

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX

VS

SELLO JABAVU PAAMO

JUDGMENT

Coram: Hon. Hlajoane

Date of Hearing: 18th September, 2012, 19th September, 2012, 20th September, 2012, 21st November, 2012, 30th October, 2012, 26th November, 2012, 4th December, 2012, 6th March, 2013, 7th March, 2013, 13th March, 2013 and 20th May, 2013.

Date of Judgment: 21st August, 2013.

Summary

*The accused charged of murder and three counts of attempted murder –
Accused having been positively identified by three of the crown*

witnesses as the person who directed his gun at the students – Intention to kill based on “dolus eventualis” as opposed to “dolus directus” as accused foresaw the possibility of causing death but reckless of such result.

- [1] The accused appeared before Court charged with the crime of murder and three counts of attempted murder. He has however pleaded not guilty to all those counts.
- [2] The summary of the facts as presented by the prosecution has been that the students at the National University of Lesotho (NUL) had on the 22nd October, 2009 embarked on a protest march outside and within the campus. They were protesting against the late payment of their allowances by their sponsor, the National Manpower Development Secretariat, commonly referred to as Manpower.
- [3] The prosecution led evidence of seventeen crown witnesses in all including admitted evidence. The allegations having been that the accused on or about the 22nd November, 2009 and at or near NUL campus unlawful and intentionally killed one Matseliso Thulo and

attempted to also kill Papali Chabana, Retselisitsoe Hoala and Refiloe Mohono.

- [4] The defence at the close of prosecution's case applied for the discharge of the accused in terms of **section 175 (3) of the Criminal Procedure and Evidence Act¹**. The Court however having listened to arguments on both sides felt that there was a case for the accused to answer and reserved reasons for such ruling.
- [5] The defence led evidence of the accused himself and one other witness.
- [6] The evidence of P.W.1 Kokong Malefane, was to the effect that he was a police officer but was a student at NUL from 2004 to 2009. He was staying outside the campus. On the day in question he was attending a lecture but they somehow had to abandon their lecture to join those who were protesting outside. Though he never actually participated but he witnessed the protesting students standing in a group before the library building and requesting those

¹ Act No.9 of 1981

who were in there to come out. When those inside failed to come out the protesters started throwing stones at the library windows and breaking the window panes.

[7] P.W.1 again followed the students to the gate till they got to the outside of the campus. Some of the students burned a tyre and were singing in the process.

[8] It was only this witness who mentioned about a security officer at the gate firing his 9mm pistol at the students as students were throwing stones at the security officers. He said the firing was directed at the Mafikeng direction. He later saw police coming towards Maseru direction, one of them holding a pump action and the other one an SLR.

[9] One of those policemen was preparing his gun as though was going to shoot but did not shoot. The witness was still outside the campus when he heard gun reports though he did not see where they came from. This was after he had seen a group of students approaching the police with their hands raised up. The students ran towards Mafikeng and police were following them and the

accused was among them. It was after that shooting that he realized that one of the students was injured. She was taken to hospital.

[10] The witness said he did not see any blood on the injured student. He had lifted her T-shirt and looked at her back only and saw some small spots which appeared to have been caused by pellets. He saw that most of the police who were at the scene were armed with pump actions. He also saw a gallil that was carried by one of the police who came from Maseru, but the police from Maseru came after those who were injured had already been taken to hospital.

[11] According to P.W.1 when a pump action is fired in the air it would not cause any injury. He was saying that because he said he had used such a rifle during the riots as a police officer. The Court went out on an inspecting in loco to observe the place where the events took place. The witness had only heard gun reports but did not particularly see who amongst the police officers shot at the students.

[12] P.W.2 Mekhoa Mathe was also a student at NUL in 2009. She became aware of the students' protest against the delay in the payments of their allowances. Like P.W.1, P.W.2 was also not a resident within the campus.

[13] The witness saw the students coming from Maseru direction in a group as she sat in a taxi with one Lipuo at the gate. Students were walking in the main road. They came facing the police who were near Robertos behind their vehicle. The witness was seated inside the sprinter near the business centre which is near Rorbetos and opposite the main campus gate. She was with two other passengers though sitting at different seats.

[14] She said as the students were approaching the police got into the road and stood in a line and were carrying big guns. When the students were near Rorbetos, the police fired. Two of those police officers fired in the air but the third one directed his gun at the students. The students ran away taking different directions.

[15] After the shooting by the police had stopped he noticed some students approaching carrying one of them from between Rorbetos

and Kaycees. The students put that girl near the police van telling the police that she was their victim and even asking police to then finish her off. The injured girl was taken away in police vehicle.

[16] It was after some days that the witness said she saw that police whom she said had directed his gun towards the students. She even asked the person who was with her about the name of that police officer and she was told it was Paamo, the accused. She said she had been seeing the accused at Roma passing near the place where she stayed at ten houses to Mangopeng where he stayed. She even pointed at the accused in Court. She then learned of the death of the girl who was injured on the next day.

[17] The witness was asked about students throwing stones at the police but she said she never saw any stone throwing. This witness said she last saw when two police were pointing their guns upward, but the other one directing it at the students but that when firing began she ducked and hit herself in the sprinter. The witness was never called for any identification parade. She had heard many gun reports. When asked why she said it was the accused who shot at the students she said it was because he was pointing his gun at the students before she heard the gun reports.

[18] As already said by P.W.2, Lipuo Ramarothole as P.W.3 was seated also in the sprinter at the taxi rank opposite the NUL gate on the day in question. They were driven out of their lecture rooms by some students. As she was seated in the taxi she saw a group of students coming out of the campus singing. At the gate students clashed with security. Students threw stones at security but security beat them up and students ran out of the campus.

[19] There was burning of tyres by students outside campus. When police vehicle came, police armed with big guns alighted, and students ran away taking Maseru direction. The students came back and started throwing stones at the police and police started shooting. The taxi in which the witness was seated drove away running away from the commotion. It drove back to the taxi rank opposite the gate after some time.

[20] When the taxi drove back to the same spot the police were still there and the students were coming towards them. The witness went into another taxi there at the gate. The students were still coming towards the police and were singing. They had raised their hands up, as though surrendering according to the witness. But

police stood in a line in the road and started cocking their guns. There were four of them. The witness said police started shooting. All were pointing their guns in the air except for one.

[21] From the direction of Mafikeng after some time students came carrying one of them who was injured. In explaining the person who shot directly at the students she said, she did not know him, but that he was dark and hefty and facing away from her. That since police were all in their uniform that police was even taller than others. She said she paid much attention at the police who was pointing his gun at the direction of the students.

[22] According to P.W.3 there had been three incidences of shooting. The first being when police vehicle arrived, the second being when students were approaching police van. The third when students came with one of them who was injured.

P.W.3 said she was seeing that police who directed his gun at the students for the first time on that day. It was only after three days of the events that as she was with a friend she saw the said police and when she asked of the name of that police from her friend she was told it was Paamo who stayed at Mangopeng. The friend she referred to being P.W.2.

[23] It is to be remembered at this juncture that the same P.W.2 whom P.W.3 said was the one who told her about the name of the accused had also said a friend had told her of the name of the accused without mentioning who that friend was.

[24] The witness also was never called for any identification parade. But she denied when it was suggested to her that when P.W.2 talked of her friend she was referring to her. She said P.W.2 was the one who knew of the name of the accused when P.W.3 only had the features. Further that besides the four that were shooting there was a fifth police behind the taxi but was not the accused. She finally said when all these happened the time was around 1.00 p.m.

[25] P.W.4 Limakatso Rakhoro also said she was part of the students on protest. Same as the first three witnesses who have already given evidence she was also staying outside campus. She said when they raised their hands as they approached the police it was a sign that they were not fighting but only wanted to be allowed to enter the campus as she had to attend a 1.00 p.m. lecture.

[26] The witness said all the police who were there were armed. The police prevented them from going into the campus. She heard 9mm reports but could not say the police were the ones who fired. One of those police who were there was not in his uniform. But she did not know where the gun reports came from, as she never saw any of the police firing. The police were in uniform.

[27] She did not count the number of the police who were there. Some students later came after the shooting with one of them who was injured. She was taken to hospital with others who were also injured and she accompanied them to hospital in police van, and the victim was breathing with difficulty. She observed a wound behind her shoulder and had a metallic round object on her neck which she removed leaving a hole on the neck. She also had a bruise behind the left shoulder, and had her eyes closed. She later learned of her death.

[28] P.W.4 said she did not know where the shooting came from. She also said as she accompanied the deceased to hospitals he never saw any blood on her.

[29] ‘Madonakaze Ralahlehile became P.W.5 in this case. She was a street vendor at the time, selling vegetables outside the University campus at the gate. She was still seated outside the campus at her usual place of business on the 22nd October, 2009. It was her evidence that she witnessed everything starting from the confrontation between students with security at the gate and police and students outside the campus.

[30] According to this witness there was a conflict between students and the security at the gate and students started throwing stones at the security but students’ presidents in their red robes reprimanded them. Students’ representatives managed to stop students from throwing stones and the students went outside campus. They were singing and holding placards, sticks and branches from trees. Students were also reprimanded from closing the gate whilst security would be opening it.

[31] The witness saw the students walking down inside the road taking Maseru direction. They were still singing. The students eventually came back moving up to a business place called Speak Easy. They then started throwing out rubbish from the dust bins and putting stones in the road. The dust bins were also left in the road.

[32] When the students moved back towards the University gate they started burning tyres in the road. As students got to a place near the business place called Kaycees, police arrived at the bus stop in police van. She saw three policemen alight from the vehicle and they stood in the road near Robertos.

[33] The witness explained that there is a speed hump after passing Kaycees. As students passed that hump and seeing the police they raised up their hands and continued singing. She saw police carrying big guns in one hand but as students approached they carried their guns in both hands. As the police cocked their guns the students ran away.

[34] According to this witness it was at that time when students were running away passing Keycees and Robertos to Ha Chaolane that the police started shooting. Two of those police pointed their gun upwards whilst the third one directed his gun at the students, or at least at the direction where the students ran to. The police fired several shots.

[35] P.W.5 then said she saw that it was the accused before Court who directed his gun at the running students. She had known the accused even before that incident. He pointed at the accused before Court. She said she used to see the accused going about with other police officers, and what was unique of the accused was his uniform which though navy blue like that of others, his was very old even his cap. She even had to ask her co-workers about the accused with such an old uniform and that was when she was told it was Paamo. This was long before the incident as she had been seeing him between 2005 and 2008.

[36] The witness even knew that the accused stayed between Mangopeng and Liphakoeng. She then said after the shooting had stopped she saw some six students emerge between Robertos and Kaycees carrying a female student. Students were no longer singing. They got to the police van and put the female injured student near it asking the police to shoot them all and kill them after finishing their job with the one they had already shot. No response came from the police.

[37] The witness saw police drive away taking the injured student with them taking direction to hospital. She learned of deceased's death

the next day. The witness said she never heard any firing by the security guards at the gate in their confrontation with the students. She only saw students throwing stones at the security people but not at the police. And that the throwing of stones was at the time the students were still in the campus not when they were already outside campus.

[38] P.W.5 estimated the distance from where she was selling to the gate at four paces. The distance from where she was selling to where the police were at 20 to 25 paces, and that students' distance from police estimated at 15 paces. And the witness said she had a clear view of what was happening.

[39] When referred to her statement she said she never said that the police were pointing their guns downwards. She was adamant that whoever recorded her statement at some areas did not write what she had said. She further said she was made to sign before she had had chance to proof read what was written and that when statement was read back to her it was said she said guns were pointing up not down. Even under cross examination the witness denied when she was told that the accused was going to say he too fired in the air, but said unlike the other two policemen accused fired directly at

the students. Though it was put to her that there were five police officers at the scene she said she saw three policemen.

[40] P.W.6 Papali Chabana who also was a student at NUL in 2009 was amongst the students who protested against failure of payment of their allowances. She too joined the students who moved from the campus to the gate singing. She confirmed the burning of tyres and closure of the main gate by some students.

[41] They had earlier been in class but were forced to leave the lecture room when they heard some noise from outside. And when they came out they saw security chasing after students. Students were running all over the campus.

[42] Since P.W.6 was staying outside the campus at Mafikeng she and her friend decided to move to the main gate. That was where they joined other students who were already outside the campus coming from Maseru direction. They met those students who were moving towards the gate and were singing. There were already several police outside the campus around the university gate.

[43] P.W.6 and her friend then crossed the road and were to pass between Robertos and Kaycees when she heard gun reports. She then felt choked on her right foot as though she was electrified. She heard the second report and kept on running with others. As she was running she felt that her foot could not carry her any further, and blood was coming out of that foot. She was putting on a pair of jeans. She then had to roll her jeans up to see where the blood came from.

[44] Her friend shouted out for help and others came and took her to the police van. After she had been shot she had heard three other shots. Her friend Retšelisitsoe had also sustained an injury on her head and her braids had fallen off. The police took them to hospital at St Joseph's where she got admitted.

[45] When taken for x-ray it was discovered that there was a pellet that was struck in her leg under the skin but the doctor told her she could still live with the pellet still in her body, the front part of her leg. She was discharged the next day.

[46] P.W.6 had to go back to St Joseph's after some time to have the pellet taken out as she was developing some complications of not being able to bend her knee. The object was taken out which she said was a round metal. She left the object at the hospital.

[47] According to how she felt lately she said she would feel pains whenever its cold. The witness even showed the Court the scar on her leg running from the back part of her leg to the front below the knee. She handed in the medical form for her injury.

[48] The report on one part is filled by the police and the other side is filled by the doctor. The police filled in that the students at NUL were on strike and to disperse them police fired pump actions and victim got injured in the process on her right leg.

[49] The witness said when she heard a gun report she had left the police near the gate and had just crossed the road and was near Robertos. She never looked back. She said there were about five police officers but would not be exact as the number five was suggested to her by police. She knew they were police because they were in uniform and were carrying guns.

[50] P.W.7 Retselisitsoe Hoala told the Court that she was with P.W.6 on that day. She too was part of the strike. As they went out of the gate they saw police vehicle with police near it though can't remember the number. She could not even recall if police were in the road but they were carrying guns. She crossed the road from the gate with P.W.6 and one Khoboso.

[51] She saw other students coming up the road near kaycees to the gate and were singing. She managed to cross the road and when between Robertos and Kaycees she heard a gun report. She heard P.W.6 cry out to say she had been shot and as she said that the witness also sensed something like an electric shock on her head. Part of her hair had fallen down. Her fingers came with blood as she touched her head. She also realized blood on P.W.6's leg. Police took the injured to hospital.

[52] The witness handed in the medical report for her injury. It was his evidence that after that injury she has developed a persistent headache so much so that she only lately manages to read for only one hour in her studies. She could not even estimate the distance

she was from police when she heard gun reports as she said she never looked back.

[53] P.W.8 Kamohelo Mojakisane a retired police officer since May 2011, told the Court that he was stationed at Roma in 2009 when students went on strike. He was the one who was instructed by his senior Inspector Bokaako to go to the armoury and allocate pump action guns to other police officers to go at NUL and quell the situation.

[54] P.W.8 said since it was during lunch hour he only managed to find three police officer to whom he allocated each a pump action and ammunition. To use his words, he said since they were rushing to the scene he did not bother to register as to whom a particular gun and its ammunition was allocated to. He would therefore not know as to who used which gun and the ammunition. He went out with Trooper Kotzee, Trooper Motseki and Trooper Leteba. His evidence was that normally he ought to have registered those guns and to whom each was allocated.

[55] The witness instructed the three officers in his company as to how they were going to disperse the mob. That was to be by firing in the air. According to P.W.8 as they got to the campus gate, a group of students who were in the road ran downwards on seeing police vehicle. As they alighted students started throwing stones at them and they fired immediately they alighted their vehicle.

[56] He then ordered for reinforcement and two other police officers joined them, but the two were not armed. It was Thamae and Mohloki. Since the students had run down the road he saw them making fire in the road. Three other police later joined them. They were Trooper Paamo, Trooper Maphooe and Trooper Thoola. Out of the three it was only Maphooe who was not armed but Paamo and Thoola had their pump actions.

[57] The witness then said he ordered Motseki, Thamae, Mohloki and Leteba to go down to where the students were to disperse the crowd that had made fire in the road. He gave his gun to Thamae and Mohloki took one from Trooper Kotzee. Since the witness was not at the office when Paamo and his group left to join them it was hearsay for him to have said it was Senior Inspector Bokaako

who issued the guns to them. He also ordered Paamo and Thoola to disperse the students.

[58] He confirmed that when the students came up towards the gate and close to the police they had raised up their hands. He also confirmed that they were standing in a line facing the students. Stones were thrown at them from behind. He once again ordered the police to fire in the air to disperse the students. He gave out his order, "shoot and disperse," and the police fired in the air. But he said the guns were slanting as police fired not straight up, but towards the students. Police fired about five times though he could not be exact. He saw students running on first gun report. They ran to between kaycees and Robertos. He said students kept on running on subsequent shootings.

[59] He then saw some students approaching them carrying one of them 5 to 10 minutes after the shooting had stopped. When he saw that he became frustrated as he had seen no other people shooting except the police. The guns used pellets as their ammunition. He explained that the pellets only scatter after they would have left the barrel at a certain range, and that when they so disperse they could hit more than one victim. Such pellets could cause such fatal

injuries resulting in death. That the guns that were used were seized by the investigating team.

[60] The witness said the guns were not registered as they were issued out to the police, so that it was not possible for him to say who used which gun. He considered the situation to have become intolerable as the students kept on approaching them throwing stones at them. He then ordered the police to shoot and disperse and took it that the police understood the command clearly. He said it was a lie for P.W.1 to have said that one of them had an SLR as none of them had such a gun. He however did not rule out the possibility that one of the police could have shot directly at the students. At any rate he had said in his statement that he did not see things properly.

[61] The witness said the shootings were in fact directed towards Kaycees and Robertos which was the place where the students ran to. He had ordered the police to shoot yet he was not even sure as to what the results would be as he and others of his team were using that type of a gun for the first time. He even said the estimation of the range was hearsay as he had been told by others.

He included the accused amongst those whom he said were using pump actions for the first time.

[62] P.W.9 Refiloe Mohomo told the Court that she was also a student at NUL when the students went on strike in 2009. She saw some students near the gate who had raised up their hands and were singing. Other students were between Robertos and Kaycees.

[63] The witness had not seen when the police arrived but when she saw them they had their rifles though could not remember their number. She ran away at the sound of the gun report but could not tell the number of shots she heard. She was running towards Kaycees when she realized that she had been shot as she fell. She could no longer move forward. She became numb and could no longer see things properly. She too was taken to hospital in police van.

[64] Because of the injuries P.W.9 was hospitalized. She had injuries on her hand, neck and spinal cord. The x-tray showed her injuries and she handed in the report for the injuries. The pellets were still

trapped on her neck even as she gave her evidence. Also trapped on her shoulder, even in her lungs and spinal cord.

[65] According to this witness the doctor had told her that the pellets were better left trapped as they were at a dangerous spot. The doctors are waiting for the time when the pellets would have come closer to the skin, then can be removed. Even the one at her spinal cord was still trapped in her as it was said to be at a dangerous spot. About three to four pellets were still trapped in her body as she gave her evidence.

[66] P.W.10 Sergeant Sehau proceeded with investigations in this case. In his investigations he got five pump action guns from Roma police alleged to have been used by Police in their efforts to quell the situation during the strike by NUL students during their strike. He got the guns from Senior Inspector Bokaako after the post mortem was conducted on the body of the deceased Matšeliso Thulo. There were pellets found in the body of the deceased.

[67] He took the guns for ballistic examination after which he filled in LMPS 12 form and presented them before the clerk of Court. He

recorded their serial numbers. He also handed over the two pellets that were found in the deceased's body.

[68] The witness took the guns from Roma Police for examination a week after the events. Though he had said in evidence that he filled in LMPS 12, under cross examination he turned from that to say could have been him or someone else who filled the form. He said it was a mistake that the date was not reflected.

[69] When confronted with the statement that the instructions were that the guns were taken from Roma Police a year after the events he said that could not be true as it was on the 24th November 2009 or thereabout when he submitted the guns for ballistic examination. It was also put to him that accused knew that as a fact since they had been using those guns thereafter. But the submission form was not produced in evidence, the reason given by the witness being that his evidence was only on firearms. He also denied that an SLR weapon was used on that day.

[70] The witness said considering the state of affairs of that fateful day the guns were just issued without first having been registered, so

that it was not easy to establish who carried which weapon. He said even on their return after use they were only seized and kept. Even from the ballistic examination it was not established how many times had each fired. Also not clear as from which gun the pellets were fired.

[71] P.W.11 Senior Inspector Pali, an already retired police officer told the Court that he was well trained in the kind of job he was doing as firearm examiner. His training helped him to ascertain a used firearm and relate it to the cartridge collected from the scene of crime.

[72] He had been given 5 firearms to examine by P.W.10 on the 4th November, 2009. They said they were Mossberg 12g short guns. He gave out their serial numbers. He was given the two pellets which were before Court and said were AAA lead shot. He said there would be 35 such leads in a cartridge though smaller ones would be 100 or more. The two pellets were given to them the same day they were given the five firearms. He even demonstrated how the leads would be housed in a cartridge. He said the cartridge could be fired by any gun hence why he said they were standard.

[73] That if the gun had been cleaned it would not be easy to tell the range when it was fired. It would also not be easy to tell if a gun had been fired or not. The following were the serial numbers of the firearms he examined;

S/N M10876

S/N M1574

S/N 1300

S/N 1636

S/N 10508

and out of those five only four had residue showing they had previously been fired. They were the following;

S/N M1300

S/N M1636

S/N 1574 and

S/N 10508

[74] The witness had compiled a report after his examination. He explained that the pellets if fired within the range of 40-60 meters

could kill. That when fired they travel for some distance in the air before they disperse. And that after the shooting the cartridge case will be left at the scene where the shooter was standing. To make the Court understand how the particular firearm operates, he said when one has fired the pellets would not go out all at once but will go out as one pumps, whatever that meant. The pellets would injure many people at once depending on the range. The range would also be affected by the size of the gun and bullets used. He said the fact of the matter was that since people got injured at the back that was a sign that the shooter was behind them. His report was handed in as part of his evidence.

[75] According to this witness if the pellets hit a person still intact before they explode they would go through the body. That would be at a short distance, but in a distance of 25 to 35 meters would cause perforating wounds. He said the firearms he examined had been brought to him on the 4th November, 2009.

[76] The witness explained what an occurrence book is. That it records everything from crimes reported, assumption on duty, going on leave and allocation of firearms and who released them. The witness read the minutes of the 17th November, 2010 in the

occurrence book. That the guns were handed over to him by one Moloï on the 3rd December, 2009. That the five pump actions with serial numbers as already stated earlier on were released as exhibits on the 17th November, 2010 and given to Mokhesi and Maseli. He said the date reflected 21st November, 2012 was when he downloaded the information from the computer when preparing to come to Court.

[77] Things were suggested to him that the guns were used somewhere else after the 22nd October, 2009 and had also been used by Senior Inspector Masupha for training and the witness showed he was not aware of that.

[78] There were statements that were admitted in evidence. The statement of deceased's father, Mojalefa Thulo who identified the body of the deceased before post-mortem examination was performed as being that of Matseliso Thulo. The statement of Trooper Ramaputle who inspected the body of the deceased at Roma mortuary and discovered bruises at the back of the shoulder with three open wounds at the back. Detective Police Constable Kontane one of the investigating team, had filled LMPS22 form as an application for the post-mortem to be performed at the then

Queen II hospital and took photos of the body before and during the post-mortem examination. He also compiled an album of the photos of the deceased.

[79] The other admitted evidence was that of Detective Sergeant Moletsi who also examined the body of the deceased Matseliso at MKM mortuary on the 26th October 2009. He observed four open wounds at the back, three open wounds on the right upper arm and one open wound on the left upper arm at the back.

[80] Dr. Moorosi became P.W.16 as a qualified Pathologist. He had performed the post-mortem on the body of the deceased Matseliso Thulo on the 27th October, 2009 at Queen2 hospital. He discovered small penetrating and perforating wounds. He described penetrating to mean going in and not going through and perforating to mean getting in and passing through. The wounds were on the posterior of the chest. He counted seven of such wounds.

[81] On opening the body he discovered that the wounds had perforated the heart and the heart was swimming in blood. Photos were taken

of the observations. There was also perforation of the left lung which caused it to collapse and had become smaller. There was also a perforating wound of the liver. He also found a metallic object from the liver. An x-tray that he requested for the whole body helped the doctor to find yet another metallic object in the left elbow. The two metallic objects were handed over to the police. He formed an opinion that death was due to perforation of the lung and the heart, which caused the lung to collapse.

[82] The doctor had also filled in a form H26, form A, which was attached to the post mortem report. It is a picture form showing where the wounds were located. It reflected that the wounds were mostly located at the back of the chest and both arms. Both reports handed in collectively as exhibits. That the wounds must have been caused by the pellets which were later found in the body.

[83] P.W.17 Senior Inspector Mokhesi was one of the investigating team in the case before Court. He said in their investigations Senior inspector Bokaako handed over to them some firearms. It was on the 23rd November 2009. He was not sure if such firearms were registered before being handed over to them, but said he hoped it was by Senior Inspector Bokaako. He was also present

when the post-mortem was conducted on 26/10/09. He realized that two pellets were found in deceased's body.

[86] The witness could not remember the date when the pellets were taken for ballistic examination. They were given back from ballistic exam during the first week of December. They were later taken back to Roma but was not certain whether they were registered when taken back to Roma. Could not even remember if such rifles were exhibited at the inquest proceedings. He said the guns were pump actions. He was allowed to refresh his memory from his report in giving out the serial numbers of the guns, mosbegs numbers M10508, M10876, M1636, M1300 and M1574.

[87] In cross-examination he changed the date which he had given for collecting firearms from Roma. He had said it was on the 23rd but changed to 26th which he said was when their investigating team was formed. He mentioned that the issue of dates in ones investigations was crucial but realized that his report had no dates.

[88] The witness further said that he had filled in LMPS 12 when the firearms were presented to the clerk of Court. The clerk of Court

ordered that they be taken for safe keeping till the trial date. He was then instructed by Assistant Commissioner, Letsie, to take them back to Roma despite the order of the Clerk of Court. He described that as an abnormal procedure because it was expected of him to have kept the firearms safely after he had presented them to the Clerk of Court. He finally said in terms of the law he ought to have kept the guns as exhibits and not to have been used.

[89] At the close of prosecution's case counsel for the accused applied for the discharge of his client in terms of **Section 175(3) of the Criminal Procedure & Evidence Act 1981**. In motivating his application counsel indicated that the crown has relied on circumstantial evidence as none of its witnesses said they positively saw the accused shooting directly at the students.

[90] The defence mentioned that P.W.2 and 3 said accused shot at the direction of the students. P.W.3 had further described the person who directed his weapon at the students by his complexion and body build. She even said he was taller than others, dark and hefty. She was later told of the name of that police to be Paamo by P.W.2, but no identification parade was ever made. P.W.5 also said she saw the accused shooting directly at the students. She was

talking about the person whom she knew so well as she used to sell vegetables at the University gate and had been doing that work for years at the same spot.

[91] The defence further showed that the LMP12 for submission of firearms to the Clerk of Court by P.W.17 has not been produced before Court. So that the exact date when that was done if at all, has not been ascertained. There has only been a record in the occurrence book showing that the firearms were released on the 17th November 2010, a year after the events of the shootings. He considered the investigation to have been conducted in a shabby manner. The guns were also just dished out to the police without having first been registered to show who took which gun and what ammunition.

[92] The Crown conceded there might have been some inconsistencies here and there but that was yet not the time to decide on them at that stage of the proceedings, **Putsoa v Rex**². He persuaded the Court to find that there was a case to answer, which the Court did, on exercising its discretion judicially.

² Putsoa v Rex 1974 – 75 LLR 201 at 202

[93] The defence was alive to the fact that it was yet not the time to consider the question of credibility as was the case in **Rex vs Dlangamandla**³. But that where the issue of credibility is of such a poor quality it could even be considered at that stage.

[94] The Court however decided that there was a case to answer based on the evidence of P.W.2, 3 and 5 as will be seen later.

[95] The accused took the witness stand and testified. He told the Court that on the day in question he was called to the armoury department at his place of work at Roma Police Station. He was called by the station commander Inspector Bokaako. He was issued with a pump action rifle together with Maphooe and Thoola. They were detailed to go and quell the situation at the University gate.

[96] They were near the filling station near the campus when he noticed NUL students moving up and down in a group taking the direction down to Ha Sekautu. There was smoke amongst them. He said before they got to that place some police officers were already

³ S v Dlangamandla 1999 (1) SACR 391

dealing with the situation. They were Mojakisane, Kotzee, Tumahole, Motseki and Mohloki. Mojakisane was in charge of the operation.

[97] He saw the students coming up towards Roma business centre in a group. Accused and his group were five in number. The students came towards them singing with some objects in their hands. Mojakisane ordered the police to stand across the road in a line facing the students. When students were about 7 to 10 meters away, some raised their hands whilst others started throwing stones at them (police).

[98] As students threw stones at the police the witness said Maphooe fired in the air. He said he listened to the command by Mojakisane. He too said he started firing in the air twice and saw the students disperse. The students ran in different directions. Some ran into the campus whilst others ran to Chaolana's place. He said he fired upon instruction by the commander. He was not the only one who fired in the air. After that he went back to his office and put the gun away.

[99] He was not aware if the weapons were ever taken for ballistics examination. He knew of the date of the 17th November, 2010 when the guns were collected from Roma Police Station and were recorded in the occurrence book. But that after the events involving the students the same guns were used by Senior Inspector Masupha for police training. This was a week after the NUL disturbances. The same pump actions were used to quell the situation by St. Michael's students who had burnt down some property.

[100] Though the witness said he had fired twice in the air on Mojakisane's instructions he also said he fired as he saw Mojakisane fire in the air. He did not give the serial number of the gun he used at NUL disturbances.

[101] The accused also confirmed that if the deceased had sustained injuries at the back it would mean she was facing away from the shooter. But said as he was standing on the right side of everybody during the shooting he was able to see that each one of them shot in the air. He again said if pellets were fired in the air and came down due to force of gravity such pellets would cause no harm.

[102]The accused however said he listened to P.W.5 when she said she saw him shooting directly at the students, and he still insisted he fired in the air. He did admit that he was staying at Mangopeng where the witness had said she had been seeing him come from to his place of work, and passing near where the witness was working at the gate.

[103]P.W.5 had also described the accused as a police officer who was wearing an old uniform which had almost turned pale together with its head rest. In cross examination when accused was asked if his uniform was as old as was described by the witness he said they were all putting on the same uniform, accused had said he did not even know the witness. The accused said he only felt that he was being framed by the witness. Will come to that issue of uniform later.

[104]Police Constable Thoola who was also working with the accused at Roma at the time told the Court that on the 22nd October 2009 they were hurriedly called from their lunch by station commander Senior Inspector Bokaako. At the office they were alerted of the strike by NUL students. They were issued with firearms and ordered to rush to the campus. They had found accused already at

the office. They were issued with two pump actions and an SLR as they were three with Maphooe. He and the accused had pump actions whilst Maphooe had an SLR.

[105]When they got at the University gate they found Sergeant Mojakisane and Kotzee already there. He saw the students in a crowd near ha Sekautu and were burning tyres. There were some police officers with them trying to stop them from doing what they were doing. He saw the students coming up towards them singing. Sergeant Mojakisane ordered them to stand in a line in the road as students were near Kaycees.

[106]As the students came closer to them they started throwing stones at the police. Sergeant Mojakisane ordered them to fire and they fired in the air all of them. He said he fired twice and some students ran away but others kept on throwing stones at them. He said as they ran away there was a gun report fired between speak easy and Kaycees. There was quietness and after a short while students came carrying one of them.

[107]As they came P/C Maphooe fired in the air once again and the students ran away except those who came carrying one of them. The student was injured and was taken to hospital in police van. The police then went back to their station. They took back the weapons to where they were kept. He said the guns were taken to Headquarters but would not know if they were examined.

[108]The witness read some minutes in the occurrence book which reflected the handing over by Senior Inspector Moloji of five pump actions to Senior Inspector Mokhesi and Sergeant Moseli on the 17th November, 2010 as exhibits. He called them Mossbergs of the following serial numbers:

SN AM 10508

SN 1636

SN 10876

SN 1574

SN M1300

The book was handed in as an exhibit.

[109]The witness said he never offered to make a statement as he was never approached by anyone. Also that when they so fired they were facing each other with the students, and were about ten meters away from the students. When it was suggested to him that all the students who were injured had the injuries at their backs, he had no comment to make.

[110]Looking at the evidence of both the Crown and the defence it would be realized that there has been no dispute that there was a strike by the NUL students at Roma on the 22nd October, 2009. As a result police were invited to go and quell the situation.

[111]The number of the police officers who attended the scene has not exactly been established as they did not all come at the same time. But among those who were there, was Mojakisane, Kotzee, Motseki, Leteba, Thamae, Mohloki and Maphooe, Thoola and the accused later joined them.

[112]The police were armed with pump actions with pellets as their ammunition and they had all fired with the aim of dispersing the crowd. It has been the defence case that they had all fired in the

air, but P.W.5 said she knew the accused well and that possibility was not denied by the accused. The witness even mentioned where the accused stayed and she happened to have been correct.

[113] Evidence has shown that the deceased had all of her injuries at the back and that was a clear indication that she was facing away from the gun that shot her. As for the three that were also injured Retselisitsoe Hoala, P.W7 had a scalp laceration on the left parietal area, P.W.6 Papali Chabana had an injury on the frontal part of her leg and the pellet is today still stuck in her leg. P.W.9 Refiloe Mohono was shot as she ran away and sustained injuries on the upper part of her right arm, the right side of her neck and on the right hand. As P.W.9 gave her evidence she still had pellets trapped on her shoulder, her lungs and spinal cord.

[114] In the evidence presented before this Court we have not been told that there were other people who were at the scene armed with pump actions except the police. They were not only armed but fired from such rifles. The only question to be decided therefore would be who among them caused the death of the deceased and injured three other students.

[115]The evidence of P.W.2 Mekhoa Mathe has been to the effect that she was seated in the sprinter when she saw three police officers armed with guns. She saw two of them pointing their guns upwards with the third one directing his gun in the direction of the students. She ducked on the sound of the gun reports.

[116]P.W.2 said she had before the incident been seeing the police whom she said directed his gun to the students. She would see her at Roma passing near ten houses where the witness stayed to Mangopeng. When asked why she said it was the accused who shot the students her response was that it was because accused was pointing his gun at the students before she heard some gun reports. She even pointed at the accused before Court. She had asked the person who was with her some days later when she saw the accused about accused's name and that person said it was Paamo, the accused.

[117]P.W.3 Lipuo Ramorothole on the other hand also said she was seated in the sprinter on the day in question when she saw four police all in their uniform at the scene. She said three of them were pointing their guns upwards as they were shooting but the fourth one was directing his gun towards the students.

[118] Three days after the incident when she again saw the police who was shooting directly at the students, she asked P.W.2 about his name and she was told it was Paamo, the accused. On the day of the shooting she had only said he was taller than other policemen of his team and that he was dark and well built. She even said she was paying much attention to the said police whose gun was directed at the students during the shooting.

[119] P.W.5 'Madonakaze has been an eye witness. She knew the accused well and she had been doing business of selling near the NUL gate for some years and had been seeing the accused pass in his old uniform. She saw accused and other two police shooting on that day in question. That the other two had their guns pointed upwards but accused was shooting directly at the running students. She said police fired several times, after which she saw some students approaching the police carrying one of them who was injured.

[120] The doctor's report on examining the body formed the opinion that death was due to perforation of the lung and heart. Most injuries were at the back of the deceased's body. Two metallic pellets

were found in deceased's body. The police report on injuries on the deceased's body showed several wounds at the back, also at the back of the left upper arm and the back of the right upper arm.

[121]P.W.9 Mohono had injuries on her neck, right shoulder and right hand. The x-tray that was taken revealed some pellets still trapped in her body, neck, shoulder, near her lungs and spinal cord.

[122]P.W.7 Hoala had a scalp laceration on the left parietal area which injury has caused her to develop persistent headache. This has disrupted her studies as she said she could no longer study for anything more than an hour.

[123]P.W.6 Chabana was shot on her leg, the right foot and as she gave her evidence the pellet was still stuck in her leg. The x-tray showed the pellet was stuck under the skin and the doctor explained that she could still live with it.

[124] Considering the important factors on the issue of identification of a particular person the Crown referred to the case of **Koenyama Chakela vs Rex**⁴ where it was stated thus;

“that previous knowledge of the person sought to be indentified is one of the most important factors in identification, in that probability of an accurate description is much increased. The important factor is the degree of previous knowledge and opportunity for a correct identification having regard to the circumstances in which it is made.”

[125] P.W.2 had been seeing the accused even before the events of the shootings. She used to see him quite often as he went passed on his way to Mangopeng where he stayed. She even indentified the accused in Court.

[126] P.W.5 also knew accused even before that day of the shooting. She used to see him in the company of other police officers and used to remark about his shabby and old uniform which had lost the navy blue colour but turning light. That was how she got to know of his name. She even knew where the accused lived. So that the identity of the accused was without question on that day,

⁴ 1971-73 LLR 105 at 107

particularly by P.W.2 and 5. P.W.3 only corroborated what had already been said by the other two witnesses on the identity of the accused.

[127] In cross examination when the accused was confronted about his old uniform he was being evasive. When asked if it was true his uniform unlike that of others was just too old he replied by saying all police uniform is the same. The Court even had to ask him to answer the question that was being asked but kept on saying it was navy blue like that of all other police officers.

[128] Considering the evidence of P.W.3 the test as the crown pointed out would not be whether he had intention to deceive the Court, but whether his evidence could be relied upon to corroborate critical important evidence of indentifying the accused, **Lempe vs Rex**⁵

The Crown submitted therefore that the identification of the accused as the person who shot directly at the students has been adequately proved.

⁵ 1997-98 LLR and LB at 221

[129]The accused was at the scene together with other police officers. Crown evidence has shown that the police were in their uniform and that was not denied. Also that they were armed with pump actions which used pellets as their ammunition. The injuries on the deceased and other students who were also injured were caused by pellets. Some of the pellets found and seen in the bodies of the victims.

[130]Having dealt with the identity of the accused as the person who was seen shooting at the direction of the students who were running away, the question that follows would be whether the accused had the necessary intention to kill the deceased and whether causing injuries to some students was wrongful and unlawful.

[131]More focus will be placed on the expression “intention to kill”, in relation to count 1. The accused, not just an ordinary person, but a police officer of 20 years service and well trained in the use of firearms. He said if the pellets were fired in the air they could not have caused any harm to the students when they came down.

[132]The Court has already said that the accused has been positively identified as the person who directly shot at the students. The accused, a police officer when he so directed his shots at the students was subjectively aware of the possibility of causing death but was reckless whether it did ensure or not, see **S vs Siqwahla**⁶. The Court in Siqwahla *supra* explained the expression “intention to kill”. That it suffices if the accused subjectively foresaw the possibility of the act causing death and that the accused in this case had been reckless of such results. The form of intention was one known as “*docus eventualis*” as opposed to “*dolus directus*”.

[133]The defence contended that the crown is relying on the circumstantial evidence as none of the witnesses saw the deceased being shot and those others who got injured. True enough P.W.2 had said she ducked at the sound of the gun report, but before that she had seen that it was the accused directing his gun at the students. The same with P.W.3 who said she indentified accused by his features and was later told it was the accused.

⁶ 1964 (4) S.A 566 at 570

[134] The defence has also relied on the distances of the witnesses which they have given showing how far they were from the police. Such distances were not exact but just estimations.

They could have been even closer or further away from the police, but the fact of the matter is they clearly saw the police from where they were. We have been to that place on an inspection in loco. The place is just open except when one leaves the main road taking the direction between Robertos and Kaycees.

[135] The Court thus find that the crown has managed to adduce evidence which has positively indentified the accused as the person who shot directly at the students, resulting in the death of the deceased Matšeliso Thulo and injuring the three complainants, Papali Chabana, Retšelistsoe Hoala and Refiloe Mohono.

May the accused please stand up.

[136] On the evidence presented before this Court, you are thus found guilty as follows:-

Count 1: Guilty of murder of Matšelisio Thulo

Count 2: Guilty of attempted murder of Papali Chabana

Count 3: Guilty of attempted murder of Retšelisitsoe Hoala

Count 4: Guilty of attempted murder of Refiloe Mohono

Postponed to 2nd July, 2013 for extenuation. Bail extended.

My Assessor agrees with my findings.

In Extenuation

[137] The Court was addressed at length by both counsel on extenuation. Counsel for the accused submitted that the accused could not have gone to the scene had it not been because he was detailed by his superior to go and quell the situation armed with a pump action loaded with pellets. He further said that the accused went to the scene on instruction of going to protect the NUL property. It was only unfortunate that his conduct on that day caused ultimate death to the deceased and injuries to other students. Counsel referred to the circumstances of that day as unusual, and referred to **S v Mnisi**⁷.

[138] The defence submitted that accused was not going to commit similar acts in the future. This came from counsel as he was addressing the Court on extenuation. The crown responded by showing that the defence's submissions could have carried more weight had the accused taken the witness stand and later be cross examined.

⁷ S v Mnisi 2009 (2) SACR 227

[139] Referring to the case of **R v Maliehe and Ors**⁸ the crown referred to the passage where the Court said,

“One of the most vital principles around which the determination turns for the finding that extenuating circumstances exist, is the existence of proof or substantiation on evidence by the accused on a balance of probabilities that such circumstances do in fact exist.”

[140] The crown said the above from **Maliehe supra** still mindful of the provisions of **S296 of the Criminal Procedure and Evidence Act (CP&E)**⁹ which enjoins the Court to *mero metu* get some established facts from the record in an effort of determining the existence or otherwise of extenuating circumstances.

[141] The crown further referred to the case of **Serine v Rex**¹⁰ where the Court on Appeal had set out some three factors of enquiry relating to existence of extenuating factors as follows:

⁸ R v Maliehe & Others CRI/T/2/1992 (unreported)

⁹ Criminal Procedure and Evidence Act No.9 of 1981

¹⁰ Serine v R 1991-92 LLR & LB 42

- (a) Whether there were at the time of the offence circumstances which could have influenced the appellant's mental faculties of mind, if so
- (b) Whether such factors did subjectivity influence him.
- (c) Whether such subjective influences, according to the objective assessment of the Court, rendered the offence less blameworthy. **S v Mongesi and Another**¹¹.

[143] On the authority of **Maliehe** *supra*, despite the fact that the accused had a discretion either to rely on the evidence presented before Court or on his evidence after conviction to discharge the onus, it was found to have been of vital importance to lay a foundation upon which the Court could base its finding as to the existence or otherwise of extenuating circumstances. The Court in that case in dealing with evidence for extenuation said,

“such self serving statements ---- which have not been tested in Court by cross examination cannot constitute evidence which the Court is entitled to take into account.”

¹¹ S v Mongesi and another 1981 (3) S.A 204 at 207

[144]I have already indicated above that the section in the CP&E referred to dealing with extenuation enjoins the Court to state whether in its opinion there exists any extenuation. What was put forward by the counsel for the defence would not be considered as extenuating circumstances but rather aggravating. For a trained police officer of such vast experience to have acted in the manner that accused did was not justified. He joined others already at the scene and had been armed with a rifle using pellets. Good enough, but he still had to exercise care in dealing with the situation.

[145]I do agree with him that it was an unusual situation as the students were on strike, but since he came later there was no longer the issue of protecting any property as the students were already outside the campus. What only remains is the fact that as the Court said earlier on in the judgment, he was reckless in the use of his firearm in directing his gun at the students. The fact that accused must be taken not to have intended the killing but became reckless and that nothing was said about his pre-meditation are to be considered as extenuating circumstances.

[146]The accused's verdict in the circumstances of this case should therefore read:-

Guilty of murder in count 1 with extenuating circumstances.

Sentence

4th September, 2013

[147]The accused has already been found guilty of murder with extenuation and three counts of attempted murder. The only mitigating factor that this Court considered to be material is that the accused is the first offender. In passing sentence therefore the Court is going to consider that mitigating factor.

[148]The Court is also going to strive to pass the sentence which it considers to be reasonable, but reflecting the moral blameworthiness of the accused coupled of course with the seriousness of the offence. The sentence has to be in keeping with the particular offence and the specific offender.

[149]The crown relying on **S v Diedericks & Andere**¹² showed that in passing sentence both the mitigating and aggravating circumstances have to be taken into account and weigh the two. Similar consideration was echoed in the case of **S v Thonga**¹³ of

¹²S v Diedericks & Andere 1969 (3) S.A. 270

¹³ S v Thonga 1993 (1) SACR 365

taking an objective consideration of all relevant facts, mitigating and aggravating in passing sentence.

[150]The other important guiding principle when it comes to dealing with sentence is that the trial Court must jealously guard the fine line between raw revenge or emotional punishment and the Judicial, reasonable and objectively balanced exercise of discretion. That has been provided for under our **Criminal Procedure and Evidence Act Section 302.**

[151]I have considered that the sentencing process is as distinct and vital a factual enquiry as the determination of the guilt of the accused. Hence why it is for counsel to selectively choose whether to lead evidence on both extenuation and mitigation.

[152]Counsel for the accused has submitted that accused is remorseful and that he is not going to commit similar wrongs in the future. It was still perfectly in order for counsel to have addressed Court in mitigation on behalf of the accused, but there are instances where the how part of an undertaking ought to have been answered.

[153] In the instant case the Court is left in the dark as to what guarantee there is for accused to have promised not to commit similar acts. There has also been a mere recital of the words of remorse. We have seen in some cases that an accused will have pleaded guilty or contributed in the burial of the deceased as a sign of remorse. But in this case we have heard only those words from counsel.

[154] The unusual circumstances of that day of the killing was melted down by the fact that though there had been damage to the property at the campus when the accused arrived the students were no longer inside the campus but outside. Even the nature of the injuries sustained bear testimony to the fact that the students were facing away from the accused and his team, they were running away. They were no longer posing any danger to the police.

[155] The Court always strives to leave room for flexibility in dealing with sentencing because no two cases are absolutely identical. Even punishment shouldn't be imposed in *abstracto* but with specific reference to the convicted person.

[156] The question of firearms having not been registered has no bearing on the question of sentence.

[157] But before passing the appropriate sentence, I must register the Court's concern regarding the manner at which the operation to deal with NUL situation was conducted. When officers were detailed with the pump actions to go and quell the situation the issue of registering the guns and ammunitions might have been seen as a waste of time, but when they were back from the operation realizing that some of the students had been injured, then the issue of registering must have been considered important.

[158] It has also not been clear as to when the guns were taken for ballistic examination. The operation was done in a very shabby manner. Officers have to be accountable in their day to day duties.

May the accused please stand up.

[159] Sentence

Count 1: You are sentenced to a period of eight years imprisonment..

Count 2: Two years imprisonment

Count 3: Two years imprisonment

Count 4: Two years imprisonment

Sentences to run concurrently.

Firearms which were exhibited before this Court to be returned to the Roma Police.

Your bail is automatically cancelled.

A. M. HLAJOANE
JUDGE

For Crown: Mr Lenono

For Defence: Mr Nthontho