CRI/T/93/2012

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

vs

MOLUPE TSENYANE TEMO	**1st Accused**
SEABATA NONYANA SEKANE	**2nd Accused**
MOEKETSI TALLY TALANYANE	**3rd Accused**

JUDGMENT

Coram:	**Hon. Hlajoane J**
Dates of Hearing:	**14th May, 2013, 15th May, 2013, 3rd June, 2013, 5th August, 2013, 23rd August, 2013, 27th August, 2013, 25th September, 2013, 30th October, 2013, 5th December, 2013, 4th February, 2014, 6th February, 2014.**
Date of Judgment:	**4th March, 2014.**

Summary

Accused having been charged with murder and unlawful possession of firearm – Plea of alibi – Accused failing to take witness stand to substantiate his plea of alibi – The shooting having been witnessed without identifying the shooter and the victim – Evidence to be considered on the type of firearm between Police Officer and an expert firearm examiner – Dead bullet found in deceased's head matching the one fired from firearm found in accused's possession for test purposes – One accused found guilty of murder and unlawful possession of firearm and another guilty as an accessory before and after the act.

Annotations

Statutes

1. **Criminal Procedure and Evidence Act 9 of 1981**

Books

1. **Hon. M.P. Mofokeng on Criminal Law and Procedure Through Cases p.288**
2. **C.R. Snyman – Criminal Law p.263 at 268**

Cases

1. **R v Tsosane (1995 -99) LAC 635**
2. **Mothobi and Others v R**
3. **S v Boesak 2991 (10 SACR 24**
4. **S v Brown 1996 (2) SACR**

5. **S v Hena and Another 2006 (2) SACR 33 at 36**
6. **S v Guess 1976 (4) S.A 715**
7. **Serine v Rex 1991 – 92 LLR & LB 42**
8. **S v Mongesi and Another 1981 (3) S.A. 204 at 206**
9. **R v Fundakubi and Another 1948 (3) S.A 810 at 818**
10. **Rex v Letsolo 1970 (2) S.A. 476**
11. **R v Biyana 1938 EDL 310 at 311**
12. **Botso Mashaile & Others v Rex 1971-73 LLR 148 at 164**
13. **S v Kulati 1975 (1) S.A 557 (D)**
14. **S v Scheepers 1972 (2) S.A. 154**

[1] The accused appeared before Court charged with two counts. The first count being that they unlawfully and intentionally killed one Thabang Moliko on or about the 29th March, 2012 and at or near Sefika Bus Stop area in Maseru. The second count being in contravention of **section 3 (1) (2) (a) of the Internal Security Act (Arms and Ammunition Act 1966) as amended by Act No4 of 1999,** in that on the same date and place as in count 1 the accused acting in concert and in furtherance of a common purpose did one, the other or all of them unlawfully and intentionally purchase and / or acquire and / or have in their possession a firearm, to wit a .38 special serial No. ML 873601 with six bullets without holding a firearm certificate or otherwise authorized by such certificate.

[2] The three accused pleaded not guilty to both charges but the third accused was discharged at the close of crown's case as the crown conceded that there was no *prima facie* case established against the accused hence the acquittal.

[3] The crown led evidence of eleven witnesses in all. The first prosecution witness was Moholi Lebesa. In his evidence he told the Court that he had been with the deceased Moliko on that day before he met his death. He sounded to have been a close friend to the deceased. He said he came to know him after joining a group called 'Bana ba Khoale'.

[4] His evidence revealed that he had been to deceased's office at Manonyane to charge his phone. He knew the deceased to be working as a radio presenter at PC FM. Before they knocked off one Motlatsi had brought a CD by Khosi Mosotho Chakela to deceased's office. The deceased had played the CD about five times and told the witness he was listening to the lyrics of that CD. Deceased conveyed the meaning of the song to the witness as giving the message that one would be killed by someone close to him.

[5] The witness said it was at the time that the deceased was playing the CD that some two boys entered the office. The boys had

come to ask for the key to the toilet, which deceased handed over to them. The boys both had their blankets on one black and the other yellow. The witness said the two boys took a very short time with the key and came back. After handing back the key they left.

[6] P.W.1 had seen the security guard at Manonyane call the deceased to the outside and that when deceased came back he appeared sad and even expressed that he was not happy without divulging the cause for that sudden change of mood. Before they left the office the deceased had asked for a short prayer and after that prayer he had continued playing the same CD. Repeating the words which the witness said used to be said by the deceased when was sad he said. "Leave things as they are as everyone works for his father."

[7] Before they left, the deceased had promised to come and play the same CD first thing in the morning the next day. It was late in the evening when they parted ways, with deceased giving the witness money for transport. The witness said as he was listening to the radio at around nine the same evening he heard the same song that the deceased was playing being played several times after which there was an announcement over the radio that the presenter who had played that music had just been shot dead without mentioning the

name. He tried deceased's number but found was engaged. He tried one Masisi of 'Bana ba Khoale' who confirmed the deceased's death and even told him they had just taken him to the mortuary.

[8] The second witness Moeletsi Mohai gave evidence to say he did not know the deceased facially but only knew him on air as a radio presenter. This witness related a story about his younger brother by the name of Marake Mohai. The story was about Marake who had called him one night about a car that was passing near his place which he suspects was belonging to people who wanted to kill him.

[9] The witness though was no longer sure of the date, thought it could have been on 26th March, 2012. His brother had called to request for money so that he could go to South Africa. But as he had suggested his brother came to him same night at around 12:30 a.m. in the company of another man. When he was there the brother told him he wanted to flee to South Africa as police had interrogated him in relation to the deceased's death.

[10] It was P.W.2's story that when his brother got to him they found him waiting in the car and his brother was with that suspect. They spent the night in that car till morning. The witness advised his brother to report the suspect to the police and he did.

The police came during the day at P.W.2's workplace and found the suspect there and was arrested. The witness though was seeing the accused for the first time that day he identified him in Court as Tsenyane as police called him that.

[11] P.W.3 Retselisitsoe Sechai told the Court that his home is in Mafeteng but stays at Ha Leqele as a taxi driver. He owns a 4x1 taxi. He identified accused 1 and 2 in Court. He said he used to transport accused 2 as he works as a street vendor. He only came to know of accused 1 on the 18th March 2012 as accused 2 had asked him to drive them with accused 1 to Mafeteng and were going to pay him for the trip.

[12] The witness drove them to Ha Ramokoatsi in Mafeteng. As they had stopped at Ha Ramokoatsi a car from Mafeteng came and stopped near them. The car eventually was parked in front of their car. Accused 1 and 2 left him in his car and joined the other car that came from Mafeteng. They later came back ordering him to drive back to Maseru. They had said to him they were going to Mafeteng to collect money for accused 1 to leave for Gauteng.

[13] It was P.W.3's evidence that when they drove passed Ramokoatsi Courts to Maseru accused 1 said he was satisfied that he got his thing. When witness asked what thing it was

accused 1 said a firearm. He drove back and dropped them at Lower Thamae where accused 1 stayed. The witness was not paid the M400.00 he had been promised but was only given M100.00 for petrol. The witness had been transporting accused 1 and 2 to several other places later. Until when one Tuesday at about 5.00 p.m. accused 1 called him asking him to collect him from Ha Thetsane near the hospital. He drove there alone.

[14] After he had picked accused 1 from Ha Thetsane he noticed a white vehicle in front of him near the hospital. The vehicle blocked his way. The occupants of that vehicle were armed with guns. They ordered them out of the car and started searching them. He later identified them as police and amongst them was Matobako. They found a small gun with accused 1. But nothing was found with the witness.

[15] He said they were able to arrest accused 1 because at the time accused 1 called him to ask him to fetch him from Ha Thetsane the witness was at the Charge Office Pitso Ground. Police asked him who he had been talking to and he told them it was accused 1 hence why they followed him.

[16] The witness was a close friend to the deceased and said he even used to transport him and visit him at his work place. P.W.3 came to know of deceased's death on Thursday evening at

around 8:30 p.m., which was prior to the day he had gone to fetch accused 1 from Ha Thetsane.

[17] The witness had said he did not know the person who was responsible for deceased's death except for having been told by accused 2 that accused 1 was responsible. The defence objected to that statement as hearsay evidence.

[18] The crown however submitted that the statement was not hearsay as it came from accused 2 who had the chance to challenge that. But the defence insisted that that evidence could only be admissible against accused 2 only, will come to this later.

[19] P.W.4 Tsepiso Taaso's evidence was that he worked at Sefika bus terminal. He did not know the deceased. He only identified accused 2 and 3 as people who work at the bus stop area near Africa Shop as street vendors.

[20] The witness had left his work place to go and buy some materials. It was around 7:00 p.m. and was becoming dark. He heard a gun report and when he looked back he noticed a person fallen behind him. He saw someone shoot at that person where he had fallen and even jumped over him. He saw him when he put his firearm on his waist and he fled taking Tip Top direction

to Thibella. He estimated the distance of the shooter from him at two paces when he fired the second time as the victim had fallen.

[21] He still remembered how the person was dressed who shot at that other person. He saw that the shooter fired once at the victim as he was on the ground. He left for his place and reported to others. He said he was deeply shocked as he could have been shot also considering the distance between him and the victim and the shooter. He said did not notice any of the accused there.

[22] D/P/C Mokole became P.W.5. He is one of the investigators in this case. He was amongst the team that went out to arrest accused 1 near Thetsane Hospital. He was with D/P/C Matobako Mohloai, Raphiri and Mohloki. They found accused 1 near Maseru Private Hospital. Accused 1 was in a 4X1 cab. They stopped the car and found him with the driver. After identifying themselves to him they arrested him. They had first searched each one of them. They found a .38 special in accused 1's possession with six rounds. The witness denied when it was suggested to him that the gun was found in the car not with accused 1. He insisted and said was found in accused 1's possession and not P.W.3.

[23] P.W.7 D/Sgt Motanya who was stationed at Pitso Ground CID told the Court that he was on duty on the 29th March 2012 when he learned of deceased's death. He was in the investigating team. He was detailed to go to Sello Mortuary on the 11th April 2012 for deceased's post mortem examination. The examination was conducted by Dr Moorosi. He was there when the doctor took out a dead bullet at the back of deceased's head. It was handed over to him. He in turn forwarded it to P.W.6 D/P/C Matobako for forensic examination.

[24] The witness had examined the body first before the post mortem was carried out. He observed a wound on the forehead and another on the chest.

[25] P.W.6 D/P/C Matobako was also one of the investigators in this case. He learned of death of deceased on the 29th March 2012 as he was on duty. He received a report on the 3rd April 2012 that suspect in this case was seen at Ha Thetsane. He left in the company of Mohloai, Mohlomi, Mokole and Raphiri. They met a 4 x1 at Ha Thetsane with two occupants. They stopped the car and ordered the occupants out. They identified themselves to them as police and told them why they had stopped the car. When they were searched the witness found a .38 revolver on accused 1 and had six rounds. He was asked to produce a

certificate for such possession but he had none. He insisted that the gun was found on accused 1 and not in the car.

[26] The witness came to know of the accused's name subsequent to finding the gun on him. Accused 1 was cautioned warned of his rights and charged of unlawful possession of firearm with 6 rounds. He was also given a charge of murder of the deceased. He gave out the serial number of the gun which was seized from accused's possession as ML873601.

[27] He seized the gun and kept it as an exhibit. He later took the gun to ballistic section for examination on the 4th April, 2012, and kept the bullets at his office. The gun was sent to be examined for purposes of determining if it was still in good working order.

[28] The witness was on the 11th April, 2012 given a dead bullet by D/Sgt Motanya. That same bullets was also taken for ballistic examination. The purpose being to compare it to the gun that had already been submitted. The firearm examiner prepared the report of his findings which report was later filed. The gun and the six rounds together with the dead bullet were handed in as exhibits.

[29] In cross examination the accused had indicated that he was going to call evidence to show that in fact the gun was not found on his person, but in the 4x1 they were travelling in. He was also going to call evidence to show that when the deceased met his death he was not in Maseru but in Mafeteng visiting his witch doctor Marumo. That he had been in Mafeteng from 2:00 p.m. of that day and had spent the night there. The witness finally told the Court that accused was putting for the first time his defence of *alibi* in cross examination.

[30] The firearm examiner PW Khauoe was called as P.W.8. She had joined that branch of ballistics in 1993 after having in 2008 enrolled and qualified in Moscow, Russia. She had been trained in microscopic examination of fired bullets, fired cartridge cases and other related items including restoration of obliterated numbers on metals and forensic Dartyloscopy (study of finger prints).

[31] The witness had been given the gun and dead bullet to examine by P.W.6. He conducted her examination on the 23rd April, 2012 and prepared a report for her findings. She corrected some typing errors on the report. After compiling her report he had gone to the microscope and took photos of the bullet he had fired from the gun for test purposes and the dead bullet that had been handed over to her. She pointed out on the photos she

handed in some marks or features which was an indication that the two had been fired from the same gun.

[32] In her report the witness showed that she had been handed over .357 Tanrus revolver for examination by P.W.6 whilst P.W.6 had said he handed over a .38 revolver. We will come that later. But she was positive that the gun she examined was the one which P.W.6 handed over to her. The photo as described by the witness shows some horizontal lines as an indication that both fired bullet for test purposes and the dead bullet that had been handed in tallied as having been fired from the same firearm exhibited before Court.

[33] The witness being a trained firearm examiner professed to be familiar with firearms. She told the Court in her evidence that .357 and a .38 are two different guns. But still said the gun she examined was the one given to her by P.W.6.

[34] D/P/W Moeketse visited the scene after receiving the report whilst she was on duty at Pitso Ground. The report was about a dead person at Sefika bus stop. She said it could have been around 7 p.m. They proceeded to the scene with Det. Masupha and D/Ins.Sefali. At the scene they found a body of a male adult lying on the ground fallen on his face. The man had a black bag on his right hand and had fallen on it.

[35] On inspecting the scene she saw another black bag a pace away from the body, containing CDs. On examining the body she observed an open wound at the back of deceased's head, a gaping wound on the left side above the eye, another open wound on the right cheek, and open wound on the left side of the nose. The body was identified as being that of Thabang Moliko.

[36] The witness and his team took the body to Lesotho Funeral and the items that were found. She mentioned that the body did not sustain any further injuries on the way to the mortuary.

[37] Their investigations on the death of the deceased led them to Seabata Sekane Nonyane a street vendor operating from near Africa Supermarket selling fruits. The place is at Pitso Ground. It was on the 3rd April, 2012 when they approached Nonyane. He identified himself to him, he was warned and cautioned and given a charge of murder and was arrested. He pointed at accused 2 as the person he was referring to.

[38] Later in the day their investigations led them to Moeketsi Talenyane, accused 3. He went there in the company of police Mphephoka. Same as accused 2, accused 3 was also found at Africa Supermarket selling fruits. He identified himself to him

cautioned, warned him and gave him a charge of murder and was arrested. Accused was taken to the Charge Office.

[39] P.W.9 only came to know about accused 1 when he found him already arrested. He saw the items that were seized and said it a .38 special and 6 rounds. She came to know of its serial no. as ML873601 as he was the one who filled in the submission form.

[40] In describing what a submission form is he said it is a form that has to be filled when taking the exhibits to the laboratory. She was aware that the exhibits were taken for ballistic examination. The shells and the gun were taken for examination in order to determine if the shell could be linked to the gun.

[41] The witness said when a gun had been taken for examination it will come back with a laboratory reference number. He had had the occasion to see the gun when returned from the laboratory that it had that laboratory number F91/12. He held the exhibits before Court and showed they were the ones which he had filled the submission form for. The laboratory number was reflected on the submission form and on the report. He had also filled the forms for the rounds. He confessed that one who is an expert can better tell what type of a gun it was other than himself. But he showed that a .38 and .357 are similar as both are revolvers. He further said there was no other firearm that was seized in this

case. He handed in the submission form which had the same Ref. No. F91/12 as appears on the firearm.

[42] The witness admitted that she had said nothing that would link accused 2 and 3 to this case. He however denied that he ever assaulted the two accused persons with a knob kerrie and rubber hammer. She also denied ever suffocating them with a tube. She even pointed out that she would never do such a thing to men as a woman.

[43] P.W.10 Dr Moorosi testified as a qualified pathologist. Looking at his report he showed on request by the police he, on the 11th April, 2012, performed a post-mortem examination at Lesotho Funeral Services. On examining the body his findings were that it was a body of a Mosotho male adult. He referred to the pictures attached to that post mortem report showing the location of the injuries which he said were all on deceased's head.

[44] The body had a wound at the back of the head slightly to the right side 5cm in diameter with a burn round it. A wound on the left side of the nose which was 1cm in diameter and racked. A wound on the right cheek and another on the forehead. The pictures show that a bullet was lodged in the left temporal region under the scalp. The pictures in all showed six wounds

and the one on the forehead penetrating into the cranial cavity. Out of those six wounds the doctor characterized them some as entry wounds and others as exit wounds. The bullet that was taken out from one of the wounds was given to the police. The doctor described the cause of death as due to skull fractures resulting in extensive brain contusion. The report was handed in as an exhibit.

[45] The last crown witness, P.W11 was Thato Lepholisa. Her evidence was that on the day in question in the evening around 7:00p.m. she was at a place known as Lepoqong and wanted a taxi to take her to Ha Seoli. It was dark as she was there and came following two gentlemen. She was taking the direction leading to Tip Top. The man in front had dark clothes on and had something on his shoulder, a bag. The second man in front of her was just a pace away. She then heard a 'qha' sound and saw the man in front fall down. As the man fell she saw the man she was following shooting at the man who had fallen. She ran away to a shack where there were some two men. She asked them as to what was happening but they turned to say but you were walking with them. She replied and said I was only following them. She had heard two gun reports.

[46] According to P.W.11 before the shootings there had been no conversation between the two men but were just following each

other. She then left and did not see where the shooter ended, she never came to know as to who those two men were.

[47] The crown at this stage wanted to call a witness by the name of Binang Marake – Mohai who unfortunately is outside the jurisdiction of this Court. The desire to have this witness resulted in many postponements. All efforts by the crown to secure his attendance failed till the crown decided to close its case. The only reason the crown gave for non-attendance of that witness was that the witness feared for his life.

[48] The defence had applied for bail but the Court felt that the case was already at an advanced stage and that releasing the accused on bail might prejudice the interests of justice.

[49] Counsel on both sides were agreed that on the evidence presented before this Court nothing so far had been said about accused 3. Accused 3 was therefore acquitted and discharged after the close of the prosecution case.

[50] A formal application for the discharge of accused 1 and 2 was made in terms of **section 175 (3) of the Criminal Procedure and Evidence Act[1] (CP&E)**. The defence contended that there has been no direct evidence to link accused 1 and 2 with the

[1] Criminal Procedure and Evidence Act 9 of 1981

crimes. He was saying this based on the evidence of P.W.8 and P.W.6. That P.W.8 as a firearm expert said she examined a .357 gun when P.W.8 had said he had submitted a .38 revolver for examination. The firearm examiner had said the two firearms were different.

[51] The defence also said there have been no eye witnesses to the offences charged, not even a circumstantial evidence. He therefore asked for the acquittal and discharge of the accused persons.

[52] In response the crown submitted that P.W.4 and P.W.11 saw an unknown person shooting at an unknown person. That true enough the police said the gun that was seized and taken for examination was a .38 but P.W.8 as an expert said it was a .357 gun. He persuaded the Court not to consider that as anything that had to be taken seriously. He asked that accused be found guilty as there is a case against them.

[53] The Court in considering the application for discharge of accused 1 and 2 felt that on the basis of the evidence presented before Court by the crown that there was a case to answer and promised that reasons were going to form part of the judgment.

[54] The defence intimated that the accused were going to take the witness stand to testify. But on the date set for hearing the defence had changed its position and showed were no longer going to testify, instead they closed their case.

[55] The crown in addressing the Court showed that though the defence had argued that there were no eye witnesses to the shooting, the evidence of both P.W.4 and P.W.11 had been to the effect that they witnessed the shooting but did not only know the person who was shooting together with the person who was shot. The fact that they did not know the two did not mean that they did not witness the shooting.

[56] P.W.4 had first heard a gun report behind him. When he looked back he saw someone fallen behind him towards his left. He then jumped to the other side and saw someone jump over the person who had fallen. He saw a person shooting the person after he had fallen and then putting his weapon on his waist and fled.

[57] P.W.11 also heard a 'qha' sound. He had seen two people in front of him following each other. On the sound of the gun report the person in front fell and the one between them that is between the person who had fallen and himself, shot at the

person who had fallen. The two witnesses clearly witnessed the shooting by an unknown man to an unknown person.

[58] P.W.11 had shown that before the shooting he had seen that the person who was later shot had a bag on his shoulder. When P.W.9 visited the scene he found the deceased fallen on his face with a bag on his right hand. Another bag containing music CDs was found a pace away from where the deceased had fallen.

[59] P.W.9 observed injuries on the deceased as he examined the body at the scene. The wounds were at the back of the head, on the left side above the eye, on the right check and on the left side of the nose.

[60] According to the doctor P.W.10, there were six wounds in all, three being entry wounds and the other three exit wounds. The exit for the wound at the back of the head was the wound on the left side of the nose. The entry point for the wound at deceased's check had its exit in the left temporal region where the bullet got lodged. The entry wound above the left eye penetrating the intracranial cavity had its exit behind the ear. The doctor explained the cause of death as being due to skull fractures and extensive brain contusion.

[61] Through their investigations the police were already looking for accused 1 as a suspect. They had already had information that P.W.3 would know about the accused. As P.W.3 was at the charge office questioned about accused 1, accused 1 phoned him to request P.W.3 to go and fetch him from Ha Thetsane as he was planning to cross the border. The police followed P.W.3 and managed to arrest accused 1.

[62] Upon his arrest in P.W.3's 4x1 taxi P.W.5 and 6 searched the accused and P.W.3, on accused 1's person a firearm was found. P.W.6 said the gun was a .38 special revolver with 6 rounds. He asked accused 1 about its certificate but he had none. He was thus warned, cautioned and charged of unlawful possession of the firearm. P.W.6 said the serial number of the gun was ML873601. He then seized it as an exhibit. He was later handed over a dead bullet by P.W.7, Motanya. He had already sent the gun to ballistic section, he also sent the dead bullet to the same section.

[63] The gun was sent there for purposes of establishing if it was still in good working condition. The dead bullet was sent for comparison with the gun.

[64] P.W.3 had told the Court in his evidence that he had been knowing accused 2 as a street vendor and that he used to

transport him. He only came to know of accused 1 through accused 2 when on the 18th March 2012 accused 2 asked him to transport him and accused 1 to Mafeteng at a fare of M400 though they never paid him except for a M100 which they said was for petrol.

[65] They went only as far as Ramokoatsi where another car from Mafeteng came to them. He remained in the car as accused 1 and 2 went to that car. They had left for Mafeteng at around 5.00 to 6.00p.m. They had told him they were going to Mafeteng to collect money so that accused 1 could go to Gauteng. On their way back P.W.3 heard accused 1 explaining that he was satisfied that he had found his things. When he asked him what things he said, a gun, but P.W.3 did not see that gun.

[66] From the evidence it would seem that accused 1 and 2 were always in each other's company since they came from Mafeteng. From Mafeteng P.W.3 had left them at accused 1's place at Lower Thamae. A day after that accused 2 again asked P.W.3 to take accused 1 to Khubetsoana at around 8:30 to 9:00p.m. He had been transporting the two of them to various places.

[67] The evidence of P.W.3 clearly showed that accused 1 and 2 knew each other as were always transported together even when they went to fetch the gun from Ha Ramokoatsi. Even on the day the deceased met his death accused 2 had requested P.W.1 to transport accused 1 to where he was staying.

[68] Coming to the firearm that was found in accused'1 possession P.W6 and 9 had said it was a .38 special revolver which P.W.6 submitted to the firearm examiner, P.W.8. P.W.8 on the other hand described it as a .357 Tauras Revolver and even said the two are different firearms.

[69] There was only one firearm that was seized and submitted for examination. Its serial number being ML873601. And in outlining the procedure for submitting firearms for examination, P.W.9 showed that he had filled in the submission form as was requested. When the examiner receives the form and the items submitted she will give them a laboratory (lab) reference number which in our case was F91/12. The lab reference number has to appear on the following

- Ballistic Report
- The firearm and
- The submission form.

[70] In this case the laboratory reference number appeared in all the three items listed above. P.W.9 conceded that since he was not an expert in firearms though he had said the gun was a .38, the firearm examiner's report on the type of the weapon had to be considered. He said the two look alike.

[71] The crown relied on the case of **R v Tsosane**[2] where the Court of Appeal emphasized that the ballistic evidence should always be considered important. So that for P.W.9 to have described the gun as a .38 and P.W.8 describing it as a .357 should not be taken as talking about different guns but the same gun by considering the evidence of an expert, P.W.8. The serial number was the same and the reference number from the laboratory appeared in all the three items.

[72] I have already shown that though the defence persuaded the Court to take it that there had been no eye witnesses, but looking at the evidence of both P.W.4 and P.W.11 it became evident that they witnessed the shooting. They did not only know who was shooting and who was being shot. The fact that they did not identify the shooter and the one being shot should not be taken as an indication of not having witnessed the incident.

[2] R v Tsosane (1995099) LAC 635

[73] On the question of the gun that was used, P.W.3 has shown in his evidence that he was the one who transported accused 1 and 2 to Mafeteng Ha Ramokoatsi. He was told by accused 1 on their way back that he had gone there to collect a gun. True enough P.W.3 did not see that gun.

[74] Accused 1, as he was arrested by police at Ha Thetsane he was in the company of P.W.3. A gun was found in accused's possession when he was searched. The same gun was taken to ballistic section together with the dead bullet that was found trapped in deceased's body. That shell was also taken for examination and was found to have been fired from the same gun that was found in accused1's possession.

[75] P.W.4 and 11 have explained how the person they saw being shot was shot. He was shot from behind and was also shot whilst he had fallen to the ground. This being a murder case, and murder being an unlawful and intentional killing of another human being. Killing another human being is unlawful. Intention would be inferred from the conduct and behaviour of the person and the weapon used and area of the body attacked.

[76] The post mortem report has shown that all the injuries were on deceased's head. You don't shoot a person on his head and expect him to live. The intention would be to kill. The

deceased was shot even after he had become helpless as he had fallen. Since the evidence had connected accused 1 with the gun found to have been used to kill the deceased, his intention to kill the deceased had clearly been established.

[77] The Court in finding the accused guilty of the murder of the deceased relied not on direct evidence but circumstantial evidence. Accused 1 was not clearly identified during the killing but as was said in **R v Tsosane** *supra*, that

"In considering circumstantial evidence in criminal cases, the inference sought to be drawn must be consistent with all proved facts, and the facts must exclude all other reasonable inferences except the one sought to be drawn."

[78] In our case the only inference to be drawn is that it was accused 1 who killed the deceased. This inference being consistent with all proved facts and such facts exclude all other reasonable inferences except the one suggesting accused 1 as the killer. The objection was therefore overruled.

[79] Three accused persons were charged for both counts of murder and unlawful possession of firearm. Accused 3 has already been acquitted and discharged at the close of crown's case.

[80] Considering the participation of accused 2, P.W.3 showed in his evidence that most of the time since transporting both accused to Mafeteng Ha Ramakoatsi, he has been transporting them both to various places. They were together when they went to collect the gun in Mafeteng. When they got to Ha Ramokoatsi they both went out of P.W.3's car to join occupants of the other car from Mafeteng which stopped in front of their car. Accused 1 received the gun in accused's 2 presence. Even when accused 1 talked of his gun on their way back he was saying that in accused's 2 presence.

[81] Even after the killing of the deceased it was accused 2 who asked P.W.3 to transport accused 1 to Khubetsoana and Qoaling. And the transporting always happened at night. Even on the night that P.W.3 heard of deceased's death he had just transported accused 1 to Khubetsoana on the instructions of accused 2.

[82] P.W.3 had said when a description was made of the person who shot the deceased, that description resembled accused 1. For him to confirm he called accused 2 on his mobile phone about accused 1 and accused 2 confirmed that it was accused 1, being the person they had travelled to Mafeteng with.

[83] The defence challenged the evidence of P.W.3 on having been told by accused 2 of accused 1's involvement in the killing of the deceased as hearsay. But the crown showed it was not hearsay as accused 2 who is alleged to have uttered the words was in Court and would have the opportunity to challenge that.

[84] Counsel on both sides referred to the case of **Mothobi and Others v R**[3] where the investigating officer had said that the accused gave him an explanation. The defence wanted to know what that information was and the police told the Court that accused 3 had told him that himself and accused 2 killed the deceased. The Court ruled that such evidence was only admissible against accused 3 and not against accused 2.

[85] Even in this case the Court in giving its ruling on the admissibility of what P.W.3 said about accused 1 having been told by accused 2 said, the statement was only admissible for purposes that it was made and not that what was told should be taken as the truth, see on this point the book compiled by **Hon. M.P. Mofokeng**[4]**.**

[86] P.W.3 has told this Court, as earlier said, that accused 1 and 2 were together in his car when they went to Mafeteng to collect the gun. Accused 2 may have not been aware as to why accused

[3] Mothobi and Others v R
[4] Hon. M.P. Mofokeng on Criminal Law and Procedure through Cases p.288

needed that gun. But P.W.3 said when the car came to where they had stopped both accused 1 and 2 went out to that car. They did not wait for the occupants of that car to come to them. It would not be unreasonable for one to conclude that they both did not want P.W.3 to see the gun as when he was asked to go to Mafeteng P.W.3 said he was told it was for collecting money.

[87] It was not accused 2 who asked accused 1 when he said he was glad he got his thing, but it was P.W.3 who asked what thing it was. Again even after the shooting of the deceased it was accused 2 who requested P.W.3 to transport accused 1 to Khubetsoana. Looking at the surrounding circumstances leading to the shooting of the deceased it would not be unreasonable to conclude that accused 2 knew of the killing of the deceased.

[88] The crown referring to **C.R Snyman**[5]where it was said;

"A person is guilty of being an accessory after the fact to the commission of the crime, if after the completion of an offence he unlawfully and intentionally engages in conduct intended to enable the perpetrator of or accomplice in the offence to evade liability for his offence or to facilitate such person's evasion of liability."

[5] C.R. Snyman – Criminal Law P.263 at 268

[89] Looking at the behaviour of both accused 1 and 2 before and after the death of the deceased, with accused 2 instructing P.W.3 to transport accused 1 to various places at night, including the night the deceased met his death points at the unshaken inference that he was quite aware of what was to happen and what later happened to the deceased.

[90] Accused 2 never denied his acquaintance with accused 1 and P.W.3. He never denied that they had gone to Mafeteng in P.W.3's car. It was put to the crown witnesses that the accused were going to deny in evidence that they were responsible for deceased's death. But instead they exercised their constitutional right of not taking the witness stand.

[91] The crown referred to a passage in the case of **S v Boesak**[6] where it was said;

"The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer and an accused person chooses to remain silent in the face of such evidence, a Court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused.

[6] S v Boesak 2001 (1) SACR 24

Whether such conclusion is justified will depend on the weight of the evidence."

[92] The crown referred to the passage above as at the close of the crown case after the defence had made a formal applicat*ion* for discharge the Court had made a ruling in dismissing the application that there was a case to answer.

[93] Still on that point of exercising the right to remain silent the crown extracted a passage in the case of **S v Brown**[7] in these words;

"The accused's constitutional right to silence cannot prevent logical inferences; the circumstances of a case may be such that a prima facie case, if left uncontradicted, must become proof beyond reasonable doubt. This happens not because the silence of the accused is considered an extra piece of evidence, but simply because the prima facie case in a particular case is in the absence of contradicting evidence on logical grounds strong enough to become proof beyond reasonable doubt."

[94] But the accused is not to be found guilty merely because he never took the witness stand. There are some considerations

[7] S v Brown 1996 (2) SACR

which have to be looked into. As was said in **S v Hena and Another**[8] that,

"The fact that no evidence has been led to gainsay the evidence tendered by the state, does not mean that the accused must automatically be convicted. The central question that must be answered remains whether on that evidence the state has proved its case beyond reasonable doubt".

[95] The question that remains to be answered would be whether based on the evidence that has been led by the crown before this Court it could be said that the crown has proved its case beyond reasonable doubt.

[96] Evidence led has been to the effect that though there was no direct evidence to say accused 1 was seen shooting the deceased, the gun that was seized on his person matched the dead bullet that was found trapped in deceased's head. Accused 1 never proffered any reasonable explanation about his movements with accused 2 based on the evidence that was given by P.W.3.

[97] Besides accused 1 had pleaded an *alibi* to say he had on that day at around 2:00 p.m. left Maseru for Mafeteng to visit his witch doctor only to have come back the following day. He only

[8] S v Hena and Another 2006 (2) SACR 33 at 36

pleaded the defence of *alibi* but failed to substantiate it. In the case of **S v Guess**[9] the defence had argued that it would be wrong to reject the explanation by the accused merely because the crown witnesses appear to be acceptable and therefore accused's evidence to be rejected. But in the instant case the accused not only did he not offer any explanation but also failed to substantiate his defence of *alibi*.

[98] Regard being had to the evidence adduced before this Court the Court has thus come to the conclusion that:

May the accused please stand up.

Accused 1:

Count I: The crown has successfully established its case beyond reasonable doubt and you are found guilty of murder of the deceased Thabang Moliko.

Count II: You are found guilty of contravening **section 3 (1) (2) (a) of the Internal Security Act (Arms and Ammunition Act 1966)** (As amended by **section 3 of the Internal Security Arms and Ammunition Amended Act 4 of 1999)** by being found in possession of a gun and failing to produce a licence for such possession.

[9] S v Guess 1976 (4) S.A 715

Accused 2:

Count I: Based on your involvement with accused 1 before and after the act, you are found guilty as an accessory before and after the Act.

Count II: Found not guilty acquitted and discharged.

My Assessors agree with my findings.

In Extenuation

[99] The defence submissions could have carried more weight had the accused 1 taken the witness stand in extenuation and be cross examined. In **R v Maliehe & Ors CRI/T/2/1992** (unreported) 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."

[100] **Section 296 of Criminal Procedure and Evidence Act** enjoins the Court to *meru motu* get some established facts from the record in an effort of determining the existence or otherwise of extenuating circumstances. Set out in **Serine v R** [10] are three factors of enquiry relating to existence of extenuating circumstances. They are

(a) whether there were at the time of the commission of the offence circumstances which could have influenced accused's mental faculties.

(b) Which such factors did subjectively influence him.

[10] Serine v Rex 1991-92 LLR& LB 42

© whether such subjective influences, according to the objective assessment of the Court rendered the offence less blameworthy.

[101] **S v Mongesi and Another**[11]**,** murder of a prisoner by co-prisoners. Influence by others to commit crime can be considered as extenuation. **Mongesi** also describes what extenuation means that it is all cumulative effects that subjectively influenced him to commit murder.

[102] In **Maliehe** *supra* the Court said in dealing with evidence in extenuation,

"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."

[103] In his heads on extenuation counsel for the accused for the first time has asked the Court to take a judicial notice of the realities of "*famo"* wars and to view the actions of accused 1 within that context. He asked the Court to consider the background of the "*famo*" music wars that have seen scores of people killed in the Mafeteng district in the past five years.

[11] S v Mongesi and Another 1981 (3) S.A 204 at 201

[104] Counsel went further to say that it was the perceived belief by accused that the playing of lyrics and songs by the deceased over PC FM, where deceased was employed, was responsible for fuelling rivalry between the warring factions in the '*famo*' industry. He referred to the accused, particularly accused 1 as a simple illiterate man.

[105] Regarding accused 2 counsel submitted that he has not been the actual perpetrator of the crime of murder, but an accessory before and after the act. Accused 2 was a close acquaintance of accused 1 or could even be called his friend. He asked the Court to consider that fact enough to reduce accused 2's moral blameworthiness.

[107] In demonstrating the Court's approach to the exercise counsel referred to the case of **R v Fundakabi and Others**[12] which emphasized the subjective approach in determining the existence or otherwise of extenuating circumstances in the following words:

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

[12] R v Fundakabi and Another 1948 (3) S.A 810 @ 818

[108] In **R v Letšolo**[13] the following words were used:

"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."

[109] The crown sang the same tune as the defence on factors for consideration when dealing with extenuating circumstances. She referred to the case of **R v Biyana**[14] where the following was said:-

"An extenuating circumstance is a fact associated with a crime which serves in the mind of reasonable man to diminish morally, albeit not legally, the degree of a prisoner's guilt."

The same words as in **Biyana** above were echoed in **Botšo Mashaile and Others v Rex**[15]**.**

[110] The crown was persuading the Court to consider that there are no extenuating circumstances based on the evidence presented before Court. That the onus rested on the accused to prove existence of extenuating circumstances. That the accused could discharge it by means of his own evidence or by reliance on other facts proved in the course of the case.

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[13] R v Letšolo 1970 (2) S.A 476
[14] R v Biyana 1938 EDL 310 at 311
[15] Botšso Mashaile & Others v Res 1971-73 LLR 148 at 164

[111] The crown was quite entitled to say that because nothing came out in evidence or indeed under cross examination which could be of assistance. The accused never testified as he exercised his constitutional right of remaining silent.

[112] The Court also under **section 296 (1) of the Criminal Procedure and Evidence Act**[16] was, without the accused bringing extenuation, enjoined to find the existence or otherwise of extenuating circumstances. The section provides the following;-

"Where the High Court convicts 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."

[113] It was not until at this stage of putting forward the extenuating circumstances that the defence for the first time explained why the accused killed the deceased. The issue of factions in the '*famo*' music industry particularly by musicians from Mafeteng where both accused come from was the source.

[114] These killings have become a notorious fact that the Court can safely take judicial notice of their frequent occurrence and the

[16] Ciminal Procedure and Evidence Act 9 of 1981

district where they are particularly rife. It has been shown earlier on from cases cited above that extenuation can be any factor which tend to have a bearing on the commission of the offence and reduce the moral blameworthiness of the accused.

[115] Looking at how the deceased was killed and the timing of the killing, being after the deceased had played one CD for a certain '*famo*' group several times before he retired from his work for the day, shows accused's state of mind.

[116] Because the Court could not find anything from the facts that could have prompted the killing, consideration will be placed on what was said on what accused's perceived on music played by the deceased on PC FM. What he believed in may have been wrong, but morally that was the reason why he perceived killing the deceased would stop the war. That alone would be considered as an extenuating factor.

[117] Accused 1's verdict will therefore be altered to read guilty of murder with extenuating circumstance.

Sentence

[118] Accused 1 has already been found guilty of murder with extenuation in count 1. In count two guilty as charged. Accused 2 on the murder charge has been found guilty as an accessory before and after the act.

[119] Both accused are said to be first offenders. They are both young men in their early thirties who support their siblings that depend entirely on them. They also care for their elderly parents.

[120] But in passing sentence not only are the mitigating factors to be considered but also aggravating circumstances so as to strike a balance on the two. The killing was bad and very cruel. Deceased must have also left behind some loved ones and others who may have depended on him for their upkeep. Also that killings of this nature if they are allowed to continue we are going to experience a never ending revenge on the two factions.

[121] Authorities have shown that it is a sound and important principle of our law to keep first offenders out of prison, **S v Kulati**[17]. But again **S v Scheepers**[18] is authority for proposition that imprisonment is only warranted where it is necessary to remove

[17] S v Kulati 1975 (1) S.A 557 (D)
[18] S v Scheepers 1972 (2) S.A 154

offenders from society and protection of the public. This case is one such as case.

[122] The appropriate sentences in the circumstances of this case will be as follows:

Accused 1:	Count 1:	Twenty five years imprisonment
	Count II:	M500.00 (five hundred maloti), or six months imprisonment.
		The sentences to run concurrently.
Accused 2:	Count I:	Ten years imprisonment.

The gun which was exhibited before this Court as Exh. "1" will be forfeited to the crown.

A. M. HLAJOANE
JUDGE

For Crown: Ms Mofilikoane

For Defence: Mr Hoeane