

**CRI/T/119/2010**

**CRI/997/10**

**IN THE HIGH COURT OF LESOTHO**

In the matter between

**REX**

**V**

**TELLO MABUSELA**

**ACCUSED 1**

**SEABATA RAMOHAJANE**

**ACCUSED 2**

**MAREKA NTHEJANE**

**ACCUSED 3**

**THABANG KOTELO**

**ACCUSED 4**

**THABISO SEPHULA**

**ACCUSED 5**

**JUDGMENT**

**Coram** : Nomngcongo J.

**Date of hearing:** 08 March 2011

**Date of Judgment:** 14 June 2013

- [1] At the commencement of this trial Advocate Thetsane K.C. for the Crown indicated that the indictments was initially in respect of four accused viz. Accused 1, Tello Mabusela, Accused Seabala Ramohajane, Accused 3 Mareka Nthejane and Accused 4 Thabang. He went on to indicate that had subsequently decided to withdraw the charges against Accused 4, Thabang Kotelo in terms of section 278 of the Criminal Procedure and Evidence Act NO.7 of 1981 which empowers him in that regard. He was replaced as Accused 4 by Thabiso Sephula. Thabang Kotelo turned crown witness and indeed the star witness in the case.
- [2] They are charged with seven counts. On count 1 they are charged with the Robbery of a motor vehicle, a cellular phone, a travel document NO. RA177180, office keys and residential house keys the property or in the lawful possession on Thabo Phohleli on the 5<sup>th</sup> September 2010 and at or near Ha Ramatsa in the district of Maseru.
- [3] In the second count they charged with the unlawful and intestinally killing (murder) of the said Thabo Phohleli on the 5<sup>th</sup> September 2010 and at or near Ha Ramatsa in the district of Maseru.

[4] The third count charges them of the unlawful possession of a firearm contrary to the provisions of section 3(1) (2) (a) read with section 43 of Arms and Ammunition Act n0.17 of 1966 as amended. It is alleged that they acted in concert and in furtherance of a common purpose on the 5<sup>th</sup> of September 2010 at or near Ha Ramatsa aforesaid. I fast forward to count 6 which is couched in identical terms except the date of the occurrence which is said to be the 27<sup>th</sup> September. The firearm in question is the same in both instances and is described as a 9mm 288 pistol whose serial numbers have been obliterated.

[5] The fourth and fifth counts related to the unlawful and intentional killings (murders) of Thabang Moliko and Malerato Maphathe respectively and at or near Lithoteng in the district of Maseru on or about 27<sup>th</sup> September 2010. The seventh count was of the attempted murder of Thabang Kotelo himself.

[6] The crown then proceeded to call its first of 24 witnesses and it was none other than Thabang Kotelo the former accused 4 and he was introduced to the court as an accomplice witness in terms of section 236 (1) of the Criminal Procedure and Evidence Act. I accordingly informed him that he

would be compelled to be sworn or make affirmation as a witness and to answer any question the reply to which would tend to incriminate him in the offence.

- [7] The witness was sworn in and proceeded to give evidence. Afterwards he was cross examined by all counsel for the various accused. During cross-examination by Mr Hoeane for accused 1 it was put to him that on the 5<sup>th</sup> September:

*“When you and your colleagues were killing the deceased he was at Morija at Ha Folene with one ntate Letsema”*

- [8] The answer to that was that he was not telling the truth. This line of cross examination was pursued no further than that. Five other witnesses were called after Thabang Kotelo (PW1). The prosecution then called as its seventh witness, Letsema Pakela. Mr Hoeane rose and objected to the calling of this witness by the prosecution because as he put it then, the defence had not been furnished with his statement before the commencement of the trial. This Letsema Pakela it would appear was the same Ntate Letsema that counsel had referred to in cross examination as the accused’s alibi. Mr Thetsane for the crown then pointed out that the

question of the alibi had only arisen during cross examination, so the police did a follow up on it. They obtained a statement from Pakela and it was then offered to counsel who refused to accept it. In the end I upheld Mr Hoeane's objection to the calling by the prosecution of this witness in the belief that he was a witness for the defence although through that single question he put to PW1 in cross-examination he had not even indicated his intention to call him as such. In the event this witness was not called by the defence, Mr. Hoeane for accused 1 bitterly complaining in his closing submissions that "... *the right of A1 to defend and adduce evidence ...*" has been infringed and irreparably prejudiced". He submitted that the crown's Conduct amounted to tampering and interference with a potential defence witness and the conduct of obtaining a statement from such a person was "*irregular and unacceptable in law*". As a result of the tempering the defence , it is said, no longer had any confidence in Pakela and therefore would not call him as an alibi. It is said that on the basis of this the accused (A1) had been deprived of his right guaranteed by section 12 of the Constitution to a fair trial. Mr Hoeane referred us to the case of **Millenium Travel and Others v DPP 2007 – 2008 LAC 27** at **31** where the Court of Appeal simply re-stated the law regarding a fair hearing which includes

*inter alia* the right to adduce and challenge evidence. No one can have any quarrel with that. The question is whether it has any application in the circumstances of this case. I was not referred to any other authority on the submissions which in fact are the crux of the defence case regarding count 2, the murder of Thabo Phohleli. In the short time that the court had I was able to come across a South African Case **S v MANGCOLA 1987(1) SA 507** where a policeman had interviewed a witness who had been subpoenaed by the defence before the commencement of the trial. In commenting on the best ethical practices regarding approaching the other parties witness Williamson J. had this to say after referring to previous authorities.

*“It is quite apparent from the judgment that James J.P. did not regard these ethical rules as rules of law. As I understand the position these rules have evolved over the years as an integral part of those mechanisms and practices which exist in order to facilitate and regulate the ordered and proper administration of justice. It is obviously desirable that prosecutors should also adhere to these rules of practice. However, their position and that of police is somewhat different to that of the ordinary litigant for they are charged with the duty of investigating crime and collecting evidence. It is conceivable that in certain circumstances that duty may clash with the ethical rules about interviewing the other sides. It is, so I would think, only in*

*rare cases that such conflict might arise and, if it does, then the non-observance of one or more of those ethical rules might well be excused”.*

- [9] Williamson J. then went on to point out that a value judgment had to be made as to the nature and extent of the prejudice to which an accused has been subjected before taking so drastic a step as stopping the prosecution or setting aside a conviction. He then made this important observation at 512 D-E:

*“It is possible that the defence may become more difficult because a witness has apparently changed allegiance. The witness may perhaps still be called and may be a good or a bad witness; who at this stage can possibly say what will happen. All this lies in the realms of the foreseeable failure. For all we know what has happened may even turn to be a blessing in disguise as far as the defence is concerned”.*

- [10] In the instant case through a single question during cross-examination and note before, A1 raised the defence of an alibi. This defence is one that lends itself to the possible clash between the duty of the police investigating crime and prosecutors and the undesirability of approaching the other side’s witness. The former must prevail otherwise it would be impossible for the crown to rebut the defence. The duty to rebut this defence was well illustrated in the case of *TS’ELISO LEMPE V REX* where the

Court of Appeal set aside a conviction upon an otherwise solid *prima facie* case precisely because the police had not followed up on the accused alibi.

[11] Counsel for the A1 not only belatedly raised his defence but he had not unlike in the MANGCOLA case (*supra*) even subpoenaed or indeed indicated his intention to call him. When he was given his statement counsel refused even to look at it. After that he claims prejudice and tampering. On what that is based we have no idea. He objected to his being called by the crown. The objection was upheld. He now cries foul on the basis of speculation that he might now not testify on his behalf on the basis of a statement that he has refused to have a look at.

[12] In my view the defence has itself to blame for not calling or availing themselves of the alibi witness. I find no merit in the argument.

[13] I turn now to the evidence for the crown. It begins at the home of PW1, Thabang Kotelo on the 5<sup>th</sup> September 2010. He was at his home doing family chores when A1, Tebello Mabusela approached him and asked him to accompany him to Ha Tsolo where he claimed he was going to collect money from someone who owed him.



[14] On their way A1 talked for a few minutes on the cell-phone after which he said the person who owed him was on the way. Shortly afterwards they were joined by a short and slender person who was introduced by A1 as Seabata Ramohajane, A2 in this case. Thereafter A1 gave PW1 money to buy a soft drink at a nearby café. He went into the shop only to find they had run out of the drink and he went back to report this. He was then apparently sent back to the shop to get an empty bottle so that he could buy the drink elsewhere. The sales lady could not oblige. He came back empty hand-again. As he rejoined A1 and A2 he heard A1 remark: “Hei soare motho eane ke eane” meaning “brother-in-law, there is that person” pointing in the direction of an on-coming vehicle. After saying this he put his hand into his pocket and took out a plastic bag which he gave to PW1 to give to A2. He could (PW1) feel that it contained a metal object which he could not say what it was. A1 then instructed A2 to move over to the left side of where they were sitting. PW1 was surprised by this sudden frenzy of activity and it prompted him to ask what was happening. A1 cut him short and told him to stop asking that because they wanted to take the on-coming vehicle. The vehicle was then about fifty paces away. It was a white “Corsa” utility van. PW1 was then instructed to move in front of A1 and

prepare to drive the on-coming vehicle. At this time A1 took out a gun from his waist and cocked it. The vehicle went passed them and as it did A1 was on his cell-phone. PW1 then recognized the sole occupant and driver of the car as Thabo Phohleli (deceased).The director of Astoria Bakery where PW1 had worked as a casual labourer.

[15] The vehicle drove past and stopped at a gate where the deceased alighted. The two were also by this time gone to this gate. A1 then pointed a gun at the deceased and asked him to stop. He then got hold of him and ordered him to get into the back of the van. PW1 was then standing next to the door of the van which he says A1 had ordered him to drive. The door was open. A1 demanded to know why PW1 was standing around instead of driving the car as ordered. PW1 observed that deceased was very frightened as he was ordered into the back of the van. PW1 then got into the van and drove off. A1 and A2 both climbed into the back of the van. PW1 did not know what to do as A1 was very angry as he was ordering him about.

[16] As they drove through the village PW1 wanted to take a left turn but he was ordered to take the right and from then on to follow the directions of

A1. They drove very fast and at one point A1 banged on top of the van signaling PW1 to stop. He did and was ordered to park it on the side of the road. He turned the vehicle off and alighted from it. He saw that A1 and A2 had also alighted. Deceased had his hands cuffed in front of him and he also had alighted. A1 then gave instructions to take deceased's things so that, he said, people should not take them. A2 then took out plastic bags and documents PW1 did not know, a passport, a driver's license a bundle of keys and a NOKIA E75 cellphone. The plastic bags contained a two litre drink, biscuits, viennas and buns.

[17] From this point A1 instructed the party to walk in the direction of the Phuthiatsana River because, he told the deceased, he had questions to ask him. They jogged down towards the river. A1 and deceased were in front. They went down into the river A2 and PW1 went across. It was at this point that PW1 asked A2 why they had not informed him of the nature of their mission so that he should prepare his conscience whether to take part in it or not. A2 asked him if A1 had not told him. He expressed surprise.

[18] At this time A1 was standing by the river bank talking to deceased. It was at this juncture that PW1 heard A1 ask the deceased. "Do you know me?"

The deceased said he did not but asked for forgiveness. He said “ntate”, I don’t know, please forgive me.” A1 then said “I am Tello Mabusela, why did you fire my sister?” The deceased replied that it was the exigencies of work and that this would be corrected and his sister returned to work.

[19] It was at this point PW1 says that A1 ordered the deceased to close his eyes and pray. He was pointing a gun at his face. PW1 then heard a gun report. PW1 looked back and moved away from where he was. He started to run away. He was followed by A2. A1 was soon following after them as well. He caught up with them. He then gave instructions as to how and where to move from there. They moved without conversation up to the confluence of the Phuthiatsana and Mohokare rivers. They found a path through some trees whereat A1 instructed A2 to remove the SIM card from the deceased’s cell phone. A2 was not able to do it and this was then done by PW1. The phone had been ringing prior to this. A1 expressed the fear that the cell phone might even have a camera which might lead to their arrest.

[20] After this A1 opened up to conversation again. He said that the deceased was disrespectful and took people for granted. He had long been looking for him. He said he had also expelled his sister from work. PW1 says he

was frightened as he was saying these things and was not listening properly.

[21] They walked round a certain mountain and passed through a village which A1 called Ha Hlalele. They went passed it and got to another village which he called Ha Mokhalinyane. PW1 did not know his place. A1 then gave an instruction that deceased's papers should be thrown away at this place because there would pick up the papers and recognizing the name Phohleli's, they would take them to his family there. It would then be assumed they were a result of some village quarrel. The passport driver's license and other documents were there thrown away there.

[22] The trio had been walking for most of the night. PW1 says his muscles started to ache and he could not walk anymore until A1 had to carry him. Along the way they ate the food stuffs that they had found in the plastic bags. They never stopped to rest except for very brief periods of about a minute to drink some water. They walked until about 6 a.m. when they were able to board a taxi at Ha Mants'ebo. PW1 says all along he had been frightened and was wondering what would happen to him. They arrived at a place called Lekhalaneng where PW1 alighted. He was given taxi fare to

his home. There he slept until after lunch. He did not hear from A1 for about a week. He then phoned him to ask about his whereabouts. PW1 told him he was at Ha Mantsebo whereas in fact he was still at Ha Seoli. He was trying to avoid meeting him again.

[23] Sometime later A1 called at his home. PW1 saw him and dodged him. He phoned again after that and PW1 forbidd him off saying he was still with his grand –mother at Ha Mants’ebo. He says A1 sounded as if he wanted to meet him urgently.

[24] They next met by accident on a Friday the 15<sup>th</sup> October when PW1 was on his way home and A1 was travelling in the opposite direction. He met him where he could not avoid him. PW1said he was on his way to Ha Mants’ebo. A1 asked him to accompany him to Ha Leqele. What started as a request turned into a demand. PW1 says he protested that A1 was going to force him into doing the things they had done previously without his knowledge to which A1 replied that he was not about to do so as he was not dressed for such occasions, because as PW1, knew for such occasions he wore boots. He was then rather smartly dressed in black from top to bottom. There was a bulge around his waist which PW1 concluded was a

gun. At the sight of it he agreed to accompany A1 to Ha Leqele whence they immediately proceeded.

[25] Thereat they arrived at an L-shaped dwelling whose A1 communicated with a female voice in another adjoining room and he asked about the whereabouts of one Tumane whom PW1 did not know. He got to know him when he arrived later in the evening between the hours of 7 and 8 p.m. PW1 wanted to go home but A1 procrastinated on his request until he said it was too late and they should sleep over. His request to go home in the morning was also not acceded to. A1 had slept with a gun under his pillow. In the night PW1 had tried twice to slip away and make a run for it. Each time A1 had forbid off these attempts and indicated that he would brook no such attempts.

[26] While they were in the house accused had said that he did not quite see what person PW1 was. He had wanted to train PW1 a soldier and be like him. He wanted him to be like himself. A1 further told him about a certain carelessness that he had gotten rid of in the person of PW1 namesake, Thabang. He said he had in the process bundled his concubine with whom he had found him. PW1 knew this Thabang though their association as taxi

conductors and he knew that he had died on the same day as a lady whom he considered his wife as he had often seen them together appearing to be comfortable with one another. A1 asked him if he knew Thabang and PW1 replied in the affirmative. PW1 was very afraid as he heard A1 tell him these things.

[27] When PW1 insisted that he wanted to go home A1 then said he had thought better about these things and considered that things might not go right. He therefore thought that from then on PW1 should not separate from him. He should go home and fetch his clothes in order to stay with him. PW1 protested that A1's work was too heavy for him and that he could not even if wanted do it with him as he was too old. It would not appear proper if he was caught with him, to which A1 assured PW1 it could not happen and that this was attested to by the fact that they had not been arrested up to then for what they had done at Ha Tsolo.

[28] After this PW1 and A1 proceeded to his home at ha Seoli. PW1 asked what he would say to his elder brother with whom he stayed. A1 advised him to tell him that he had gotten a job at Bloemfontein or Gauteng. They got to his home where PW1 found his brothers. He told him of the job in



Bloemfontein and then took his clothes while A1 stood at the door preventing PW1 from closing it by wedging it with his foot so that he should eavesdrop on them. They afterwards left back to ha Leqele. On a Sunday A1 asked PW1 to fetch his photos which he had left at Ha Seoli. They left shortly after lunch. On the way at a place called Temong A1 asked them to wait a while so that they should arrive at PW1's home in the dark. When they left Ha Leqele A1 had taken his gun and loaded it saying it was in preparation for anything that might happen. At a place called Temong they were joined by Tumane. At about 10 p.m. They went to PW1's house which they found locked. They returned.

[29] On the way back and again at Temong, Tumane expressed a reluctance to go back to Ha Leqele saying he was afraid to go although he did not know why A1 suggested that they sleep over at that spot. They sat down among a plantation of wattle trees and in a furrow. A1 sat next to PW1. The latter pulled down the jacket he was wearing down to his feet. For some reason he made the Lord prayer when he had finished he heard a gun report and air whizzing past his neck. He then felt blood trickling from the sides of his neck and the mouth. He fell down. He unzipped his jacket which now felt tight and suffocating. Tumane and A1 then left and stood a distance away

talking. They later came back to where he was sitting frightened and confused wondering what was going to happen to him. He then heard A1 tell Tumane "Finish him off with the 65". Tumane produced a gun from his pocket and cocked it. He approached where PW1 was. PW1 held his breath as Tumane put his hand below his nose. He then proclaimed that PW1 was quiet and not even breathing. A1 wanted to be assured of this which Tumane did. He instructed him to search PW1. This was done and a passport, keys and a licence were taken from his pockets. They left.

[30] PW1 waited a while and when he thought it was safe to do so, he went to seek help with difficulty he walked to a place near Ha Makhupane. There he found one Tau whose other particulars he does not know. Tau took him to Queen 11 Hospital. It was around midnight. He was admitted and he told Tau to tell his brother he was in hospital.

[31] The following day PW1's brother arrived in the company of two policemen one of whom was Mokole. The police asked who had shot him and he told them it was A1. After this the police kept coming and asking questions. He was hospitalized from the 17<sup>th</sup> to the 25<sup>th</sup>. He was given various treatments. He says his health has changed dramatically since then.

[32] On his discharge from hospital the police were present and they immediately took him into custody. He was still in pain and even had difficulty climbing into a vehicle. He was taken first to Police Headquarters. There he saw Accused nos 1, 2 and 3. From there they proceeded to the central charge office and then to Pitso Ground Police Station at the latter station the witness was interrogated. During this interrogation one policeman said that the witness was not telling the truth regarding certain items of evidence and as he already had injuries he would finish him off with electricity. As he was saying that the policeman plucked electrical wires which started producing sparks. It appears the threat was never made good.

[33] The witness was taken to two other police stations during the interrogation. After that he was remanded in custody.

[34] Cross-examination of the witness on behalf of A1 was to the effect that he did not participate in the killing of the deceased and that he (the witness) was concealing the identity of his co-participants in the killing. It was put to the witness as earlier alluded to that on the day in question A1 was at Morija Ha Folene with one Letsema. It was said accused would testify and

refute the alterations regarding Thabang and what counsel called the rapturous lady. We now know that A1 did not call Letsema nor did he testify himself.

[35] Cross-examination on behalf of accused 2 was in the same vein, that he did not participate in the killing of the deceased and that the first time ever they met was at Maseru Central Prison. To that PW1 replied that it was the third time. It was also put to him that he had not, mentioned him in any of the statements made to the police which he said was not true.

[36] The second witness was Moliehi Tsupane (PW2) she testified that she was two men at deceased's gate. One of them pointed a gun at him and threw him into the back of a vehicle that was then driven off at high speed. She then phoned the police who arrived shortly afterwards. She pointed the direction in which the deceased had been taken away, she was later to learn from them that they had found deceased dead.

[37] PW3 was one Muso Mokoatsi. On the 5<sup>th</sup> September 2010 he had been herding his cattle when he saw a vehicle driven at high speed. When it stopped he saw three men alighting from it. One of the men was being pulled. The men left running as disappeared from view. About ten minutes

later a police vehicle arrived and he assumed that the trio was running away from the police. As he was taking his cattle home he saw many people taking the same direction as the police. After entreating his cattle he also followed. They arrived at a place where they found the body of the deceased. He assisted in carrying him away.

[38] PW4 Mpolokeng Letuma resides at Ha Leqele with his brother Mokhophe Letuma. She says A1 rented one of the rooms at this residence. Sometime in October 2010 there arrived policemen in the company of A1. She was called by the police into A1's rented room. A1 then explained that he had come to produce keys. He pointed to a suitcase which was on the floor. There the police found a bundle of keys. This witness says she knew PW1 because she had seen him at that place in the company of A1.

[39] PW5 testifies that on the 5th September a stranger arrived at the shop where she worked and asked for an empty bottle. She did not agree to give it to him. There is in apparent corroboration of PW1's story that A1 had sent him to a shop to borrow a bottle to buy a drink from another shop when they could not find it in PW5's shop.

[40] PW6 Mapulane Phohleli is the deceased's wife. After the death of her husband the police visited his place making inquiries. Later she was called by the police. There she positively identified keys belonging to her husband. These were keys to the garages, the kitchen, the post-office box for their family. The keys were later tested at her residence and they were able to open the relevant doors. She also identified her husband wallet, bank cards and her husband's driver's licence. There was also a key-holder which she said had been bought by her personally.

[41] PW7 Peter Finlay was the Transport Manager of Astoria Bakery where deceased worked. He was called to the Police Station where he identified two keys as being those of the workshop at Astoria Bakery.

[42] PW8 Neo Lepelesana worked at Astoria Bakery as a Production supervisor. The night following deceased's death A3 arrived at their work-place around mid-night and kept asking people why they had killed the deceased. He was troublesome and pestering. He left at around one o'clock.

[43] PW9 Limakatso Seatile was employed as a cashier at Astoria. She was a friend of Puseletso Mabusela, A1's sister. Thus knew A1. She says in 2009 Astoria Bakery was bought by Sunbake. After that deceased called a

meeting to tell staff of these changes and that they would continue to work for the new company. He further told them that if they wished to get severance pay, they would have to resign first without any guarantee that sunbake would re-deploy them. This caused dissatisfaction among staff and as a result to joined one of the trade unions (LECAU) through which to vent their grievances. She says she noticed that A4 had not joined the union.

[44] The witness goes on to say that one morning she was approached by A4 who told her about his plan to kill the deceased because he was denying them their severance pay. He asked PW9 why they didn't find someone to kill him. He said he was already in the conspiracy with Ellen Lerotholi, Marethabile and Fezi. This was some two or three months prior to deceased's death. About three weeks after deceased burial A4 once again approached PW9 looked frightened she says as he explained to her how deceased had met his death. He told lies that deceased had been abducted by Puseletso's brothers who had afterwards killed him with PW1. He said he had been told this by PW1. PW9 had on another occasion met A4 who told that she had been introduced to A1 whom he described as a handsome person whom one could not suspect off having done such things as he had

done. It would appear from this that A4 had never met A1 prior to the death of the deceased.

[45] On yet another occasion A4 and PW9 had met. On that occasion he had according to her, told her that the person he had secured to kill the deceased, who had not done the job, was pestering him and always demanded money. He had then asked A1 to get him out of the way i.e. kill him because in any case he already knew about the plan to kill deceased so he might go to the police. The witness said he was on good terms with A1 and A4.

[46] Under cross- examination it was put to the witness that A4 took the advice of the witness not to be involved in the plan to kill the deceased to which she replied that she did not know what to say. This clearly suggests at least some involvement in or knowledge of the plan. Out curiously it was later put to her that A4 says that he never planned nor killed anyone.

[47] PW10 Puseletso Mabusela is A1 relative. The son of her father's elder brother, known in Sesotho as ntate moholo, literally "grand father" in English translation. A2 is her husband's elder brother. So the three are related to each other. She also knows A3 and A4 as they had worked



together at Astoria Bakery. Deceased had been over all manager at Astoria. She was dismissed by the deceased. She reported such dismissal to the family so A1 knew of it.

[48] After her dismissal the witness has occasion to meet A4 on her way to work and he wanted to talk to her. He asked her why she was going to the police, she told him that she had been charged about matters relating to Astoria. A4 then told her that no one would be suing her if his wishes had been carried out. The witness then went on her way saying in a hurry.

[49] Again one A1 went via her home. He asked her if she had heard that deceased had died. She had heard and she asked what had happened. A1 said that he, A2 and PW1 had killed him. She asked why they had done that. He said that he wanted to have money.

[50] Days later the witness was visited by A4. It was on a Sunday. He told her that the person he had secured to kill Thabo Phohleli resided at Corneng Ha Seoli. That person had demanded M4,000 to do the job. He had been paid M2,000 but he did not do the job. He was going to go back to the persons, he had planned the killing with to raise the balance. He further said he

would go to A1 to kill the person who lived at Corneng as he might get them arrested as he knew about the plan.

[51] Subsequently PW10 met A1 at Ha Pita. A1 confirmed that he had been asked by A4 to kill the person who lived at Corneng. Asked by the witness if he knew the person he (A1) said PW1 would show him. The witness pleaded not to be implicated in these things.

[52] Cross-examination of this witness was only to the effect that both A1 and A4 never told her the things that she says they did. She was adamant that she was told.

[53] PW11 was Mokhophe Letsema. He was introduced as an accomplice witness. The court inform him of the implication of his status as such a witness in terms of section 236 (1) of Criminal Procedure and Evidence Act. He was then sworn in.

[54] He testified he knew A1 as his home boy. He stepped with him as a tenant at Ha Leqele. One day during the month of October 2010 he received a phone call from A1 inviting him to join him at a spot between Lithabaneng and Ha Matala. He proceeded to this place where he found him together with PW1 at around 4 p.m. They waited at the spot until about 6 p.m. for

Ha Seoli where PW1 resided. The purpose of the trip was said to be to collect PW1 clothes.

[55] They arrived at the latter's home and found it locked. They decided to leave. On their way back they rested at a place called Temong. It was a clear night. PW1 sat in front of him and A1 on the side. The witness was armed with a 6.5 caliber pistol and A1 with a 9mm caliber as they sat PW11 heard a gun report coming from the direction of A1. He saw PW1 fall and noticed that A1 had his pistol in this hand. As PW1 lay on the ground A1 ordered him to finish him off. He said that PW1 was already dead and did not do as ordered. They left him there. PW11 was himself subsequently arrested.

[56] Cross examination of this witness elicited how he was tortured and ill-treated by the police. He was trussed up and made to lie on his face. A police woman sat on his shoulders and he was suffocated with clinical gloves and later with a plastic bag placed over his face. He was being asked why they killed people. He denied killing anyone.

[57] It was then put to him that the shooting of Thabang (PW1) must be put squarely on his shoulders and further that the evidence he gave was as a

result of the torture suffered at the hands of the police. He denied both suggestions.

[58] PW12 was D/P/C Masupha stationed at Pitso Ground. On the 27/9/10 at about 7 a.m. he received a report that a person had been killed at Ha Seoli. He with one D/P/C Matobako then proceeded to lithoteng police station where they were joined by a policeman who led them to the scene of crime where a crowd had already gathered. There inside a two-roomed house in one of the rooms of what appeared to be a kitchen they found the dead body of a woman who was lying naked. A piece of wire had fastened tightly around her neck. No further injuries were observed.

[59] In the next room was found the dead body of a male person. It was lying in a pool of blood. The room appeared to be a bed-room. It had two open wounds on the ribs on the left side. It also had an open wound above the right eye. The right hand had been tied tightly with a piece of wire just like that of the dead woman. There was also found near the body an iron rod.

[60] The wire tying the dead bodies were unfastened and the bodies were taken to the mortuary. The items found on the scene were seized as exhibits.

They were handed in as exhibit 1 collectively. The witness was later to learn that the bodies were of 'Malerato Maphathe and Thabang respectively.

[61] PW13 Teboho Maphathe was the husband of the deceased Malerato Maphathe. He was not at home when his wife met her death. He had proceeded home upon hearing of her death, while he was there and his deceased's wife clothes were being washed an empty bullet shell was found. It was found by him in the grass. He then took the shell to the police at Lithoteng and gave it to P/C Mpatlise. The latter testified as PW14 and confirmed receiving the empty shell. PW14 ALSO LATER GAVE THE SHELL TO pw15. d/p/c Makhothi who was investigating the deaths of Malerato Maphathe and Thabang Molikoe the two deceased who were found by PW2 D/P/C Masupha. PW15 later submitted the shell to S/Inspector Pali for forensic examination.

[62] PW16 D/P/C Nkhahle was one of the investigators into the killings 'Malerato Maphathe and Thabang Molikoe and the attempted murder of PW1 Thabang Kotelo. He upon learning of a 9mm pistol that was one of the exhibits in this case took the shell that had been handed to the Lithoteng Police for comparison with the 9mm.

[63] PW17 D/S Inspector Tsiane, following information received, proceeded together with D/P/C Mokole, Maphallela, Ralekaota and PW Moeketsi to Ha Makhoathi in search of A1. There they met Mokhophe Letuma (PW11) who told them he knew where A1 stayed but he cautioned them that A1 was dangerous and he would resist arrest. A1 actually stayed at PW11's place as we have heard.

[64] The police proceeded to his house. There PW17 instructed the police he was with to surround the house following the warning he had received from PW11. He himself went to the door and knocked. He called A1 by name and told him they were the police and he should come out. There was no response although PW17 was sure that he was in the house because he heard some rusting inside. He knocked persistently without any response. He then said he was going to throw tear-gas into the house. He did not in fact throw tear gas into the house and shortly afterwards an apparently terrified P/C Moeketsi urgently shouted out his nick name; 'Lepas' As she did so. The police then returned fire at the fleeing A1 and the police followed in hot pursuit into the Leqele village. Along the way A1 attempted but failed to mount a horse which he saw tethered in the vicinity. A1 ran at short bursts and turning at the pursuing policemen. The

witness days they were armed with assault rifles and Maphalla and he with pistols. During the chase he phoned the head office for reinforcement. The chase went passed Ha Bosofo and Ha Nelese and into the forest at Masianokeng. The exchange of fire continued in the forest until reinforcements arrived in the persons of Inspector Lekote; detectives Motanyane, Mphephoka and Thokoana.

[65] Inspector Likoti then drove from Ha Nelese in the direction of Mazenod opposite the forest still at Masianokeng A1 emerged and went towards Likoti's vehicle which stopped for him. He talked to Likoti and then got into his vehicle. He was still holding his pistol. The vehicle then proceeded to Mazenod Police Station.

[66] When PW17 and his party finally made it to Mazenod Police station they found A1 already handcuffed. A1 called PW1 by name and said that if he had known it was him "Chief Tseane" he would not have done what he had done PW17 was actually surprised that A1 knew him. He was also angry and told him so and that he had nearly killed them. A1 said he had known PW17 when he worked at Thaba-Tseka in the Stock Theft Unit.

A1 and the rest of the party then went back to Maseru, Pitso Ground Police Station.

[67] PW17 said when they shot at A1 they did not miss him but they were unable to take him down. His T-shirt had what appeared to be many bullet holes. When asked to explain this A1 said they could not take him down because of the medicines that were found on him when he was searched. He said he had felt as if he had been sprinkled with sand stone as they shot at him. A1 had no injuries.

[68] PW18 was D/P/C Matobako confirming what PW17 testified to while PW19 P/C Kholopo was stationed at Thaba-Tseka at the time and was in the vicinity only because he was on leave and therefore off duty. Nevertheless when he heard the commotion in the forest at Masianokeng he cautiously approached. Then he saw a person go into a car and he decided to go to him. It turned out that it was D/Insp. Likoti. He introduced himself and then joined him in the car. They left in the direction of Mazenod before they reached they saw A1 attempting to stop passing vehicles. Two in front of Likoti passed without stopping. Likoti however stopped and let A1 into his car. A1 asked to be rescued from the public that he said wanted to kill him.



PW19 told him they were willing to help him but that they were afraid of the gun he was carrying. They requested him to unload it. They advised him that it was best to flee to the charge office. That is how A1 was eventually taken to Mazenod Police Station where he was immediately hand-cuffed and arrested. He was eventually taken to Pitso Ground Police Station in Maseru.

[69] PW20 D/P/C Matela together with Sgt. Khanyapa D/P/C Mokote and D/W/P/C Moeketsi proceeded to Ha Leqele on the 23<sup>rd</sup> October 2010. They were in the company of A1. He took them to a place which we now know was his rented quarters. There they found PW4, Mpolokeng Letuma who stayed in the same house as A1. A1 told PW4 that they had come to the place to collect keys which were in his bag. PW4 opened the door and the party went in. Once inside they found a bag and A1 said "Morena (chief) open that bag and on the left or right corner you will find them I n a plastic" PW20 then searched the bag on instruction. Indeed a plastic bag containing a bundle of keys was found. These were the keys that were later identified by PW6 as belonging to the late Thabo Phohleli, her husband and one of the workshop at Astoria Bakery. They were handed in and marked Exhibit 5.

[70] Cross-examination of this witness was to the effect that A1 knew nothing of the keys and that the witness had gone alone into his room.

PW21 D/P/C Mokote was stationed at Thetsane Police Post. On the 5<sup>th</sup> September 2010 together with his colleagues proceeded to the village of Ha Ramatse following information received. There they found a white “Corsa” van. It was locked and had no occupants. He was then called by a police officer called Nkhabu. Together they proceeded down to the banks of Phuthiatsana River. There they found the dead body of a person. It was hand-cuffed. It had a wound behind the left ear and another on the right ear. He formed the opinion that they were the entry and exit wounds of a bullet. It also had a gun-shot wound on the forehead. Next to the body was a 9mm bullet shell.

[71] The cuffs were removed from the body and it was catered away to the Lesotho Funeral Services Mortuary. PW21 then handed the 9mm bullet still to D/Sgt Monaheng the following day.

He then proceeded to the village of Ha Mokhalinyane. At the chief’s place, he and P/O Kolozi were handed a drivers licence and a passport – both

belonging to Thabo Phohleli. They were later handed in as exhibits and marked 6 and 7 respectively.

[72] This witness later joined another investigating team, this time to investigate the death at Ha Seoli, Corneng. This team made the arrests of PW1 Thabang Kotelo, A2 A3 since discharged and A4 whom they all charged of the various charges as appear in the indictment.

[73] Cross-examination of this witness sought to establish that he severely tortured A1 and threatened to do so in respect of PW1.

D/Sgt. Monaheng confirms that he was handed him a 9mm bullet shell which he later submitted for ballistic test. It was returned to him together with a ballistic report. He handed in the shell as Exhibit "10".

[74] PW23 D/W/P/C Moeketsi was in the team that went to arrest A1 and she confirms the manner in which he was so arrested after an epic chase through several villages. She was handed the gun that had been seized from A1. It was handed in and labeled Exhibit 11. He submitted it for forensic examination and she received results thereof from PW24.

[75] The ballistic expert who received and subjected the firearm and two bullet shells to examination was S/Inspector Pali. After the examination the two cartridges handed to him by D/P/C Makhothi and D/Sgt. Monaheng had been fired from the pistol handed to him by D/W/P/C Moeketsi. The evidence went unchallenged.

With that the crown closed its case.

[76] After the close of the crown case counsel for A3 applied for his discharge in terms of (section 175 93) of the Criminal Procedure and Evidence Act of 1981. The crown did not oppose the application. Having considered the evidence the court found that no *prima facie* case had been made against A3 and accordingly discharged him.

A1 and A2 elected not to give evidence in their defence as they are entitled to in terms of section 12 (7) of The Constitution of Lesotho.

A4 gave evidence. He said he was arrested on the 20<sup>th</sup> September 2010 at the police station had killed the deceased. He then went down to the river with the policemen he was with. At the river A4 gives a strange narration of what he says he told the police.

[77] He says when they were there the police asked him whether they had come to search for the place where he and others had killed the deceased or whether he had come to point out such a place. He says he replied that he had come to point it out. He had then pointed out a place where he said it was probably the spot. He says the police became angry and told him they wanted the exact spot and that he should stop saying it was probably here or there. He then pointed to a spot where he said they had shot deceased. He was asked what they had said to the deceased before they shot him. He replied that he was not near but he could still see. He was asked again who was near when deceased was killed and his reply was that it was Mareka Nthejane and Tello Mabusela (A1). He then said he told them that he had seen the deceased nodding and shaking his head. He did not hear what they were saying as he had left the place where he was and gone out of view. After that he had heard a gun out of view. After that he had heard a gun report. A1 and Mareka Nthejane had then come out and they had left the place.

[78] This is what A4 says he told the police about the killing of Thabo Phohleli. He says that they left the spot and went back to Pitso Ground.

A4 says he was later released after a warrant for his further detention had been issued. He was only charged in March 2011.

[79] He denies ever telling PW9 about plans to kill Thabo Phohleli. I do not know if this was inadvertent or not, but such a denial was not made against PW10 in A4's evidence. He denies in particular that PW9 ever advised her to abandon the plan and join a trade union. This is despite what his counsel put to PW9 that he (A4) had heeded her advice in that regard. He had neither talked to one Ellen or Rethabile or Shezi about this about the plan otherwise investigators would have been on to it. He includes that he doesn't believe that if he had such a plan he would have told it to anyone who was not involved in it.

A4 did not lead further evidence and that was the close of the defence case on all fronts.

[80] To prove its case the crown relies heavily on the direct evidence of the PW1 in respect of the robbery, murder and attempted murder charges in count one, two and seven and indirectly so in respect of the other counts. It submits that such evidence was corroborated by the testimony of the witnesses PW2, Pw3, PW4, PW5 and PW21.

[81] Before dealing with these and other pieces of evidence, it is important to be alive to the fact that PW1 was introduced as an accomplice witness, albeit according to him a reluctant one because he was duped into joining the murderous escapade and afterwards acted out of fear of A1. But he was an accomplice because he participated in the offence charged and afterwards concealed or failed to report the murder when he had ample opportunity to do so when after the incident he was out of the clutches of A1. The court therefore has to approach his evidence with caution. The need for this was succinctly expressed by Holmes J.A. in *S V HLAPEZULA and others* 1965 (4) SA 439 (A) at 440 D-H, a South African case:

**“It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First he is a self confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third by reason of his inside knowledge he has a deceptive facility for convincing description – thus only fiction being the substitution of the accused for the culprit. Accordingly ... there has grown up a cautionary rule, of practice requiring (a) recognition by the trial court of the foregoing dangerous, and (b) the safeguard of some factor reducing**

**the risk of a wrong conviction, such as corroboration implicating he accused in the commission of the offence, or the absence of gain saying evidence from him, or his mendacity as a witness as the implication by the accomplice of someone near and dear to him. See R V Ncanana 1948 (4) SA 399 A at 405-6. R V Gumede 1949 (3) SA 749 at 758; R V Ngamtweni and another 1959 (1) SA 894 at 897 G – 898D. satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon the appraisal of all the evidence and the degree of the safeguard aforementioned”.**

[82] As the learned authors Hoffmann and Zeffertt opine before relying on evidence of an accomplice the court should find some circumstance which can properly be regarded as reducing the danger that it might convict the wrong person. The best known such circumstance, and not necessarily the only one being corroboration. Other factors would include failure by the accused to testify where there is direct evidence implicating him in the commission of the offence, As Holmes JA said in S V SNYMAN 1968 (2) SA 582 (A).

**“Where there is direct evidence, that the accused committed the crime in general his failure to testify (whatever his reason thereof) *ipso factor* tends to strengthen the state case, since there is no**



**testimony to gainsay it and there fore less occasion for or material to doubt it.”**

[83] Another factor may be how the evidence of the witness has been obtained from the accomplice. In *S V MALEPHANE* 1979 (1) SA 1009 at 1017 *Le Roux J.* warned that the ordinary cautionary rules may be totally inadequate where the evidence of an accomplice was preceded by say, beatings and torture. He had this to say;

**“Where the accomplice himself introduces factors like beatings, inducements and the facts that they were all detained by the police, all the inherent danger attended on the acceptance of accomplice evidence are multiplied and it calls for even greater caution from the truer of fact than in the normal case.”**

The learned judge went on to say:

**“It is usually said that corroboration of an accomplice’s evidence must be on some material aspect. (see *R V Thielke* 1918 AD 373 at 377 and *R V Lakatula* 1919 AD 362 at 364). This corroboration may consist of any proven fact which tends to support the evidence of an accomplice and in my view it may also consist of evidence given**

**by other accomplices provided there is some corroboration in turn for their evidence.”**

[84] In this case PW1 knows A1 well. They had previously met when the latter visited her mother at their home at Ha Seoli. The question of identity therefore does not arise and it was never even raised in cross-examination. A2 made a half hearted suggestion that they had only met for the first time at court. PW1 denied this and said that it was the third time that they met. The question of identity was never pursued with any vigour.

[85] PW1 chronicles the journey from Ha Tikoe to the place where Thabo Phohleli was ultimately existed. It begins at the place where he was sent to buy a cold drink at some shop thereat and what transpired at the said shop. Those events are confirmed by an independent witness (PW5) Keneuoe Maoeng who was a shop assistant. The latter does not say that she recognizes that person as PW1 but simply that those events took place.

[86] The events at Thabo Phohleli’s gate as narrated by PW1 were witnessed by PW2 Moliehe Thupane who gives an almost identical description of what happened during the kidnapping of Phohleli until he was driven away at great speed in the direction.

- [87] This vehicle was driven to a place where it was later abandoned and four men alighted from it and they disappeared in the direction of Phuthiatsana River. PW3 'Musu Mokoatsi who was herding his cattle in that vicinity witnessed this incident and describes it in exactly the same manner as PW1.
- [88] Up to this point PW1 has been credibly corroborated by witness who were fair and independent and I have no hesitation in accepting that the facts up to that point have been established. I infer from this that it was PW1, A1, A2 and deceased who went down to the banks of Phuthiatsana River where the latter was executed in the manner that PW1 described.
- [89] The police who were close on the heels of the kidnappers and their victim later found the body hand-cuffed with bullet wounds to the head. Next to the body they also found a shell. This shell as we shall recall was later submitted for forensic examination. It was established that the shell had been fired from a gun that was later seized by the police from A1 when he was arrested. This piece of forensic evidence went unchallenged.
- [90] PW1 testified that after the shooting, they travelled through the village of Ha Mokhalinyane where accused advised that deceased's passport and license be dropped as some kind of red-herring. The passport and license

which had been taken from the deceased and later so dropped were recovered from there by the police,

[91] The evidence regarding the killing at Corneng is of a circumstantial nature. A1 is said to have told PW1 that he had got rid of a certain carelessness at Corneng. The person at Corneng was PW1's name sake. A1 told PW1 his name sake had been with some woman whom he had trussed up. Indeed when the police went to a scene they found a woman strangulated with a piece of wire. PW10 was a relative of A1. He made an unsolicited admission that he would kill the man at Corneng and PW1 would show him the man. In the vicinity of the killings of the man and the woman a bullet shell was found. It also was submitted for forensic testing. It was found to have been fired from the gun seized from A1 upon this arrest. The man at Corneng had died of a bullet wound besides the multiple stab wounds to the neck and chest as established by the post-mortem report. Ext 'C'. It seems to me on these facts the inference that it was A1 who killed both deceased is inescapable.

[92] The shooting of PW1 himself is testified to by himself and the accomplice PW11. They corroborate each other.

In the face of all of this A1 and A2 have chosen not to give evidence in their defence. A1 gives the spurious reason that a witness that he might call had been contaminated and tampered with by his being interviewed by the police. I have already indicated how untenable that proposition is. When the accused do not give evidence where a strong case has been made against them that tends to make the case even stronger.

[93] Now murder is the intentional and unlawful killing of another human being that Thabo Phohleli was intentionally killed admits of no doubt. A1 had it all planned. He positioned himself where and when he obviously knew deceased would be passing to this his home. He kidnapped him frozenly and in brought day light. He took him to a seclude spot where despite his pleas for mercy he shot him in cold blood after asking him to close his eyes and pray. A2 was privy to this plan and this is evidenced by A1's utterance when he saw Phohleli's van "Hei brother – in law there is that man."

[94] In the execution of this plan Phohleli's properties were taken as alleged in the indictment viz his van, keys etc. A1 n0.1 is linked to the deaths of Thabang Molikoe and 'Malerato Maphathe through the admissions that he made to PW1 and PW10 but the most important link is to be found in the

shell that was found in the vicinity of the killings which matched the pear off the killings which matched the pear off found on A1. There is no evidence however linking A2 with these murders. That they were done intentionally is patently evident in the manner they were carried out a shot to the neck and chest and finally the strangulation of 'Malerato.

[95] Regarding A4 He gave an explanation. The Crown would have us believe that because he told the same story that PW1 told us then he knew of the killing of Phohleli. If we believe PW1, as we do not then clearly what A4 told us about the events surrounding the death of Phohleli cannot be true because he just was not there. He was simply mimicking what PW1 said. Regarding the evidence of PW9 and PW10 about what he told them about the plan to kill Phohleli, I am not convinced that he actually participated in it. My impression is that he knew of it, probably approved of it but he has not been shown to have taken any further part in it. He is not linked to A1 who carried out the killings in any manner. It is significant in this regard that he remarked about A1, that he was a handsome man who could not be suspected of the deeds he had done and this remark was made after the death of Phohleli. It shows he had never even met him until after his death.

[96] One last observation is with regard to the gun, the unlawful possession of which A1 is charged. I have carefully gone through the record. Nowhere does it appear that any of the police officers ever required of him to produce a fire-arm licence which he failed to do.

[97] Having considered the evidence as a whole I come to the following conclusion.

- Count 1** - A1 – Guilty as charged  
A2 – Guilty as charged  
A4 – Not guilty and discharged
- Count 2** - A1 – Guilty as charged  
A1 – Guilty as charged  
A2 – Guilty as charged
- Count 3** - All accused are not guilty
- Count 4** - A1 - guilty as charged  
A2 not guilty  
A4 not guilty
- Count 5** - A1 – guilty as charged

A2 – not guilty and discharged

A4 – not guilty and discharged

**Count 6** - A1 - guilty as charged

A2 – not guilty

A4 – not guilty and discharged

No previous convictions

**T. Nomngongo**  
**Judge**

**For Crown :** Mr Thetsane  
Ms Mofilikoane

**For accused:** Mr Hoeane  
Mr Mda/Mr Nthontho  
Mr Ts'abea/Mr Molati



**CRI/T/119/2010**

**CRI/997/10**

**IN THE HIGH COURT OF LESOTHO**

In the matter between

**REX**

Vs

**TELLO MABUSELA**

**ACCUSED 1**

**SEABATA RAMOHAJANE**

**ACCUSED 2**

**MAREKA NTHEJANE**

**ACCUSED 3**

**THABANG KOTELO**

**ACCUSED 4**

**THABISO SEPHULA**

**ACCUSED 5**

**EXTENUATING CIRCUMSTANCES**

**Coram** : Nomngcongo J.

[1] The accused Tello Mabusela and Seabata Ramahajane have been convicted by this court of the murders, in respect of Tello Mabusela of Thabo

Phohleli, Thabang Moliko and Malerato Maphathe and the attempted murder of Thabang Kotelo and the armed robbery of his property. In respect of Seabata Ramohajane of the murder of Thabo Phohleli and the armed robbery of his property only.

[2] In terms of section 296 (1) of the Criminal Procedure and Evidence Act where the High Court has convicted a person of murder it shall state whether in its opinion there are extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them. In deciding whether or not there are extenuating circumstances, the High Court is enjoined to take into consideration the standards of behaviour of an – ordinary person of the class of the community to which the accused belongs. (section.296 (2,)).

[3] **In Lebeta v R LAC 220 at 235** Ramolibeli J.A. (as he then)quoted with approval Holmes J.A. in **S V Letsolo 1970 (3) SA**, the principles involved in determining whether or not extenuating circumstances exist as follows.

*“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 blameworthiness of the accused as distinct from his legal culpability”.*

In this regard a trial court has to consider.

**(a) Whether there are any facts which might be relevant to  
extenuation or provocation (the test is not exhaustive)**

**(b) Whether such facts, in their cumulative effect, probably had a  
bearing on the accused’s state of mind in doing what he did.**

**(c) Whether such bearing was sufficiently appreciable to abate the  
moral blameworthiness of the accused.**

**In deciding (c) the trial court exercises a moral judgment. If its  
answer is yes, it expresses its opinion that there are extenuating  
circumstances”**

[4] Ramolibeli J.A. also referred to the celebrated case of **R V Fundakubi 1948  
S.A. 810 (A) at 818** where Schriener J.A said:

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

[5] In this case accused 1, Tello Mabusela did not give evidence either in his defence or in extenuation. It is difficult therefore to assess his state of mind in order to ascertain why he did what he did. We can only gather that from the evidence and what was said on his behalf in argument. The evidence in this regard is that a sister of his had been fired from work by the deceased and that he had possibly initiated criminal proceedings against her. It is argued that this had angered him into committing the murder of Thabo Phohleli and by extension the murders of Thabang Molikoe and Malerato Maphathe, the latter two because they had knowledge of the killing of Thabo Phohleli. The crown seems to share this view in respect of Thabo Phohleli but not so in respect of Thabang Molikoe and Malerato Maphathe. It was further suggested that the accused was an unsophisticated person.

[6] In **R V Mafela and Another 1980 (3) 825 (AA) at 829** in rejecting the submission that the appellant was a simple and unsophisticated young man who *“herded cattle in the rural lands”* and that he was influenced by a sense of grievance and injustice Jansen J.A. had this to say:

*“According to him (and this evidence has not been rejected by the court a quo), he had not been fully paid for the work he had done for*

*the deceased during his period of employment and he had twice approached the deceased in this regard but to no avail. However, the detailed and cunning planning upon which he embarked before approaching the deceased for the last time – a final approach that resulted in deceased death – does not speak of lack of sophistication, nor does the course of events give a picture of a man emotionally unbalanced by some grievance. On the contrary the planning and its execution bear the stamp of a man acting in cold blood for gain”.*

- [7] I entirely agree that for a grievance, anger as has been argued for accused 1 to avail him as extenuating circumstance it must be shown it so emotionally unbalanced him that he conducted himself in that manner that he did. In **S.V Ndwalane 1985 (3) SA 222 at 228 F – H**. the subjective nature of the inquiry was put in these terms (per Viljoen J.A).

*“The inquiry therefore is whether the circumstances are such that they are truly extenuating and if so whether they did influence the mind of the offender to commit crime. The youth who out of sheer wickedness kills his father and mother will rely on his youthful age in*

vain. *The plea of having been under the influence of liquor when he committed the murder will not avail an accused who commits a premeditated murder. And if there was provocation but the provocation did not really influence the accused to commit it will not assist him to rely thereon as an extenuating circumstance*".

[8] The killing of Thabo Phohleli in this case was a well planned affair. A1 first organized a driver whom he deceived by saying he was going to collect money that he was owed. He was armed with a gun. He obviously knew the exact time that deceased would be passing through to his home and he, PW1 and A2 lay in wait for him. He must have done a good research about his movements in order to be there at almost exactly the same time that deceased was arriving home. When deceased drove along approaching his home he said "*brother-in-law there is that man*". He had been lying in wait for his quarry. He wasted no time in abducting the deceased as soon as he alighted from his vehicle at the gate to his house. This was done brazenly and in broad day light.

[9] From his gate the deceased was taken in his vehicle and hand -cuffed. A1 directed the movement of the vehicle to a place on the banks of the Phuthiatsana River. The spot where deceased was taken appears to have

been selected in advance. Before he was shot A1 asked the deceased if he knew who he was, when he said he did not know, he (A1) told him that he was PW10's brother whom deceased had fired. Deceased offered to make amends for that and pleaded to be spared and be pardoned. All of this fell on deaf ears. He asked deceased to shut his eyes and pray. He then shot him twice in the head. He clearly shot him deliberately intending to kill him. He had *dolus directus*.

[10] The killing was in my view pre-meditated, well planned and executed with precise deliberation. The cold blooded manner and the deliberation of the accused do not suggest a person driven by anger. In anger one does not act with a total lack of emotion such as one was exhibited by A1.

[11] While we speak of anger, it cannot be forgotten that PW10, the very person whose firing A1 was supposed to be angry appears to have been shocked by the death of deceased. She then asked his brother why he had done it. He nonchalantly said he had done it for money. That and the other factors I have mentioned do not speak of a man influenced by anger.

[12] It will also be remembered that the cunning of the accused extended beyond the deed itself when he tried to cover his tracks. He made it a point

of travelling through the village of Mokhalinyane which is a village a considerable distance from the execution spot. That is the original home of the deceased and A1 knew this. There he deposited the identity documents taken from the deceased as a red herring so, that people might suspect that the killing had taken place there over some family quarrel. This shows the amount of planning that went into the killing of deceased.

[13] Regarding A2, I have already said he did not give evidence in his defence and he was convicted of murder and robbery on that basis. During extenuation he gave evidence. The net effect of that evidence was that he was raising a full defence on the merits of the case at that late hour. He says he did not give this defence at the appropriate time because he thought that at some stage he would be called to testify. It is not clear whether he expected to be called to testify on his behalf or of the state. I questioned him and then in particular his Counsel Mr Nku what all of this meant and whether he had not properly advised the accused of the legal position in this regard. I must say he was prevaricating and not totally forthcoming; his explanation of what happened was not satisfactory at all and I was left with impression that A2 might never have understood his right to give evidence in his defence. Be that as it may, having convicted the



accused there is nothing further that this court can do. This court cannot itself after a conviction and on the grounds of subsequent new evidence set aside its own conviction (See **S. V. LEEUW 1980 (3) SA 815** – the headnote).

[14] Having said that, I find no difficulty in finding extenuating circumstances in respect of A2. He was at all times under the domineering influence of A1. The killing of Thabo Phohleli was first and foremost A1's project and he directed it and everything else himself ordering PW1 and A2 about.

[15] Regarding the killings at Corneng, A1 again nonchalantly told PW1 that he had gotten rid of some nuisance who shared the same name as his (PW1's) and had bundled his concubine with whom he had found him. The bundling consisted of strangling the woman with a piece of wire. The police found her thus strangled and naked. Thabang Molikoe had been shot. The reason for the killing of Thabang Molikoe appears to have been that he knew something about the plan to kill Thabo Phohleli. Malerato Maphathe got killed apparently just because she happened to be with Thabang at the wrong place and the wrong time. The manner in which she was killed indicated that it was callous and cold blooded. A1's actions as always were deliberate and must have been premeditated and well planned. Again do not indicate.

[16] In sum total there I am of opinion that extenuating circumstances exist in respect of Thabo Phohleli A2 for the killing and that non exist in respect of A1 for the killings of Thabo Phohleli, Thabang Molikoe and Malerato Maphathe.

**T.Nomngcongo  
Judge**

10 September 2013

**For Crown :** Mr Thetsane  
Ms Mofilikoane

**For accused:** Mr Hoeane  
Mr Mda/Mr Nthontho  
Mr Ts'abea/Mr Molati

**CRI/T/119/2010**

**CRI/997/10**

**IN THE HIGH COURT OF LESOTHO**

In the matter between

**REX**

Vs

**TELLO MABUSELA**

**ACCUSED 1**

**SEABATA RAMOHAJANE**

**ACCUSED 2**

**MAREKA NTHEJANE**

**ACCUSED 3**

**THABANG KOTELO**

**ACCUSED 4**

**THABISO SEPHULA**

**ACCUSED 5**

**Coram:** Nomngcongo J

**Date of Sentence:** 12 September, 2013

**SENTENCE**

[1] The court now has to embark on the unenviable task of sentencing the accused having found them guilty on Count 1 of robbery, Count 2 the murder of Thabo Phohleli, of the two of which both accused participated,

the murder of Thabang Molikoe, the murder of Malerato Maphathe and the attempted murder of Thabang Kotelo. Only A1 was complicit in the latter three, No extenuating circumstances were found in respect of the murder convictions. They were found to exist in the case of A2.

[2] The crown has called for the ultimate penalty in respect of the murder convictions. The constitution of Lesotho guarantees the right to life in these terms in section 5(1):

1. *“Every human being has inherent right to life. No one shall be arbitrarily deprived of his life.*
  
2. *Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as a result of the use of force to such an extent as is necessary in the circumstances of the case.*

(a) .....

(b) .....

(c) .....

(d) .....

*or if he dies as the result of a lawful act of war or in execution of the sentence of death imposed by a court in respect of a criminal offence under the law of Lesotho of which he has been convicted.”*

[3] The sentence to be imposed on an accused convicted of murder is prescribed in section 297 (1) of the Criminal Procedure and Evidence Act 198 (1) read with (a 3) as follows:

*“29 (c) subject to sub-section (2) and (3) sentence of death by hanging –*

(a) Shall be passed by the High Court upon an accused convicted before it or by it and

(b).....

(3) The High Court may impose any sentence other than death upon any person convicted before it of murder if it is of opinion that there are extenuating circumstances”

[4] A reading of the Constitution therefore makes it clear that while every human being has an inherent right to life and that it cannot be arbitrarily deprived, the law may permit such deprivation in given circumstances such

as in the execution of the sentence of death imposed by a court in criminal proceedings under the law of Lesotho. Thus the constitution recognizes death as a permissible and therefore constitutional penalty.

[5] The law then in section 297 goes on to make such a penalty mandatory where extenuating circumstances do not exist. The court has no discretion in the matter according to the clear language of the statute.

[6] Like the killings of Thabo Phohleli and the other deceased the robbery of his vehicle and subsequently the groceries which he was obviously delivering to his waiting family was a methodical well planned and executed operation. It was part of the whole plan to kill the deceased. The deceased was taken to his place of slaughter in his own car. It was done in cold blood. One may recall in this regard that at one point PW1 testifies that subsequent to the killing he met A1 nattily dressed in black. When PW1 said he was afraid to go with him lest he make him join an operation such as that of killing deceased, he is reported to have replied that he does not dress like that for operations. This is a chilling answer indeed in its meaning and its implications. So A1 plans these activities even dressing up for the occasion.

[7] The attempted murder of Thabang Kotelo is in the same mould. He first of all took him to his home where he made collect his belongings and then to lie to his brother that he had found work in Bloemfontein. This in my mind is another his cunning red-herrings. His relatives would not miss PW1 thinking he was working in Bloemfontein. He then took him to a secluded place at Temong where he made them sit down. He made him wait there until dusk before he calmly shot him to the head. He then asked his companion to finish him off but the latter could not bring him to do it. The intention to kill him admits of no doubt. That he did not die is a miracle. PW1's fault was only that he would not be trusted with the secret of what happened at Phuthiatsana. PW1 was calmly shot at as they sat down chatting with appearances of geniality, as friends would do on a pleasant evening.

[8] In determining the appropriate sentence I consider:

**“The triad consisting of the crime, the offender and the interests of society” (S V Sobandla 1992 (2) SACR 613 (A) at 86 2(9).**

[9] The crimes committed in this case are obviously heinous and sentence must reflect that. The offender in the case of A1 paints a picture of a man devoid of the usual tender human emotions. He has no compaction. He has

shown no remorse and has said nothing to the end. Society must be protected against this accused. The ease with which he disposes of human life is simply chilling. A2, in my view was simply his tool in the execution of his crimes.

[10] I impose therefore the following sentences:

**COUNT 1** : Robbery

A1 : Ten years imprisonment

A2 : 2 years imprisonment

**COUNT 2** : Murder of Thabo Phohleli

A1 : The death of penalty

A2 : Ten years imprisonment. To run concurrently with  
Count1

**COUNT 4** : Murder of Thabang Molikoe

A1 Only: The Death Penalty

**COUNT 5** : Murder of Malerato Maphathe

A1 Only: The Death Penalty

**COUNT 7** : Attempted Murder of Thabang Kotelo

Twenty five years imprisonment



Pronouncement in terms of section 298 (1) of the Criminal Procedure and Evidence Act 1981.

“Tello Mabusela, you will be returned to custody and at a time and date to be determined you will be hanged by the neck until you are dead.”

My assessors agree.

- (i) It is ordered that the firearm the murder weapon used in the case be forfeited and destroyed.
- (ii) It is ordered that the exhibits being property taken from the deceased Thabo Phohleli be returned to his wife “Mapuleng Phohleli.

**T. Nomngcongo**  
**Judge**

**For Crown :** Mr Thetsane  
Ms Mofilikoane

**For accused:** Mr Hoeane  
Mr Mda/Mr Nthontho  
Mr Ts’abea/Mr Molati

