (35) km via Mohale's Hoek through the border post.

[33] The accused denied any knowledge of the shooting at Morifi. His defence was that of *alibi*. As already mentioned, he told the court that he was already at one of his shops with his wife on the 12th October, 2002 and only heard about the shooting at Morifi on the 13th October, 2002 from Lt -Col

Stapelberg. Though under cross-examination he admitted that he had heard from Stapelberg that he was a suspect of the shooting incident in Lesotho. He was adamant that the Lesotho police never tried to arrest him all that time, until the 24th December, 2003 when he met them at the identification parade.

- [34] His evidence relating to the identification parade is in conflict with that given by the Crown witnesses. He told the court that at all times he wished to have his legal representative at the identification parade but both the SA police and Lesotho police refused to allow him that right. He was not afforded the opportunity to change position, nor were the other people in the parade permitted. He however, agreed that three (3) persons pointed him out on the parade. He denied meeting any of the witnesses on the 13th October, 2002. He claimed that the witnesses were confused about his identity. He suggested that since Bethuel Mbobo's farm is right next to his (they are separated by a fence) some Basotho say the two (2) farms are his.
- [35] Under cross-examination the accused changed his theory regarding the testimony of the crown witnesses. He suggested that the witnesses were saying that they identified him at the scene, was a conspiracy between all the witnesses. He was however, unable to explain what common factor bound all these witnesses together and equally, he was unable to explain why members of the Lesotho Police Service would have been party to this conspiracy. That several of the witnesses described his clothes on that day in almost the same way, that is, a blue shirt, off-white cap and light or khaki pants, the accused attributed to being part of the conspiracy.

[36] In support of his testimony and his *alibi* the accused called Lt-Col Stapelberg as a witness, DW2. DW2 in 2002 was then the station Commander at Sterkspruit. He testified that on the day in question, he was advised by the Lesotho police that the accused was a suspect in a shooting incident at Morifi, and that it was alleged he had fled back to RSA. He further testified that he called the accused on his mobile (cell) phone and enquired where he was. The accused said that he was in Sterkspruit. The witness then asked the accused to see him and at around 16h00 the accused arrived at DW2's office in Zastron. The accused denied any involvement in the shooting incident. The defence did not call any other witnesses.

[37] It is against this background that the issue to be determined by this court is whether the crown has discharged its onus of proof beyond a reasonable doubt.

[38] It is common cause that on the 13th October, 2002 at Morifi some one hailed a Venture taxi down, as if he was going to board and that the taxi stopped for him. It is also common cause that this person, an African male person, came from the direction of the Makhaleng river, which runs between Lesotho and RSA in the Orange Free State. There is no dispute that on reaching the taxi this person did not board, but started shooting at the people on board that taxi, where four (4) people died and two (2) others were injured (see Exh "C").

[39] It is the crown's evidence that the shooter is the accused, while the defence vehemently denies this and put the accused's defence as *alibi*. In his submissions **Mr Leppan** for crown made the contention that the evidence

against the accused is simply overwhelming given the fact that the accused was not only identified by several persons at the scene, but he was subsequently also pointed out at an identification parade. He further contended that the non-identifying evidence is possibly equally convincing and points unwaveringly at the accused.

[40] He further submitted that the evidence dealing with the clothing worn by the accused is compelling as it enjoys a high degree of consistency and provides no room for a similarly clad gunman to have been present at the same time around that area. Moreover, the evidence of two (2) witnesses PW2 and PW7 is particularly convincing as both these witnesses described in compelling detail how they would never forget the face of the accused. PW1 was also said to have had a good view of the accused.

[41] **Mr Leppan** further argued that the evidence enjoyed direct and credible support by the results of the identification parade. The accused's attempt to unseat the credibility of the identification parade evidence was poor and that the court should ignore it. He submitted that the identification parade substantially complied with the rules and regulations to the holding of identification parades. Counsel argued that the court must accept that the crown witnesses testified honestly, it must also accept the evidence of the identification parade and also the threat uttered by the accused some time prior to the shooting and once the court accepts all this, there will be little room for the accused's version which must be rejected, as it simply cannot be reasonably possibly true.

[42] **Mr. Lephuthing** on behalf of the accused, in turn stated that Exh “C”, the photographs, should not be admissible as evidence since they never formed part of the docket and the accused was confronted with them only during the re-examination of PW1, who himself did not prepare them. The court was referred to the case of **Phomane & Another v R**² wherein the court held that the magistrate ought to have ruled that the medical reports were inadmissible because evidence was given by a doctor other than the one who had prepared the reports.

[43] **Mr. Lephuthing** further showed that they as the defence, had a bone to pick with the identification parade as a whole. Firstly, he bemoaned the fact that the eye witnesses allegedly first saw the accused at the scene of crime; secondly the person sought to be indentified in this matter was previously unknown to the witnesses who attended the identification parade over a year after the incident and those witnesses did not have ample opportunity to identify the accused on the 13th October, 2002. Counsel argued that there could not have been enough time to observe *inter alia* the presence of physical or facial features or any peculiarities. The court was further referred to the case of **R v Dladla and Others**³, where Holmes JA quoted James J with approval when he said;

“One of the factors which in our view is of the greatest importance in a case of identification, is the witness’ previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased. Even in the case when a witness has some difficulty in the witness-box in giving an accurate

² 1985 – 1990 LLR

³ 1962 (1) SA 307

description of the facial characteristics and clothes of the person whom he has identified, the very fact that he knows him provides him with a picture of the person in the round which is a summary of all his observations of the person's physiognomy, physique and gait, and this fact will greatly heighten the probability of an accurate identification... In a case where the witness has known the person previously, questions of identification marks, of facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made."

[44] PW2 was said to have been coached to identify the accused at the identification parade. According to the defence this was so because he (PW2) had made two (2) reports at the police, the second one was said to be an amendment of his initial statement. In those statements which he made while the matter was still fresh, he did not say anything about the accuseds' features, however, eight (8) years later in his evidence before the court, he is able to do so.

[45] It was **Mr. Lephuthing's** submission that even the evidence of PW4 must be rejected. Infact according to him, the identification parade was fraught with so many irregularities that it should be rejected. The court was asked to be wary of an identification parade that was not conducted in the presence of the accuseds' legal representative.

[46] Apart from the defence of *alibi*, which **Mr. Lephuthing** argued that it must stand, the accused also raised the issue of a conspiracy. It was argued on behalf of the accused that the police conspired by ensuring that they manufactured evidence in order to implicate the accused, while the accused himself had said even the villagers of Morifi had conspired to falsely incriminate him.

[47] In conclusion, the defence submitted that it was inconceivable that the accused would be convicted on the basis of the identification parade results, which parade did not conform with the rules stated in the case of **Teboho Mohajane and Another v Rex**⁴. It was **Mr. Lephuthing's** contention that where the accused had lied, the court should not convict him merely because he is a liar or that his explanation is improbable, it should only do so if beyond reasonable doubt it is false.

[48] It is important at this stage to examine the essentials of an identification parade. Mohamed JA in **Teboho Mohajane**⁵ (supra) held that the following are the essentials of an identification parade:

- (a) *Prospective witnesses should be asked to give description of alleged offender at the earliest opportunity to avoid discussing recollections with other potential witnesses.*
- (b) *Identification parade should be held as soon as possible.*
- (c) *There must be a sufficient number of people in the parade, 8 or more*

⁴ 1982 – 1984 LLR 434

⁵ At 437

- (d) *Persons present at parade must be substantially similar in appearance and dress.*
- (e) *Accused should be given a fair opportunity to change positions.*
- (f) *Care should be taken to make sure witnesses do not see accused before the parade.*
- (g) *Identifying witness should not be given an impression that one of the people on parade is the culprit.*
- (h) *Where there are more than one identified culprits, care should be taken to keep them apart to avoid discussion or influencing each other's identification.*
- (i) *If possible more than one parade, including a "blank one" without the culprit.*
- (j) *Contemporaneous notes of behavior of identifying witnesses should be kept.*
- (k) *It is undesirable for the investigating officer to be involved in the parade.*
- (l) *If a colour photograph of the people in the identification parade is available, it should be given to the court.*

[49] Another case that is instructive is that of **S v Mehlape**⁶ where it was held thus:

"In a case involving the identification of a particular person in relation to a certain happening, a court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a

⁶ 1963 SA (2) 29

correct identification. The nature of the opportunity of observation which may be required to confer on an identification in any particular case the stamp of reliability, depends upon a great variety of factors or combinations of factors which may have to be investigated in order to satisfy a court in any particular case that an identification is reliable and trustworthy as distinct from being merely bona fide and honest. It is necessary, however, for the court to be properly satisfied in a criminal case on both these aspects. If, in regard to a question of identification, any reasonable possibility of error in identity has not been eliminated by the end of a criminal case, it could clearly not be said that the State has proved its case beyond reasonable doubt.”

[50] In the present case it would be prudent to examine how many of the identification parade rules PW4 conformed with;

- (a) The parade was held more than a year later, in fact it was fourteen (14) months to be exact. This cannot, even by a long shot be a reasonable time. No apparent reasons were advanced (not even in evidence) why it was not possible to hold the identification parade much earlier.
- (b) Colour photographs of the people in the identification parade were made available to the court, as Exh “A” and in all fairness to the accused, only one person out of the eight (8) (accused excluded), persons in that line up had what one could call similar features to those of the accused. The other persons were totally dissimilar in

appearance and dress.⁷ It is my firm belief that where almost all the persons on the identification parade are substantially different from the person to be identified, then the purpose for which the identification parade was held becomes of little significance.

[51] In terms of Exh “A” the person to be identified is light skinned and a bit hefty. Of the eight (8) persons, only one person is light complexioned while every one else is dark skinned. Only two (2) persons are slightly hefty, everyone else is small bodied. The accused also has a small beard on the upper lip and an even smaller one under the lower lip. The people in the parade were either clean shaven or had short beards. The accused’s head was also clean shaven. One person had a bald patch, another one was wearing a woolen hat, yet another had long unkept hair, while the rest had short hair. Clearly none of the persons in that parade were significantly similar to the accused.

[52] It is rather difficult to understand how the identifying witnesses would travel in the same vehicle with the police who were actually going to conduct the identification parade, and not discuss anything about it. It did not come out

⁷ Exhibit “A” at pictures 1 and 2

clearly in the evidence what steps were taken to ensure that the potential identifying witnesses do not have the opportunity of discussing it. PW4, the parade commander in her evidence insisted that the accused refused to change positions when he was offered such an opportunity. It is hard to believe that the accused would refuse something that is clearly to his advantage, however, even if that were so, I am baffled as to why PW4 did not insist on shifting around the other eight (8) persons. PW4's response under cross-examination was that she did not find any need seeing that the accused had refused the offer.

[53] This brings me to yet another aspect of that identification parade. It was suggested also in evidence by PW4, that the accused had also declined an opportunity to have his legal representative present. It would be hard to yet again understand why the accused would deny himself legal assistance, when clearly it was to his advantage. In any case, one wonders if he had agreed, whether the identification parade would have been postponed or delayed to secure the lawyer, since it was apparent that the accused was offered the opportunity only on the day of the parade or during the parade. We will never know the answer to that question. It was also PW8's

evidence that he had had prior contact with some of the potential identifying witnesses. He had taken statements of two (2) of the witnesses.

[54] In the result, I find that that it becomes necessary to conclude that the identification parade failed in some respects to comply with a number of the identification parade rules as canvassed in the case of **Teboho Mohajane**⁸ (supra). The parade was not fair to the accused and it did not really assist the court to attach the proper weight to it⁹.

[55] Mohamed JA in the same case of **Teboho Mohajane** held that;

*“because the identification parade is not helpful, court is obliged to rely heavily on corroborating evidence....”*¹⁰

I agree with the learned Judge of Appeal that *in casu* having concluded that the identification parade was fraught with deficiencies, the court must examine the other evidence for corroboration.

[56] It was PW1’s testimony that on the day in question he was able to observe the accused walk up from the direction of the river towards the taxi in which he was sitting, over a distance of 200 – 300 metres, over a time of about four (4) minutes. According to him it was around mid day (12h00) on a sunny day. He testified that he was able to observe the accused for most of the

⁸ LLR 1982 – 1984 434

⁹ Teboho Mohajane (supra)

¹⁰ LLR 1982-1984 434

distance he walked from the river until he reached the taxi. He admitted that he could not obviously fix his eyes on him all that time especially because he was seated in the front seat, next to the driver of the taxi. As the accused reached the taxi, the only person to approach it at that given time, PW1 heard gun report. As he looked back and saw only the accused and no one else at the time, there is no evidence to suggest that he had actually boarded the taxi and sat down. Infact PW1 testified that as he turned to look after the first gun report, ‘Malimakatso Mofo and Charles Mofo had been shot. PW1 was fair to say he did not see Khotso being shot.

[57] It is interesting to note that the defence did not object to the handing in of this witnesses deposition given at the police¹¹. It was admitted into evidence and marked Exh “B”. In this statement, which was given on the 8th December, 2002, a couple of months after the incident, PW1 described the accused in detail, as a “*light brown fat man wearing a (sic) off white cap on his head, light blue shirt, off white trouser (sic) with black and white training shoes.*” He further deposed that following that first shot, he (PW1) looked at the man and saw a firearm in his hand and saw him shoot at random inside the taxi. In the deposition and in his testimony before the court, he showed that he hid himself under the seat and only emerged after a while only to see the shooter retrace his steps back towards the river, the same way he came.

[58] There was no shaking this witness under cross-examination. He stood firm and insisted that he would never forget the person he saw, for the reason that

¹¹ S v Govender and Others 2006 (1) SACR 322 (E), S v Mafaladiso En Ander 2—3 (1) SACR 583 (SCA) and S v Bruiners En Ander 1998 (2) SACR 432 (SE)

his face was imprinted in his mind since that day. In my opinion PW1 saw the accused enough to identify him any other time after that day. There is no reason to doubt that he had ample time to observe him walk up the path from the river until he reached the taxi. Nothing obstructed his view on that sunny day, in the middle of the day. No other event interrupted his observation of the accused until he reached the taxi. There is also no reason to disbelieve that he saw how he was dressed, his complexion and weight since he actually saw him up to the time he arrived at the taxi. Logically he would be tempted to look back to see who had fired a shot the first time he heard the gun report. Right through this trial, no evidence was brought to suggest that there might have been another gun man or a sniper for that matter, who could possibly have shot the passengers in that Venture taxi.

[59] PW1's evidence was also that when he emerged from under the seat where he was hiding, he saw the person he had seen earlier walk back the way he came. He was not running away to suggest that someone else was shooting at the taxi, so that even his life was in danger. I am satisfied that the identification of the accused by PW1 is reliably corroborated.

[60] PW2's evidence is somewhat similar to that of PW1 up to the point where the taxi stopped for someone who had hailed it. He was coming from the direction of the river. That person was described as limping. As he neared the taxi, PW2 testified that he alighted and waited at the opened door. Upon his arrival the man while smiling suddenly pulled out a firearm and shot PW2 in the chest. PW2 said for a while he was in a daze but then he recovered and managed to run away, taking the direction of the river. PW2 showed the court two (2) healed scars on his chests. He also showed that

he did hear subsequent gun reports possibly because his ears had been affected by the initial gun report. To him it sounded more like someone was beating on corrugated iron sheets. When he finally returned to the scene he found that other people had also been shot and killed. He notably did not describe the shooter in his evidence –in – chief and only mentioned the colour of his shirt under cross-examination as either light blue or sky blue. His was a dock identification in court. He maintained that he had described the accused in his admitted statement (marked Exh “E”) although no such description appeared in the statement. The crown attributed the omission to common reasons as shown in the **Govender, Malafadiso and Bruiners** cases¹² (supra). The witness was also adamant that he could never forget the face of the accused because he had shot him. I will come back to PW2 later in the judgment.

[61] I find it prudent that I should also examine the evidence of PW7, who testified that she was the daughter of the deceased, Charles and ’Malimakatso Mofo, who were shot in that taxi on the 13th October, 2002. She testified like PW2 that, the time was between 10h00 and 11h00 when she saw her parents off at the taxi stop, where they boarded the Venture taxi. Shortly thereafter, she noticed a man approaching from the direction of the river who called out to her and asked whether the Venture was public transport. She replied in the affirmative and she then saw him approach the taxi with a rod in one hand which he threw to the ground. She turned around and proceeded away and that is when she heard a sound which at first she thought was a bee. She then heard a “boom” noise and this time she looked

¹² ¹² S v Govender and Others (supra), S v Mafaladiso En Ander (supra) and S v Bruiners En Ander (supra)

back only to see smoke coming out of the taxi she had just left. She ran back calling to her mother to get out because she thought the taxi was on fire.

[62] When she was about two (2) to three (3) paces away and as she approached one corner of the taxi, she saw the man she had seen earlier coming from the river, moving around to the front of the taxi. She looked at him and saw that he was holding a firearm. She testified that she stood at the door, about 2 – 3 paces from him. She could see his face clearly. She recalled that he was wearing a sky blue shirt and a cap on his head. She could not recall the other things. She testified that she ran away after that person had fired a shot to the front of the taxi. This is significant as there is gun shot damage to the front of the vehicle as revealed in the photographs in Exh “C”.

[63] PW7’s testimony is also significant in that she was not part of the people who had attended the identification parade. She had not seen the shooter since the 13th October, 2002. She was able to describe two (2) items of clothing in some what a similar manner as PW1. She only identified the shooter as the accused in the dock and showed that as soon as she saw him all the memories of the 13th October, 2002 came flooding back. There is no doubt that PW7 took a good look at the shooter. To identify him as the accused, she had two (2) occasions on that day to look at him, firstly when he asked her if the venture was public transport and secondly when this time he was now only two (2) or three (3) paces away from her, at the front of the taxi, while she was on the side at the door. In her statement at the police (marked Exh “H”) it was shown that she had said the shooter was wearing a green T-shirt and a cap on his head. In cross-examination she denied ever

saying a green T-shirt. That notwithstanding, she had still mentioned the cap on the head. This was consistent with the description given by PW1.

[64] It is my opinion that from the evidence, the two (2) witnesses PW2 and PW7 were able to observe the accused and saw him long enough to be able to identify him as the shooter on that day. PW2 was standing right in front of the shooter who, it is clear shot him at point blank range, since he was even on the same level of ground as the accused. He had jumped out of the taxi and opened the door for the accused to board, only he never did board the taxi. PW2 has no reason to forget the face of someone who shot him at such close range, on a sunny day, around 10h00 -11h00, with nothing obstructing his view. In the same breath, PW7 has no reason to forget or even mistake the person who shot her parents for some one else. Two (2) to three (3) paces is a very short distance such that there is no reason not to believe her testimony when she said she had a good look at the accused. I am therefore, persuaded by the evidence to accept that the identification of the accused by PW2 and PW7 is also reliably corroborated.

[65] The accused's defence was initially that of conspiracy and because even he could not justify it or support it, he quickly abandoned it. He could not carry it through since he was unable to show why people who were unknown to him would conspire against him. Neither could he show why the Lesotho police, who first heard of him during their investigations, would conspire against him. The passengers of that taxi were going about their business on that day and from the evidence before the court, no one seemed to recognize the accused as he approached the taxi, so that any one of the survivors could have shed some light on why they would conspire against

the accused. Unfortunately even **Mr. Lephuthing** did not seem to think he ought to have proved the theory of conspiracy, so that this was merely a speculative theory which was not supported by any evidence. I therefore, conclude that it is not the truth and I reject it.

[66] The second leg of the accused's defence was his *alibi*. He testified that he had no knowledge of the shootings, he was not anywhere near Morifi, because he was in the Eastern Cape with his wife. He called DW2 Lt-Col Stapelberg as his witness to support his defence of *alibi*. The accused in his evidence – in – chief testified that he had telephoned DW2 on that day, to inform him of the theft of his stock, at his farm. When DW2 gave evidence, he testified that he was the one who had called the accused on his mobile (cell) phone, following a call from the Lesotho police, about the shooting incident and that they had informed him that the accused was a suspect. DW2 further testified that when he asked the accused where he was he said he was in Sterkspruit and had denied any involvement.

[67] The accused then later at around 16h00 that day, reported himself to DW2 as per DW2's request. DW2 conceded that he had no way of knowing where the accused was when he called him, since they were talking on a mobile (cell) phone. It is in this regard therefore, that the accused's *alibi* was unsupported. He clearly lied about the fact that he had called DW2. He did not bother to bring evidence that could have actually proven his whereabouts on the fateful day. I find that nothing could have prevented him from being in Morifi at the time of the day mentioned in the evidence, that is somewhere from 10h00 to 12h00 and then be back in Sterkspruit and

still be with DW2 at 16h00. His defence is unreliable and false beyond reasonable doubt and I reject it.

[67] The eye-witnesses, that is PW1, PW2 and PW7 created a good impression on the court. Their demeanor was confident and forthright and they remained unshaken during cross-examination. Even PW6 who was the only one who actually knew the accused prior to the shootings, her evidence clearly corroborated some aspects of PW2 and PW7's evidence. No reason was advanced why she would lie about the accused or falsely implicate him seeing that they had a cordial relationship. She knew the accused very well and would not mistake him for any one else, not even the accused's brother as the accused had tried to suggest.

[68] It is for the foregoing reasons that on the evidence before the court, it is my finding that the crown has successfully discharged its onus of proving its case beyond a reasonable doubt.

VERDICT

I find the accused guilty as charged in all the six (6) counts.

Count 1: Murder – Guilty as charged

Count 2: Murder – guilty as charged

Count 3: Murder – guilty as charged

Count 4: Murder – guilty as charged

Count 5: Attempted murder – guilty as charged

Count 6: Attempted murder – guilty as charged

My assessor agrees with me on this verdict.

[69] Extenuation

Mr. Lephuthing addressed the court an extenuating factors and it was not surprising that both counsel agree that extenuating circumstances do indeed exist *in casu*. The accused became angered by the fact that he allowed Basotho people living around the area close to his farm (in this case Morifi), to pick green vegetables (*moroho*) and to get fire wood from his farm. In return he alleged that the same people he was being so generous to, turned around and stole livestock, furniture and dagga from his farm. It is clear that the accused's source of anger was premised on what he regarded as unacceptable conduct by Basotho¹³.

[70] The court accepts therefore, that extenuating factors do exist as submitted by the defence and the Crown. It is therefore proper to record the verdict as guilty of murder with extenuating factors. The crown informs the court that the accused has no previous convictions.

[71] Plea in mitigation

The accused is said to be a sixty nine (69) year old man, who is not only old but sickly with diabetes and gout. He has been on treatment since 2000. His Counsel bemoaned the fact that he was unable to access candarel (sugar substitute/ sweetener) to sweeten his food as a diabetic. The accused is also said to have been in custody in Lesotho since 2008. He has been denied bail since then.

¹³ Thabiso Kopano and One v Rex C of A (CRI) N0.1/2011 (referred to the court by Crown)

[72] It is **Mr. Lephuthing's** argument that the accused's actions were not premeditated. He argued that since it is agreed that there are extenuating circumstances, these should reduce the accused's moral blameworthiness. **Mr. Lephuthing** suggested that the accused be given a non-custodial sentence, a fine or a suspended sentence or even a postponement of his sentence, due to his personal circumstances. He further suggested that the court should explore other options which include the customary Sesotho practice of "raising of the head" of the deceased. This means he should be allowed to pay each family compensation of ten (10) head of cattle for every life lost.

[73] In response, **Mr. Leppan** for Crown argued that the offences committed by the accused are extremely serious and warrant exemplary sentences. He went further to show that the solution adopted by the accused to resolve the apparent problem he had with theft on his farm, was wholly disproportionate to the underlying problem. It was his contention that he selected his victims at random and showed no mercy to those that he shot. According to the Crown Counsel, the accused has displayed no remorse for his actions.

[74] **Sentence**

As always the sentencing stage is the most difficult part of a trial courts' task. Even though the accused person needs to know his fate eventually after a lengthy trial, the court needs to consider and strike a balance between the accused person himself, the nature and gravity of the offence and the interests of the society including the victim (s) of the crime.

[75] Having considered the mitigating factors as outlined on behalf of the accused and also being aware that he already had a chronic disease (diabetes) when he was arrested, it is still disturbing that a sixty nine (69) year old man would brazenly cross the river from the Republic of South Africa into Lesotho to shoot at and kill so many people. The accused shot people he did not know. Their only mistake was that they were Basotho who lived some where close to his farm. This attack on Basotho was clearly premeditated as can be recalled from the evidence of PW6. Some weeks prior to the shooting, the accused had said to PW6, that he was tired of Basotho stealing from his farm and that one day he would arrive in Lesotho to do something and people would exclaim, “*Mbobo, Mbobo, Mbobo*”. Even at that time PW6 interpreted that as a threat and then the events of the 13th October, 2002 happened. Those events serve as tragic corroboration for the premeditation.

[76] The accused attacked a taxi full of people who were going about their business in broad daylight between the hours of 10:00am and 12:00pm. He committed these offences with an alarming degree of arrogance, with complete disregard for other people around him. At no stage did he attempt to shield his face as can be seen from the evidence of the two (2) survivors and PW7, the daughter of the two (2) deceased, Mr. and Mrs. Mofo. He made sure the taxi was not going to leave before he could carry out his plan. He deceived every one into believing that he was going to board the taxi. The taxi stopped for him as he walked for a distance of about 200-300 metres from the direction of the river. His next move showed his cold and calculated intention. Once he reached the taxi, he commented to the conductor PW2, that it had nearly left him. PW2 had opened the door for

him and had alighted in order to let him board. As the accused was saying all this he was smiling at PW2 as if to reassure him and then he shot him at point black range.

[77] Four (4) families have lost their loved ones, especially PW7 who lost both her parents at a go. The two (2) survivors luckily escaped with their lives. They were the lucky ones. Had things gone the accused's way, every one would have died in that taxi on that day. What kind of person kills people he does not even know. If indeed he was frustrated with the theft of his property at his farm, no where in his evidence does he say he had informed the authorities both in Lesotho and RSA, to no avail. This brings one to the conclusion that he took his time to plan his revenge until he could carry it out.

[78] Indeed the accused at sixty nine (69) is old. I also agree that if he is diabetic and has gout he is sickly. However, correctional facilities have a clinic and resident nurses. I am certain that it cannot be that he is not getting the medical attention he needs. As far candarel, I would imagine that if the correctional services cannot provide it, certainly his family would be allowed to provide it.

[79] **Mr. Lephuthing** pleaded with the court to give the accused anything but a custodial sentence. Unfortunately the **Criminal Procedure and Evidence Act (CP&E)** at **section 314**¹⁴ does not permit suspension or postponement of a sentence where one has been convicted of murder. **Mr. Lephuthing** also suggested that the accused be given a chance to compensate the families of

¹⁴ Act of 1981

the victims by “raising the head” and paying ten (10) head of cattle in line with the Sesotho customary practice of compensating the taking of the life of a loved one. This is well and good but the courts need to be seen to be protecting the notion of the sanctity of life. People should be stopped from taking other people’s lives willy/nilly. When a person takes the life of another, it must be known that he/she will be severely punished. The taking of anyone’s life has never been a solution to any problem, even in circumstances where one has been provoked. Violence does not beget violence.

[80] The accused must be punished for his brutal actions. However, I am mindful that I have already found that an extenuating factor exists so that capital punishment is not compulsory. At the same time the families of the deceased and their community have been waiting for justice for a long time now. The murders were committed in 2002 and only ten (10) years later do they find some sort of closure. The families have lost parents, husbands, a sister, brothers, children, siblings and bread winners. Nothing the court will do can ever bring them back.

[81] Having considered all the factors raised by the crown and the defence in mitigation and having gone through lengthy deliberations with my assessor, we agreed that the following sentences are appropriate and just:-

- Count 1: Life imprisonment,
- Count 2: Life imprisonment,
- Count 3: Life imprisonment,
- Count 4: Life imprisonment,
- Count 5: Six (6) years imprisonment,

Count 6: Six (6) years imprisonment.

All sentences are to run concurrently and are to commence from 2008 when the accused was incarcerated. This is my order.

L.CHAKA-MAKHOOANE
JUDGE

For Crown : Mr. Leppan

For Accused : Mr. Lephuthing

