

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CRI/T/0014/18**

**In the matter between**

**REX**

**AND**

**LEBILETSA MOTŠOANE**

**1<sup>ST</sup> ACCUSED**

**THAPELO MOTŠOANE**

**2<sup>ND</sup> ACCUSED**

**Neutral Citation:** Rex v Lebiletsa Motšoane and Another [2022] LSHC 324 Cri.  
(12<sup>TH</sup> DECEMBER 2022)

**CORAM: MOKHESI J**

**HEARD: Various dates from 5<sup>th</sup> November 2019 to 11<sup>TH</sup> November 2022**

**DELIVERED: 12<sup>TH</sup> DECEMBER 2022**

## **SUMMARY**

**CRIMINAL LAW:** *Accused charged with murder on the basis of common purpose- Crown failing to proof its case beyond a reasonable doubt – Accused acquitted.*

### **ANNOTATIONS:**

#### **Cases**

*Boi and Others v R LAC (2009 – 2010)*

*Mokoonya and Others v R 237 LAC (2007 – 2008)*

*Moshephi and Others v R LAC (1980 – 84) 57*

*R v Difford 1937 AD 370*

*S v Dladla 1980 (1) SA 526 (AD)*

*S v Shackell 2001 (4) SACR 1 (SCA)*

*S v Chabalala 2003 (1) SACR 134 (SCA)*

*S v Mgedezi and Others 1989 (1) SA 687 (A)*

*S v Mkohle 1990 (1) SACR 95 (A)*

*Thebus and Another v S 2003(6) SA 505 (CC)*

## **JUDGMENT**

- [1] Accused are charged with contravening the provisions of section 40(1) read with subsection (2) and section 26(1) of the Penal Code Act 2010, in that they unlawfully and intentionally killed one Malebelle Malebelle at or near Naleli Ha-Phaila in the district of Berea on or about the 21<sup>st</sup> day of May, 2017. Initially two accused were arraigned. Accused1 died in the middle of the trial. They had both pleaded not guilty to the charge.
- [2] Prosecution's evidence was based on the oral testimony of six witnesses, together with the admitted reports of No. 11704 Police Constable Khusu and No. 7915 Detective Sergeant Kubutu, post-mortem examination report which stated that the deceased died as a result of head injury with subarachnoid haemorrhage. The statement of P/C Khusu is to the effect that he was driving his car on the way to Sekamaneng and that when he got to Naleli Ha-Phaila he found the two vehicles which had collided. There was a male person who was lying on the ground. Upon inspecting the person, he discovered that he was bleeding from the mouth and was unconscious. He then instructed the people who were there to take him to hospital. After making an inquiry, he was told by one Mr Mohale that that male person had been attacked by the patrons of the nearby tavern. Statement of Detective Sergeant Kubutu is to the effect that he summoned the two accused to the police station and sought their explanation in relation to the death of the deceased which occurred at Naleli near Dummy Butchery. After they gave him an unsatisfactory explanation, he charged both with his murder.

[3] PW1 was Mr Litheo Motsamai, who testified that he was travelling in a deceased's vehicle with the latter driving, when their vehicle collided with another vehicle. He stated that he did not see what happened. He only heard when the deceased applied the brakes. The time was between 19 hours and 21 hours. The collision happened at Ha-Phaila Naleli. After the deceased's vehicle had hit the stationary vehicle, the patrons who were seated outside the tavern angrily approached them. He said six to seven in all had approached them. The patrons were in a fighting mood. He stopped them from fighting, and they obliged. He returned to the vehicle. While in the vehicle, he heard insults being exchanged. He alighted and went to where the altercation was coming from and that is when he realised that that group of six to seven people was fighting with the deceased. He tried to intervene, but an unknown man rebuked him saying they wanted to "finish off the deceased." He said he went to the rear of the deceased's vehicle where he found the deceased lying down. He testified that he together with PW5 Khabeletsi Khaka tried to "wake him up," and when he could not respond, they took him to hospital. He said the deceased was unconscious. When they got to Queen 'Mamohato Memorial Hospital they were told he was late. PW1 told the court that beer bottles were used to attack the deceased.

[4] Under cross examination he was asked whether it is visible enough for him to see a person who was one or two metres away. His response was that due to illumination which was provided by the tavern's outside electric lights he could see what was happening. He was questioned on how many people were involved in the first confrontation and attack on the deceased. His answer was that seven to eight people attacked the deceased. Asked how

many people were involved in the second attack on the deceased, PW1's answer was that the same number of people who were involved in the initial confrontation were involved. He repeated what he said in chief that the deceased was attacked with beer bottles. Questioned on whether he saw the two accused attack the deceased, PW1 answered that he could neither confirm or deny as he did not know them.

[5] PW2, Mr Matakalatse Mokhali was present at the scene of crime on the fateful day. He knows the accused as they stay in the same village. He said he was at the tavern in Naleli at around 20 hours and 21 hours with many other patrons. He was inside the tavern with other patrons when he heard the collision outside and immediately called upon one Phakisi to go and find out if his vehicle was not involved. Phakisi returned and informed him that his vehicle was not involved, and they went back inside the tavern. After they had gotten inside, after he seemingly had gotten involved in a fight, accused2 rushed into the tavern and picked up an axe. PW2 told the court that he prevented him from going outside with the axe. He said accused2 obliged and put it back. They all went outside.

[6] The two collided vehicles had blocked the road and had caused traffic to back up. He stated that the road was impassable as a result. He told the court that he stood next to the culvert together with accused1. The deceased was standing next to his vehicle whereupon he overheard accused1 saying he had been driving at a high speed and should not have done so in a built-up area. Upon hearing this comment, the deceased hurled insults at accused1. The deceased "became furious and insulted him [accused1] with his mother" the witness told the court. Apparently accused1 got provoked by the insults

and he approached the deceased. He tapped the deceased on the chest telling him not to insult his mother. As PW2 was frightened, he tried to intervene as “many people were going towards one person.” Before he could reach the deceased’s vehicle, he saw him “trying to pick up something near the seat.” He told the court that he thought the deceased was picking up the firearm, and because he feared for his life, he fled. At the time he fled the two accused were near the deceased vehicle. He told the court that he heard on the following day what happened to the deceased.

[7] Under cross-examination, he was asked to whom accused1 was talking when he said the deceased should not have been driving at such a high speed in the village. His answer was that he was talking to him [PW2]. He was asked whether accused1 directly attacked the deceased on being insulted by him. His answer was that “did not see him attacking him in my presence.” He was asked to confirm whether accused2 went beyond patting the deceased on the chest either by kicking or hitting him. PW2’s reply was in the negative. It was put to the witness that the deceased was visibly very drunk when he insulted the accused. PW2’s answer was in the affirmative.

[8] It was put to him that accused1 did not attack the deceased and was not drinking beer as he was running his tavern on that day and that the deceased was attacked by people who were drinking at his tavern. PW2’s answer was that he was not sure because before he left nobody attacked the deceased. As regards A2 it was put to him that he did not attack the deceased, he only discouraged him from insulting his mother. PW2 answered that he saw accused2 touching the deceased. It was put to the witness that accused2 never attempted to pick up an axe at all. PW2 reiterated what he told the

court in chief that accused2 picked up an axe and was dissuaded from going outside with it.

[9] PW3, Mr Nathanael Khoabane Mohale testified that he knows the accused as they come from the same village. He is a taxi driver. He did not know the deceased. On the fateful day he was present at accused1's tavern whereat he found many people already present. A car accident happened outside and when they got to the scene, due to skid marks, he concluded that the deceased's vehicle must have been driven at a high speed. PW3 told the court that accused1 told the deceased that there was no need to call the police as the latter was clearly at fault, and that is when the altercation started. The deceased hurled insults at the accused. Both accused approached him and the quarrel ensued, but it did not last long.

[10] PW3 told the court that he saw the deceased falling to the ground and that at that time he heard accused1 telling accused2 to go home because he was drunk. He said the accused beat the deceased "with hands". He told the court that he did not see what happened to the deceased after he fell to the ground. He was asked what accused2 was doing which led accused1 to say he should leave the scene. PW3 said he did not see what accused2 was doing. After the witness could not say what accused2 was doing which led his brother to say he should leave the scene, Crown counsel Ms Mofilikoane asked for a short adjournment. After the adjournment the witness said after the deceased had fallen to the ground, he "saw accused2 stumping him on the head."

[11] Under cross examination a question was put to him that before the short adjournment he never mentioned that the accused were stomping on the deceased's head. His answer was in the affirmative. A follow up question was what suddenly caused him to recall what happened. His answer was that he was told to recall what happened. He told the court that he was afraid of something he did not know. He however, denied that he was coached during the five minutes adjournment. It was put to him that the accused deny that they stomped on the deceased's head. His answer was "I agree". He was told that it was an afterthought that he saw the accused stomping on the deceased's head. PW3 disagreed. He admitted that he was drinking alcohol on that day but that he could still see what was happening. PW3 told the court that he did not know that the people who were drinking at the tavern attacked the deceased. He denied that he was part of the mob that attacked the deceased.

[12] PW4, Mr Phakisi Molapo told the court that the accused are his neighbours. He did not know the deceased. He was present at accused1's tavern when the collision between the two vehicles happened. He said while he was inside the tavern, he heard a sound of vehicles colliding, and immediately together with other patrons ran outside. The vehicle which was hit by the deceased's vehicle belonged to one Steve. They took about five minutes outside where accused2 was already, waiting for the police to arrive. Accused1 was selling beer at the time. After some time, accused2 came into the tavern hurriedly, went behind the counter and picked up an axe. Accused2 was disarmed. While outside accused1 commented that the deceased was driving at a high speed. The deceased overheard this conversation and started hurling insults at accused1. Accused1 immediately



crossed over to the deceased. There was “confrontation which seemed to lead to a fight.” As the driver’s door was open, the deceased leaned over as if to pick something inside. He said both accused bit the deceased with fists. He left when the fight started. He said other people stood by, watching the fight.

[13] Under cross examination PW4 was questioned about the role he played in the incident. A question was asked whether he touched the deceased. He said as they were talking at the same, he asked the deceased to stop talking to avoid the fight. He said the deceased tried to go back to his vehicle, and that is when he pulled him with the shirt. He was asked why he concealed that he pulled the deceased with a shirt. His answer was that he testified on what he remembered. After initially denying that when he pulled the deceased the latter fell, on being read his police statement to the contrary, he conceded that the deceased fell when he pulled him with a shirt.

[14] PW4 denied that he was part of the mob that attacked the deceased. It was put to him that he was part of the mob that attacked the deceased. His answer was that he was not intending to fight but instead to intervene. It was put to him that he was trying to conceal his role in the incident by saying the accused attacked deceased with fists. His answer was that there were many people trying to intervene. The question was put to the witness that he said in chief that he only spent three seconds at the scene of crime, while conveniently concealing that he pulled the deceased to the ground. He replied that his intention was to stop the fight.

- [15] PW5 was Mr Khabelesi Khaka. He did not know the accused. The deceased was his friend. He told the court that on that day he was at his shop at Khubetsoana when he got a telephone call from PW1. PW1 told him that they got involved in a car accident. As they were talking, he could not get the response from the caller. He then decided to drive to Ha-Phaila. When he got to the scene, he found the deceased lying on his back, bleeding through his mouth. He shook him and called him by his name. The deceased did not respond. PW1 emerged from the crowd which had gathered around, and they took the deceased to hospital whereupon they were told he was late. This witness was not cross-examined by the defence counsel.
- [16] PW6 was Detective Police Constable Tšasanyane who was posted at Mabote Police Station at the time of the incident. He was the investigator in this case. He told the court that his investigation revealed that accused2 used an axe to attack the deceased. He found accused2 at his brother's tavern and after requested him to handover the axe, he obliged. The axe was handed in as an exhibit and was marked "Exhibit 1". The LMPS 12 police form into which the details of the axe were filled out was marked "Exhibit D."
- [17] Under cross examination it was put to him that all the state witnesses said the axe was not used and in fact was never used. PW6's response was that "I hear you, but I got to the point of an axe by Thapelo. I didn't even see how it was like." It was put to the witness that the issue of an axe was brought up during coercive interrogation of accused2 and that he had no alternative but to hand it over. PW6 disagreed.

[18] After the closure of the Crown case, the defence applied for discharge of accused2 as accused1 had passed on during trial. The application was dismissed as the court was of the view that there was a *prima facie* case against the accused upon which the court might convict the accused. After this unsuccessful application for discharge, the defence opted to have accused2 testify in his own defence as the only witness. He denied playing any role in the death of the deceased. He stated that he was marshalling the vehicles out of the parking areas a Toyota RunX appeared travelling at a high speed. As he was marshalling one Steve's vehicle out of the parking spot, the RunX collided with Steve's car. The four occupants of the Run X disembarked and hurled insults at him. The driver of the RunX was the one hurling insults at him. He told the court that Steve tried talking to the deceased to stop insulting, but the latter would not listen. He stated that the deceased hit him first with a fist. Consequently, he ran into the tavern to tell the patrons that someone was fighting outside. Accused1 went out to find out what was happening, and he was insulted by the deceased as well.

[19] DW1 said he never went out of the tavern after being stopped from taking an axe. He told the court that the deceased was attacked by people who were outside the tavern as he was insulting everybody.

[20] Under cross-examination he denied PW3's evidence that he and his brother attacked the deceased first. Questioned on why he went back into the tavern to pick up an axe if he was not fighting, DW1 replied that he was attacked first by the deceased. He denied stomping on the deceased's head.

[21] **Evaluation and discussion**

It is a trite principle of our law that in criminal proceedings the Crown has an onus placed on it to prove its case against the accused beyond a reasonable doubt (**R v Difford 1937 AD 370** at 373 and 383). The court is entitled to acquit the accused if his version is reasonably possibly true, but it may not convict him merely because his explanation is improbable, it must, instead be convinced that it is false beyond reasonable doubt (ibid) (see also: **S v Shackell 2001 (4) SACR 1 (SCA)** at para.30).

[22] The approach to analysing evidence was stated in **S v Chabalala 2003 (1) SACR 134 (SCA)** at para. 15 as follows:

*“... the correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”*

[23] In **Moshephi and Others v R LAC (1980 – 84)** 57 at 59F – H the court put the approach to evaluating evidence as follows:

*“...The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other*

*available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole ...”*

[24] Against this backdrop of principles, I revert to the analysis of evidence led to determine whether the Crown has proved beyond a reasonable doubt that the accused is guilty of murder as charged especially in terms of the doctrine of common purpose. The purpose of this doctrine is to attribute liability on the co-participants in a criminal activity. The liability of co-participants arises from the common purpose they formed to commit the crime with which they are charged (**Thebus and Another v S 2003(6) SA 505 (CC)** at para.18: **Boi and Others v R LAC (2009 – 2010)** at 359H – I).

[25] It is not in dispute that the deceased’s vehicle collided with the vehicle of one Steve as it was being marshalled out of its parking spot by accused2 at the tavern which was owned by accused1. In the company of the deceased, who at the time was driving, were PW1, Litheo Motsamai and two ladies. It was in the evening at around 19hrs00 and 21hrs00. Consequent to the collision, there was an angry reaction from the patrons who had been seated outside the tavern. Six to seven of them approached the deceased and his companions. The six to seven people attacked the deceased and the fight ensued. PW1 tried to stop them but to no avail as the deceased ended lying on the ground. PW1 did not know all the assailants and would not be able to point them out as he was seeing them for the first time on that day. He testified that the mob used beer bottles to attack the deceased.

[26] Evidence that there were many people who had visited the tavern on that day is corroborated by PW2, Matakalatse Mokhali. Corroborating PW1, PW2 informed the court that “many people” went towards the deceased and as he was worried that so many people were going to descent upon one person he tried to intervene but that when he saw the deceased bending over as if to pick something inside his car he fled fearing that the latter could be picking up the firearm. PW1 stated under cross examination that he did not see the accused attack the deceased. He stated that accused2 did not go beyond patting the deceased on the chest. PW2 stated that the accused were not armed. He said that the deceased was intoxicated. PW2 could not deny that the deceased was attacked by seven to eight people. The witness told court that he did not see the accused attack the deceased and that the accused were unarmed. In fact, he told the court that accused2 did not go beyond patting the deceased on the chest.

[27] PW3, Nathanael Khoabane was in the same vicinity as PW1, PW4 and Pw5 on the day in question. He confirmed that the deceased was drunk and was hurling insults. As a result of the insults both accused approached the deceased and altercation started. Both accused hit the deceased with their bare hands – until he fell to the ground. Pw3 said he did not see what happened to the deceased after falling to the ground. This witness was clearly uncomfortable shedding light on what happened after the deceased had fallen to the ground, prompting Ms Mofilikoane to ask for a short adjournment ‘to consider her options’.

[28] After the adjournment of five minutes, Ms Mofilikoane reverted to the question which she had earlier unsuccessfully asked the witness pertaining to what happened after the deceased had fallen to the ground. Contrary to what the witness said before the short adjournment, he said he saw accused2 stomping on the deceased's head. As can readily be obvious when time of cross-examination arrived Mr Nthontho pounced on the apparent inconsistency of this witness' version. He was asked what had caused him to suddenly recall that accused2 stomped on the deceased's head after initially saying he did not see what happened. The witness responded by saying he was afraid and was "told to recall all what happened." Asked what he was afraid of, his answer was "I don't know."

[29] The demeanour of this witness left much to be desired: he was uncomfortable narrating what had happened to the deceased which led to him lying on the ground. The witness wanted to paint a picture that the deceased was only attacked by the accused when in fact evidence of Pw1 is to the contrary: the deceased was attacked by a mob of seven to eight people using beer bottles.

[30] PW3's testimony has serious internal contradictions on a critical issue of what happened to the deceased, and the role which was played by the accused. In one respect he says he did not see what happened after the deceased had fallen to the ground because he fled, in another respect he says he saw accused2 stomping on the deceased's head. These contradictions cannot simply be glossed over because they are material and, in my view, affect the witness's credibility. These contradictions cannot be attributable

to an error on the part of the witness (**See, S v Mkohle 1990 (1) SACR 95 (A)**).

[31] Pw4 Phakisi Molapo was also present on the scene of the fateful day. He told the court as they were inside the tavern when they heard a sound of vehicles colliding. They immediately went outside for five minutes. They returned inside the tavern to wait for the police to arrive. Accused2 who had remained outside, came in rushing and picked up an axe. He was disarmed by accused1 who was the bartender at the time. Accused2 informed accused1 that the deceased insulted him with his mother. After asking everybody to go outside, accused1 closed the tavern and crossed over to the deceased and that is when confrontation started “which seemed to lead to a fight.” And when the deceased approached his vehicle’s driver door which was open at the time him and PW2 fled the scene. He stated accused1 and accused2 were using their fists to fight. He told the court that only the accused fought with the deceased while the rest of the people who were there “all stood there”. He said he spent only three to five seconds on the scene before fleeing.

[32] Under cross examination Mr Nthontho extracted from the witness that he is the one responsible for causing the deceased to fall after he pulled him by the shirt. It also emerged contrary to what he said in chief that only the accused approached the deceased. He told the court that many people “intervened”. This is the exchange between defence counsel and the witness:



*“Pw4: I will tell the court about my intentions because I wanted to intervene*

*DC: They say [Accused] I must put it to you that in trying to conceal the role that you played, which is so prominent, you are now shifting the blame by implicating them in the attack by saying they were assaulting the deceased with their fists which is not true of course?*

*Pw4: I wasn't alone intervening we were many.*

*DC: Funny enough you said you only spent around 3 seconds at the scene of crime. Is that correct?*

*Pw4: Less than 3 seconds*

*DC: In less than 3 to 5 seconds, you conveniently decided not to mention that you pulled the deceased to the ground?*

*Pw4: I made it clear that my intention was to intervene not to fight.”*

[33] There is an internal contraction in the evidence of PW4 in the sense that in one breath he says he was on the scene for three to five seconds before he and PW2 fled the scene. He is even responsible for causing the fall of the deceased, but conveniently, he says does not know what happened to him. The deceased never got up after he fell, and this is uncontroverted. This puts in doubt his version that there was a point when the deceased leaned into his car as if to pick up something, because clearly this witness pulled the deceased by the shirt and he fell. The deceased never got up. PW1 was seated in a car when he realised that the deceased was under attack from a mob, and he alighted to go and intervene but to no avail. I find it improbable

that this witness was involved in the incident for three to five seconds. He was there much longer than he would have the court to believe.

[34] Clearly, the deceased did not approach his car. He was attacked and he fell to the ground after being pulled by the shirt by PW4. This witness is deliberately being economical with the truth to hide his complicity in the incident. He saw what happened but was intent on removing himself from the scene at the critical moments. He knew that the deceased was approached by “many” people and that his earlier story that everybody stood there watching as the accused attacked the deceased is untrue. That the deceased was attacked by a mob.

[35] Testifying in his own defence, the accused testified that he was insulted by the deceased after the latter’s vehicle had collided with Steve’s as the accused was marshalling it out of its parking slot. He admonished the deceased for insulting him. He told the court that the deceased hit him with a fist and as a result he ran back into his brother’s tavern to pick up an axe to fight. He was disarmed and never went out of the building. He denied ever stomping on the deceased’s head. The witness was clearly being untruthful when he said he never went out of the building after being discouraged from going out with an axe. There is uncontroverted evidence that everybody left the building after it was clear that there was commotion and altercation outside.

[36] On the day in question, the accused had a confrontation with the deceased after the latter had insulted him and he even went into the tavern hurriedly to pick up the axe which he said he was going to use in a fight. Whether indeed he went to fight is doubtful in the circumstances of the case.

Although PW3 and PW4 wanted to paint a picture that the accused were the only people attacking the deceased, there is evidence of PW1 to the effect that the deceased was attacked by a mob of seven to eight people using beer bottles.

[37] It is important not to overemphasise the accused's aggressive behaviour on that day, divorced from the surrounding circumstances. The accused's behaviour was triggered by the deceased's aggressive behaviour which involved insulting him. As to the accused's participation beyond the undeniable confrontation between him and the deceased I find that there is no evidence to that effect. The accused may have lied that he never left the building after being disarmed but that should not without more be the reason for imputing guilt on his part especially in view of PW3 and PW4's lack of credibility. It is important to heed the remarks in **S v Dladla 1980 (1) SA 526 (AD)** at 530 E – G:

*“...The warning in those cases against the drawing of a possibly erroneous inference from the circumstances that an accused person lied in certain respects or performed some other act which raises suspicion of his guilt ought to have been specially heeded in the circumstances of this case. It appears to me that the appellant's false denial relating to what he said and did in Jane Duma's room is neither by itself nor when considered together with all the other circumstances upon which the court a quo relied, of sufficient weight to tip the scales against him; scales upon which the vacillating, contradictory and substantially unreliable evidence of Khanyile weighs very lightly indeed...”*

[38] The essence of this dictum is that the seemingly suspicious behaviour of the accused and his lies, must be assessed in the light of all the evidence before liability can be imposed. The accused is charged with having shared a common purpose to murder the deceased. The following conditions must be met:

*“In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the [deceased]. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased, he must have intended [the deceased] to be killed, or he must have foreseen the possibility of [the deceased] being killed and performed his own act of association with recklessness as to whether or not death was to ensue.”*

**S v Mgedezi and Others 1989 (1) SA 687 (A)** at 705 I – 706 B quoted with approval in **Mokoonya and Others v R 237 LAC (2007 – 2008)** at 240 A – D.

[39] In **Mokoonya and Others v R**, (ibid) at para.6, the court warned against indiscriminately using the doctrine of common purpose and emphasised that each accused’s conduct must satisfy the requirements of the proscription of a crime before he can be convicted for it. It is common cause that the accused were present at the scene but whether they shared common purpose by associating themselves with the killing of the deceased, is doubtful: PW1 did not know all the deceased’s assailants. He could at least see that they were

using beer bottles as weapons of choice. PW2 did not see any of the accused attack the deceased.

[40] PW3 was a very problematic witness whose credibility I found to be questionable. His demeanour in the witness box left much to be desired. His testimony has material internal contradictions. At one point he says there was a fist fight between the accused and the deceased. In another, after five minutes adjournment, he says he saw accused1 stomping on the deceased's head. His evidence that everybody was watching as the accused engaged in a fight with the deceased is inconsistent with PW1's evidence that seven to eight men descended on the deceased with beer bottles.

[41] Evidence of PW4 stands on same the footing as that of PW3. He wanted the court to believe that only the accused and his brother were involved in a fight with the deceased. It emerged under cross-examination that this witness had pulled the deceased by the shirt thereby causing the latter to fall. He said he was intervening. In chief, he told the court that when accused and deceased were fighting everybody stood there watching. This is inconsistent with what he said that he got involved when, as he says, he was intervening. On the conspectus of the whole evidence I am not persuaded about the extent of the involvement of the accused in the killing of the deceased. There was a mob which descended on the deceased and hit him with beer bottles and that is consistent with the pathologist's finding that the deceased died of head injuries. In the circumstances, there being lack of sufficient evidence about the role of the accused, he should be given the benefit of doubt. The Crown has failed to prove beyond the reasonable doubt that the accused is guilty of the offence charged.

[42] The police investigations of this case left much to be desired. Detective Police Constable Tšasanyane seemed to harbour a belief that the deceased was murdered by the accused using an axe. This version is inconsistent with evidence of other Crown witnesses. He did a shoddy investigation work; it must be said. He would not even care that his version is inconsistent with other Crown witnesses' statements.

[43] In the result:

Accused is found not guilty.

My Assessor agrees.

[44] Order

Exhibit 1 should be returned to the accused.

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**MOKHESI J**

**For the Crown: Adv. L. Mofilikoane**

**For the Defence: Variously, Mr. Nthontho, Adv. Sehapi and Adv. N. Naha**

