IN THE HIGH COURT OF LESOTHO

CR/T/40/2007

In the matter between:

REX	**Crown**
V	
MOSALETSANE KULEHILE	**Accused**

JUDGMENT

Coram :The Hon. T. Nomngcongo

Date of hearing :26th February 2018

Date of Judgment :7th May 2018

[1] The accused is charged with murder and the unlawful possession of a firearm in contravention of section 3 (2) (a) of the internal security Act as amended by Act N04 of 1999. It is alleged on the count of murder that on or about the 27th October 2006 he acting unlawfully and with intent to kill shot

Tsoarelo Phehlane (hereafter referred to as deceased) and inflicted upon him a gun-shot wound from which he died at Mafeteng Hospital on the 20th November 2006. On the second count it is alleged that he had in his possession a firearm, to wit, **a 7.65 calibre pistol of serial number BB/2004 with six rounds of ammunition** without a firearm certificate in force at the time.

[2] To establish its case the crown led viva voce evidence of five witnesses and tendered five admissions made on behalf of the accused. Having closed its case with this evidence the crown further applied to introduce through the court one last witness it that it had all along intended to call but failed to secure until the last minute.

[3] The defence attempted to resist the calling of this witness claiming that it would prejudice the accused. The nature of such prejudice was not stated. The court found there was

no merit in the objection and exercised its discretion and allowed the calling of that witness ***in terms of section 202 of the Criminal Procedure and Evidence Act 1981.***

[4] The evidence of PW1 Masekhobe Mphatsoe is that on the 26th October 2006 the detailed four boys including the deceased to the bus stop to receive people who were coming to attend a funeral at their village. The boys duly went. Not being able to locate the visitors immediately they tried to do so by cell phone and went to a spot where there might be a signal, and this took them to the top of the main road. While engaged in this exercise and thereat there appear a taxi than then parked on the road alongside them. It is not said how far they were from where the taxi had parked but PW6, Lebohang Kabane testifies that it was in the middle of the field. This suggests that it was not in the immediate vicinity of the road.

[5] The taxi parked for a while – two minutes is mentioned – and no one alighted but the passenger's door opened and suddenly there was a gun report causing the boys to run off. Only that one of them had remained behind and he was shouting at them to come back. The boys had to hide in a nearby donga. The taxi drove off. From where they hid the boys then saw another taxi arrive and stop next to their companion who had remained behind and had now fallen to the ground by the roadside. The occupants of the latter taxi then took their fallen companion (who it turned out was the deceased). And drove off with him. The boys obviously concluded that the gun shot they had heard had found its target on the deceased. They went home to report.

[6] The story is then taken up by PW4. Ntja Ramokuena. He was the driver of the latter taxi. He was driving to Mafeteng from Thabana-Morena where he had left at around 8pm. On his way at Qhoqhoane he found a person lying on the road and beating down with the palm of his hand on the ground.

He stopped and looked at him. He was unable to stand up, His trousers were blood stained. The driver was with a companion, Molise Ramokuena. He helped him put the deceased into his vehicle. There he asked him what had happened he told him they had been sent to fetch people who were going for a funeral and that a Kombi had arrived and its door had opened and was followed by a shooting. His companions had run away and he did not know where they were.

[7] PW4 then rushed the deceased to Mafeteng Hospital. On the way he saw vehicle head lights shining on the village of Ha Ramarothole ahead of him. He drove faster to catch up with it and to identify it. He drove behind this vehicle until he caught up with it. He flicked his lights as a signal for the driver to stop. He did not stop, PW4 overtook him and when he was parallel to him, he was about to take a turn, when PW4 hooted him. He stopped then and rolled down his

window and so did PW4. The latter asked him what happened back where they had been.

He said he did not know anything. He (the driver) was known to PW4 as ntate Lebenya. He was in the company of a passenger that he did not know. He was in the front seat. The witness does not know the accused.

[8] The witness reported the matter to the police and then transported him to the hospital where he left him with the nurses.

The witness then about two weeks later met Lebenya at Mohale's Hoek. Lebenya then told him that he had not shot the person but that it was the person he was with who had done it.

[9] The last *viva voce* witness was PW5 N0.11840 Detective Inspector Mochele. In the company of P/C Lekholoane and P/C Kotele proceeded to **Mt.Olivet** in the area of Thabana

Morena, where accused works as a school teacher. They met accused and introduced themselves and why they were there. They explained his regrets and then sought an explanation regarding the death of the deceased. The accused then led them to a place at Ha Mats'aba where he owned a business. There he handed over a **7.65 calibre pistol serial/number BB12004 and six rounds of ammunition**. He had taken it out from a jacket that was hanging on the wall in the shop. He had not been assaulted, threatened or promised anything in return for doing so. The firearm and ammunition were handed in as exhibits and marked *Exht "1*"

[10] In cross-examination it was put to the witness that the accused never pointed to the firearm and that the police themselves searched the room and found the firearm. This was denied, and it was reiterated that he pointed where it was. It was put to him also that the accused knew nothing about the gun and further that the room as used by his

security guard. The witness replied that he was hearing this for the first time. To the assertion that accused did not live at his place of business but elsewhere, the witness said he did not know that in fact a security guard in fact lived there.

[11] There was no suggestion in cross-examination of the use of force or threats against the accused. The witness says there would not have been any occasion for any prolonged or intense interrogation as the accused was very cooperative.

That concluded the viva voce evidence which up to that stage was led for the Crown.

The admissions of the company of PW6,7,8,9 and 10 were read into the record.

[12] PW6 was in the company of PW2 and 3. He corroborated their evidence in every material respect. PW7 was N0.10306 D/P/C Mokone who testifies that following a

report he proceeded to Mafeteng Hospital where he met deceased who was still alive she observed that deceased had sustained an open wound of the right side of his waist and on the hand. From the hospital she proceeded to the scene in the company of D/Tpr. Mokuena and Mphanya. There they found a shell of a 7.65 pistol. The admission was rea into the record.

[13] The statement of D/P/C (PW8) as an admission as was read into the record. It is to the effect that she was in the company of three police officers, Mokone, Mphanya and Moleko when they went to the accused's place of work. She is quoted as saying in her report that: "**I introduced myself and other police personnel to him, then cautioned and warned him and gave him a charge of murder concerning the death of one T'soarelo Phehlane whom he shot on the 27th October 2006 and I arrested and kept him in police custody"** I hasten ahead here to deal with this statement because the Crown in its closing arguments

says that this is an admission that accused killed the deceased. This is incorrect. A mere statement in a report by a police officer that she charged someone for the death of someone else whom he had shot cannot without further ado amount to any admission by the accused that he had shot and killed that person . The report does not even say that the accused said he had shot and killed anyone. It is merely the assumption of the police officer on undisclosed premises that the accused had shot the deceased. It was not a statement freely and voluntarily made by the accused as required by the law (see **R v Barlin 1926AD. 459**).

[14] The admitted medical report says that death occurred as a result of intestinal obstruction secondary to a gangrenous bowel, and that the deceased had a bullet lodged in the sacrum. He also had to a 10-15cm gangrenous *sig.moid colon* which caused intestinal obstruction and sepsis.

[15] From the report it does not appear that prior to his death, the deceased who arrived in hospital alive and able to narrate the events of the day, was given any treatment for his injures. In my view the injuries described in the post mortem were amendable to medical intervention as they did not appear to involve any vital organs. The life of a young man might perhaps have been saved.

[16] The last in this line of witness as was PW11 Senior Inspector Pali who has once retired. He is a forensic expert. He examined the firearm that accused had produced and handed to the police at his place of business and the **bullet shell** that the police had collected at the scene of the shooting of the deceased at Qhoaqhoane on the 27th of October. His examination concluded that the shell had been fired from the same firearm.

[17] The last witness ‘Mapaseka Maphike was called by the court on the application of the prosecution. She was called in terms of **section 202 of the Criminal Procedure and evidence Act 1981.** The defence had unsuccessfully attempted to resist the introduction of this witness.

[18] She testified that she had been an employee of the accused in one of his shops. The accused sometimes served as a guard at the shops and would stay there for the purpose. She had at least on two occasions seen the accused with a firearm. On one such an occasion accused was packing his bags in preparation for going to a course in South Africa. She described it as a short gun with black and silver coloured. She also testified significantly that her father Leabuajoang had also worked as security guard at the same shop. His father had died on the 22nd May 2005 she produced a death certificate as proof thereof. That is at least six months prior to the shooting at Qhoqhoane.

[19] The defence cross-examination taxed the witness about the statement she had made to the police in which shyly omitted the important fact that accused had a firearm. She admitted this omission when that was pointed out to her but she was not asked why she had done so. There is possibly an explanation. The need for such explanation however falls away in the light of earlier cross-examination that the firearm had indeed been found at accused's place of business but according to the cross-examination not because the accused had pointed it out but because the police had on their own accused searched for it. So there was no question therefore that the firearm had indeed been found.

[20] That finally concluded the crown case. The accused chose not to give evidence in his defence. He has a constitutional right to do so. In exercising that right however the accused,

where the crown has established a ***prima facie*** case takes a risk that it might turn out to be sufficient proof. **See Osman and Another V Attorney General Transvaal (1998(4) SA 1224** and a magical of other cases in this and all Common law adversarial systems. It was held there.

> **"…in an adversarial system, once the prosecution had produced evidence sufficient to establish a prima facie case, an accused who failed to produce evidence to rebut that case was at risk. The future to testify did not relieve the prosecution of its duty, to prove quilt beyond reasonable doubt. An accused however, always ran the risk that in the absence of any rebuttal, the prosecution's case might be sufficient to prove the elements of the offence."**

[21] The defence was alive to this risk as at the close of the crown case. He had applied for his discharge in terms of section 175(3) of the Criminal Procedure and Evidence Act.

The application was unsuccessful and he was called upon to answer which he declined to do.

[22] It was however argued on his behalf, that the prosecution had failed to prove its case, this time beyond reasonable doubt because ***"no witnesses for the crown had said that the accused person was seen around that area on that night and or that he was in the said taxi***". It was submitted that in the absence of such direct evidence the Crown's only option was circumstantial evidence. The defence is correct. None of the witness, the boys at the scene, were able to identify the occupants of the taxi that stopped after the gun report which resulted in the injury to the deceased. This left the crown with only circumstantial evidence to establish their identity if they are at all related to the scene.

[23] In this regard Mr Setlojane referred the court to the celebrated case of **Rex V Blom 1939 A.D. 188** where **Watermeyer J.A.** said at **202-303** regarding inferences to be drawn from circumstantial evidence.

> **"(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".**

[24] The Court of Appeal of Botswana in holding that the constitutional right to silence does not preclude the presiding officer from considering as part of the overall assessment of the case, the accused's silence in the face of a prima facie case established by the prosecution. In **S. V Sidziya and Others 1995(12) BCLR 1626 at 1648, Naicly A.J.** put it this way that:

“The right means no more than that an accused person has a right of election whether or not to say anything during the plea proceedings or during the stage when he may testify in his defence. The exercise of the right like any other involves the appreciation of the risk which may confront any person who has to make an election inasmuch as skilful cross-examination could present obvious dangers to an accused, should he elect to testify, there is no sound basis for reasoning that, if he elects to remain silent no inferences can be drawn against him.”

[25] The circumstances surrounding this case are that on the 27th October the deceased in the company of two others were by the road –side when a taxi stopped for a minute or two along side them. An occupant of the taxi opened the door and a shot rang out. The deceased immediately sustained a gunshot wound and the taxi speed of. There can be no doubt that deceased was shot and as a result of

the shooting they wounded the deceased. Another taxi arrived and took the deceased and along the way the driver spotted a taxi going in the same direction of Mafeteng and the driver no doubt concluding that it was the only vehicle that had passed through the scene of the shooting and therefor must have seen what had happened gave chase to the vehicle he had spotted and flashed his lights in an attempt to make this taxi stop. It did not until the other taxi had to overtake it as it was about to turn although we are not told in what direction. The taxi only stopped when the other one was parallel to it and he asked the occupants what had happened back where they had passed though and he driver said he knew nothing. In my view he and his passenger were trying to shake off the passing taxi. The only reason they would have done something wrong back at the scene of the shooting.

[26] Following the shooting on the 27th the following day a shell was found at the scene. I have no doubt it was from the shot

that was fired the previous day. Days later the accused, without any undue influence and in fact before he was even taken to any police station, took the police from his place of work to his business where according to the police he himself took out a gun from a jacket hanging on the wall. According to him they found it while they conducted their own search. Even that is only suggested in cross-examination; he does not suggest where they found it. Importantly however he does not deny in cross-examination that he took the police not under any threat or undue influence to his own business where the gun was found. It was put to PW7 that accused explained that the firearm belonged to his security guard one Lebuajoang. PW7 said he was hearing this for the first time. Now it turns out that Lebuajoang had died six months prior to the shooting and it is most unlikely that all his belongings and firearms, especially, would have been left lying about an accused's business.

[27] This leads me to the issues capable conclusion that the accused owned the gun or knew that it was there, otherwise he would not have led the police to it and he led then to it for a reason. The reason that the police would have wanted the gun would have been that it had been involved in illegal activities. The illegal activity in this case was that it had been used to shoot the deceased. The accused knew this because the police told him that they were investigating this death when he led the police or produced the gun. These circumstances cry for an explanation. He must explain why a gun found in his possession shot deceased a long distance away from his business and why, we cannot therefore say it was he who shot the deceased. He is not forthcoming.

[28] In **Murray Vs DPP.(1994)/WLR (HL) Lord Slynn** had this to say:

“ ..if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty.”

The accused here is charged with murder and illegal possession of a firearm. Murder is an unlawful killing of another person with intent to kill. See **R V Valachia 1945 AD 826 at 829. Hunt – SA Criminal Law Vol.II** says:

“To constitute in law an intention to kill there need not, however, be a set purpose to cause death or even a desire to cause death. A person in law intends to kill another if he deliberately does an act which he in-fact appreciates might result in the death of another and he

***acts recklessly as to whether such death results or not*.”**

And again

“In attempting to decide by inferential reason of the state of mind of a particular accused at a particular time, it seems to me that a trick of fact should try mentally to project himself into the position of that accused at that time.”

[29] In this case, unfortunately I was not addressed on the aspect of the intention of the accused and I must gather such from the proven circumstances of the case. I have come to the conclusion that the accused must have been the person who shot the death in the circumstances of this case. He was the one passenger in the taxi that stopped alongside the deceased and his friends. They stopped for a minute or two. No purpose of such stopping was

immediately apparent. A door was opened and a shot rang out from the passenger, the accused. In any view they had stopped and had conducted a brief surveillance which had revealed the presence of human beings nearby. The accused decided to shoot, not in the air but straight ahead shooting and injurying the deceased. The act was deliberate and the accused was reckless whether death ensued or not. He is therefore guilty of murder. The accused also failed to produce a firearm certificate in respect of the firearm.

[30] Verdict: Guilty as charged on both counts.

T. NOMNGCONGO

JUDGE

For Crown : Mr Mahao

For Accused : Mr Setlojane