IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CRI/T/34/05**

In the matter between

REX

AND

LEKHOOA THAI **ACCUSED**

Judgment

Coram : **Honourable Justice E.F.M. Makara**
Date of Hearing : **29 September, 2016**
Date of Judgment : **12 December, 2017**

Summary

Criminal law – charges of murder and attempted murder – accused having pleaded not guilty to both charges – the defence being that of *alibi* – cross-examination on crown witnesses having been suggestive of the presence of accused at the scene of crime – This line of cross-examination by the accused having been in sharp contradistinction to his defence of *alibi* – circumstantial evidence leading to the exclusive inference that accused is the culprit.

Held:

The accused is found guilty as charged.

ANNOTATIONS

CITED CASES

1. **R v Rassooe**1932 NPD 112
2. **R v Setenane Mabaso and Anor** CRI/T/16/83
3. **S v Mehlape**1963 (2) SA 29
4. **R v Lefaso**[1989] LSHC 10
5. **R v Mosuoe**[1991] LSHC 28
6. **R v Nkosi** CRI/T/1Q/91
7. **Ganda v S**(A182/2011) [2012] ZAFSHC 59
8. **S v Matjeke**(049/2016) [2016] ZAGPJHC 129

STATUTES & SUBSIDIARY LEGISLATION

BOOKS & ARTICLES

MAKARA J

Introduction

[1] The accused appeared before this Court against a criminal charge consisting of two counts. In the main one the allegation is that:

> Upon or about the 25th day of May 2002 and at or near Woodpecker Night Club in the Leribe district, the said accused did unlawfully and intentionally kill Ramabanta Linakana.

In the second count it is said that:

> Upon or about the 25th day of May 2002 and at or near Woodpecker Night Club in the Leribe district, the said accused did unlawfully and with intent to kill, shot Tankiso Kori.

[2] He pleaded innocence to both charges and his Counsel confirmed that this was in accordance with the instructions he had given her. Thus, in response as it was planned in the Pre Trial Criminal Planning Conference (PTCPC), the Crown in preparation to hand in its uncontested statements read the contents of each before the Court to facilitate for their individual recording purpose and then tendered them in *seriatim* as exhibits. In the process each was accordingly assigned its label.

[3] It should at this stage be highlighted that the defence had at the PTCPC disclosed to the Court that the accused would raise *alibi* as his defence. To over emphasize the point, it transpired

during the Conference that there was consensus that the crimes that the accused is charged with had occurred in the manner described in the indictment.

[4] This understandably rendered the evidential content which the Crown advanced in support of the charge uncontested. The remaining task was for the accused to prove his defence on the balance of probabilities while the Crown remained scheduled to prove beyond any reasonable doubt that the accused was at the scene at the material time and that he participated in the commission of the offences. To execute the assignment successfully, it would have to evidentially demonstrate the existence of all the requisite elements in each count.

Common Cause Facts

[5] These logically proceeds from the acknowledgement by the accused that the alleged offences could be true in the light of the information he received from his late friend Thabang Mokoroane that he participated in the killing of the deceased at the scene in the manner described in the charge. To elucidate the picture, he specifically stated that he was never at the scene at the relevant moment or participated in the act.

[6] Resultantly, the police statements on the merits of the offences were accepted save where they placed the accused at the scene or associated him with the commission of the offence. The

first to be admitted and labeled Exhibit "A" was that of NO. 9273 Sgt. Letlola. It unfolded that he attended the scene of crime at the Woodpecker Night Club in Leribe where the deceased in Count one and the victim in count two were shot and already conveyed to Motebang Hospital in Leribe. He collected eight (8) shells and two heads of a 9mm caliber pistol from that place. He proceeded to Motebang Hospital where he found that the deceased was dead and the complainant in Count two was being attended to by doctors. He later handed over the shells and leads to the head of the investigation team S/Insp. Jankie. It should suffice to mention that the ballistic testing revealed that the shells were indicative that they resulted from the firing triggered from the gun which the Crown ascribes to the firing incidences.

[7] The next admitted statement was that of NO. 8176 Ex-Sgt Lekoetje, which was marked Exhibit "B". It revealed that he examined the corpse of the deceased at Motebang Government Hospital mortuary where he observed that it had an open wound on the face near the right eye and another open wound on the head.

[8] The admitted medical statements start with the Medical Form which the doctor completed after examining Tanki Kori who is the victim in the charge of attempted murder. It would appear

from the usual hieroglyphic writing of doctors that its material revelations are that he had:

- Linear wound 4cm;
- Gunshot abdomen entrance (RT) laceration negus (waist) outlet © Flom;
- ® thigh out- ent ……..;
- Cause of the injury - Thigh laceration outlet inner past of the (L) groin; weak nee both lower limb 3/5;
- Degree of Force Inflicted – considerable
- Degree of Injury to life – severe;
- Degree of Immediate Disability – Severe;
- Degree of Long term Disability – Partial;
- Duration of Hospitalization – 25th – 30th August, 2002

[9] The next is the Post Mortem Report. Here the doctor who examined the body of the deceased Ramabanta Linakane has inscribed that the cause of death was a brain damage reportedly caused by a gun shot. Its external appearance had a scalp wound on the right parietal eminence and a fractured skull parietals disrupted brain.

Issue for Determination

[10] Thus far it precipitates from the presented scenario that this concerns the evidential success of the Crown to have proven beyond any reasonable doubt that the accused was at the scene at the relevant moments and participated in the commission of

the offences charged. This appreciably triggers the question as to whether PW1 had accurately identified the accused. Lastly this introduces a corresponding assignment for the assessment of the ability of the defence to have demonstrated otherwise on the balance of probabilities.

The Case of the Crown

[11] In discharging his burden of proof, the Crown featured Mpho Mokola (PW1) as its star witness. His testimony was that on the fateful day he had been drinking during the day and later went to Woodpecker night club to continue drinking. At around 11:30 pm he went outside to the veranda to get some fresh air as it was too hot inside. Suddenly, he heard people arguing and realized that it was the deceased whom he knew well and someone who was a stranger to him. According to him it was through the electricity light bulb that he saw that stranger proceeding to a car which was parked some 10 paces away and then returned to the veranda where he shot the deceased on the head. Thereafter, he shot at Kori who is a complainant in Count Two. The victims were both conveyed to hospital after accused had according to the Crown spectacularly sped away from the scene with his car.

[12] As it has already been depicted under the common cause sub heading, the statement of S/INSP Janki (PW2) was admitted and became evidence before the Court. However, its dimension

that the accused told the witness that he used the gun which is in the possession of the deceased Thabang Mokoroane is expunged from the text. This is so since it circumstantially amounts to a confession and made before a police officer without referring the accused to the Magistrate to reduce same to writing as prescribed under S. 228 (2)of the CP&EA which reads:

> If a confession is shown to have been made to a policeman, it shall not be admissible in evidence under this section unless it is confirmed and reduced to writing in the presence of a magistrate.

The Case of the Defence

[13] In this background, the accused endevoured to advance his defence by explaining that he was at his home in Mafeteng at the material time and that his friend Thabang Mokoroane had confided in him as a friend that he was the one who shot both victims at the scene. He cautioned that he did so due to the assaults to which he was subjected by the police. In precise terms, he raised a defence of *alibi* and the ability of the key witness of the Crown to have identified him at the scene of shooting of the deceased and the complainant in the second charge. In line with his defence of *alibi*, the defence had in the course of cross examining the star witness of the Crown (PW1), gave the impression that the accused was at the scene though he never shot the deceased or the other victim. This arises from the question:

> The accused says that you were very drunk at the material time – the circumstances around, nature of the lights, the position where you were and the fact that you had never seen him or known him, is possible that you had not correctly identified him.

The Decision

[14] The key question is on the identification of the accused at the scene. Here the Court finds that the evidence of PW1 generates the impression that he was at the material time standing at a vantage point to have witnessed the encounter between the stranger whom he says he later got to know him as the accused, the deceased and the victim under Count 2. This is attested to by the proximity of the place where he was standing when the trio emerged from bar, the amount of light which relatively though visibly illuminated the place and all the subsequent developments. The salient ones being that he saw the accused proceeding to a car parked some 10 paces away in a dark place, from there he returned to the veranda where PW1 remained standing, walked passed him, approached the deceased and then shot him. Afterwards, he shot the victim in the other Count as the latter was approaching him.

[15] It appeared to the Court that the witness was consistent and honest in both his evidence in chief and under cross examination. He for instance, conceded that he had drunken liquor but qualified that by saying that he was nonetheless, in a sound mental state to observe the happenings. Also, he was fair

in telling the Court that the lighting on the veranda was not clear enough since it came from an assortment of coloured electricity lights and that it was on account of the reinforcement from the street based ones that he clearly witnessed the incidence. To crown it all, he fairly testified that the accused was a stranger to him, he did not attend an Identification Parade and that he first got to know the accused person while they were at Botha - Bothe during the criminal session.

[16] In concluding that the witness had identified the accused at the scene, guidance was solicited from some of the cases which have emerged to be standard in the matter. Their catalogue *inter alia* unfold - **R v Rassooe**[1] the Court concluded:

> Therefore it seems to me that the evidence of previous identification should be regarded as relevant for the purpose of showing from the very start that the person who is giving evidence in court identifying the prisoner in the dock is not identifying the prisoner for the first time but had identified him in some previous occasion in circumstances such as to give real weight to his identification[2].

[17] And, in **R v SETENANE MABASO AND ANOTHER**[3] Mofokeng J relying upon **S v MEHLAPE**[4] said:

> *... In a case involving the identification of a particular person in relation to a certain happening, a Court should be satisfied not only that the identifying witness is honest, but also that his*

[1] 1932 NPD 112
[2] @118
[3] CRI/T/16/83
[4] 1963 (2) SA 29 at 32 A

> *evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonable required to ensure correct identification…*[5]

[18] What is of significance in the present case is that the witness had previously identified the accused at the scene. He had done so from a vantage point of view and relative sufficient light to have seen the developments. This is reinforced by the consistency and honesty which he demonstrated in the course of his detailed account on how each of the victims was shot and on what happened thereafter. So, in this regard, his testimony appears to be credible and believable.

[19] The defense advanced for the accused is an intriguing one. It is basically that he was never at the scene at all material times and that instead he was with his father at his home in Mafeteng. Despite this position, he introduces an ironic dimension to his case by stating that on account of the torture he was subjected to by the police, he disclosed to them that the shooting which is the subject matter of this case, could have been caused by his late friend Thabang Mokoroane who had disclosed that to him. The explanation is unconvincing since if he had secured such vital information and suspected it to be true, it would not have been necessary for him to make the disclosure after he was tortured by the police. A normal reaction would have been for him to

[5] *Ibid* @ p. 13

readily pass over that information to them for their own investigations. This would be so especially when the said Thabang was already late.

[20] Recognizably, the evidence of S. Insp. Janki (PW2) does not directly place him at the scene or attests to his participation in the commission of the offence charged. Instead, it is of an indirect nature in that it seeks to circumstantially locate him at the place at the relevant moment and then connect him with the offence. Its matrix is very simple. It starts from a simple statement that his investigations led him to the accused. The latter simply told him that he was at Mafeteng at all relevant times and then acting on the basis of the information which he said he received from the late Thabang, expressed a suspicion that the latter had committed the offence. Finally, it emerged that the gun in question had exchanged hands between the two and that the cartridges found at the scene had been fired from it. Thus, the question would be who between the two committed the offence. This triggers the significance of the direct evidence tendered by PW1 especially on his identification of the accused but not the late at the place and time, his narration on how he shot the victims and his subsequent behavior when interfaced with the undisputed discovery of the stated cartridges found at the scene.

[21] It remains incomprehensible why the accused did not confront PW1 while he was in the witness box with his foundational defence that his late friend Thabang had told him that he shot people at Wood Parker. The narrative would have been that the incidence could have been occasioned by Thabang and not himself. This deserved to be complemented with a statement that it transpired to him that the incidence happened while he was at his home in Mafeteng with his father. An operative rule in conducting a defence is that each witness must be confronted in accordance with his testimony. The rationale is to avoid raising of what is considered the eleventh hour defence which is suspected of being an afterthought and allow the Court to judge how the Crown would have contradicted that during re - examination and perhaps, even evidentially. Accordingly, it was cautioned in **R v Lefaso**[6] that:

> Moreover in his own defence accused never put his version of an alibi to crown witnesses who say they saw him in order to enable them admit or deny his version or even to cast a doubt as to their untrammelled perception of accused and his identity. I therefore find that the *alibi* cannot be true and that accused's attempt at raising it albeit so late in the day is nothing else but something akin to clutching at the straw of a drowning man. The accused's defence is rejected as false beyond all doubt.

[22] There are serious mutually destructive contradictions in the defence advanced by the accused. His initial position when cross

[6] [1989] LSHC 10 @ para 15

examining PW1 was that he did not know anything about the shooting yet when cross examining PW2 he suggested that he took him to the late Thabang whom he knew that he is the one who shot the deceased at the scene. He ought to have from the onset consistently straightened up his defence by unequivocally explaining that he was not at the scene but at Mafeteng with his late father and that the late Thabang had confided in him that he was the culprit in the matter. This might have supported the sustenance of his defence since his burden is simply to advance a story which could be possibly true even if the Court may not believe it to be so. Had that been the case, the assignment would have remained with the Crown to rebut the explanation beyond any reasonable doubt. The thinking is justified in **R v Mosuoe**[7] where the law was articulated in these terms:

> No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

[23] Besides the identified deficiencies in the manner in which the defence presented its evidence, his case is also undermined by circumstantial evidence aspects which effectively corroborate the direct testimony of PW1 on what had transpired at the scene. These consist of the:

[7] [1991] LSHC 28 @ para 28

1. Admitted unlawful shooting of the victims, the happenings before and after the incidence leaving the Court with one question as to whom by;
2. Association of the gun used in the commission of the offence with the accused and Thabang under whatever circumstances;
3. Association of the fired bullets with the same gun;
4. Failure of the accused to distance himself from the scene at the relevant time in the face of his placement there by PW1;
5. His failure to have timeously introduced his defence of *alibi* by challenging the witness who placed him at the scene and illustrate that by suggesting that the offence could, on the basis of the information he had, have been committed by Thabang;

[24] Moreover, the same revelations turn to circumstantially corroborate the evidence of PW2 that the accused had informed him that he was the one who shot the victims at the Woodparker, led him to Thabang who produced the gun and associated its possession with himself and the accused.

[25] The evidence under consideration was basically relied upon in leading case of **R v Nkosi**[8]**.** An interesting feature in this case is that unlike in the instant one, there was absolutely no eye

[8]CRI/T/1Q/91 @ page 50

witness. However, the accused was convicted and a capital punishment was imposed upon him. The evidence and its parameters were explained thus:

> The instant case being a circumstantial one the Court has to have regard to the cardinal rules of logic set out in R. vs Blom 1939 AD 325 where these rules are set out as follows :
>
> 1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
>
> 2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude the other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.[9]

[26] At this stage, the Court duly cautioned itself concerning a possibility that PW1 might in the material circumstances have in good faith mistaken the identity of the accused. A special attention was in particular paid to the stated quality of the light at the scene, movement of people and the proximity of the witness towards the accused. A holistic perception was adopted

[9] *Ibid*

through a dissection of each evidential component in the scenario. This is in accord with the proposition made in **Ganda v S**[10] that:

> In assessing the evidence, a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused is proved beyond reasonable doubt. This does not mean that the breaking down of the evidence in its component parts is not a useful aid to a proper evaluation and understanding thereof.

[27] As it has already been stated, it is found that the Crown has discharged its burden in proving that the accused was at the scene at the relevant times where he intentionally fatally shot the deceased Ramabanta Linakana and then incidentally attempted to kill Tanki Kori the complainant under Count II by shooting him as well.

REASONS FOR SENTENCE

[28] The Court has thoughtfully considered factors raised by the defence as extenuating circumstances. In this respect, the Court recognizes the information given to it by the Crown and the Counsel for the defence that the convicted accused is currently serving a Twenty-five years (25 years) of imprisonment. The Court has in particular, taken into account revelations that the convicted accused is positively responding to the correctional programmes in prison. This is demonstrated by his obedience to

[10] (A182/2011) [2012] ZAFSHC 59 @ para 4

the authorities and industriousness in a multi-faceted way. Normally, this could be an indication of remorse and that he would in future live, like a responsible citizen. In his own words he told the Court that he will never repeat the same mistakes.

[29] Notwithstanding the acknowledged positive picture, the accused is found to have committed the offense brutally and inhumanly. There is no evidence whatsoever that the deceased and the victim in the second count, had placed his life in danger; The Court is disturbed by the 'celebrative' gestures which he demonstrated after killing the deceased and attempt to kill the other victim. This he did by spinning his car for several times and making the corresponding engine refs in what sounded like server of boastful sound.

[30] Thus, the sentence imposed seeks to balance deterrent and rehabilitative considerations. The Court has here been inspired by **S v Matjeke**[11] That:

> In our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment does not require to be accorded equal weight but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.

[11](049/2016) [2016] ZAGPJHC 129 para 15

[31] In the premises, the accused is sentenced to as follows:

1. Twenty (20 years) of imprisonment without fine in relation to the first count of murder.
2. Eight years (8 years) of imprisonment without fine in relation to Count II.
3. Both sentences are suspend for five years (5 years) on condition that during the suspension, the accused is not found guilty of an offence involving use of violence.
4. The remaining sentence is to run concurrently with the twenty-five years (25 years) sentence imposed in CRI/T/64/08

E.F.M. MAKARA

JUDGE

For Crown : Adv. Thaba instructed by the office of the DPP

For Accused : Adv. Pheko instructed by Messrs T. Maieane