

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CRI/T/000**

**9/20**

In the matter between:

**REX**

**CROWN**

**AND**

**TS'ELISO**

**NTHANE**

**ACCUSED**

Neutral Citation: Rex vs Ts`eliso Nthane [2022] LSHC 80 CRI (25<sup>th</sup> March 2022)

**CORAM: RANTARA P - ACTING JUDGE**

**DATE OF HEARING : 6 APRIL 2022**

**DATE OF JUDGMENT: 8 APRIL 2022**

## **SUMMARY**

**CRIMINAL LAW:** *murder-application for discharge at close of prosecution- right to fair trial and right to be presumed innocent until proven guilty revisited and applied- discharge application granted and accused acquitted- inelegance in drafting of murder charges noted with dismay.*

### **ANNOTATIONS:**

#### **STATUTES:**

Criminal Procedure and Evidence Act No.9 of 1981

Penal Code Act No.6 of 2010

#### **CASES:**

Khanyapa 1979 (1) SA 824 at 838 F-G

S v Dewani (CC 15/2014) [2014] ZAWCHC 188

S v Mphetha & others 1983(4) SA 262

S v Luxaba 2001 (2) SACR 703 (SCA)

Matsobane Putsoa & others v Rex 1974-75 LLR 201

#### **BOOKS:**

Hoffman & Zeffert -The south African Law of Evidence 3<sup>rd</sup> Ed 1981

- [1]** Accused is before court indicted with murder in that upon or about the 10<sup>th</sup> day of January 2019 and at or near 'Moteng in the district of Botha Bothe, the said accused did perform an unlawful act or omission with the intention of causing the death of KOPANG MOHAPI, the said accused commit the offence of murder of the deceased, KOPANG MOHAPI, such death resulting from his act or omission the said accused did thereby contravene the provisions of the Code as aforesaid.
- [2]** Accused entered a plea of not guilty and in terms of S.175 (1) and (2) of the Criminal Procedure and Evidence Act No. 9 of 1981, the crown led only two (2) witnesses and presented five admissions.
- [3]** PW1 Motiki Mokatse testified that in January 2019 he was working for a company called Nthane Brothers. On 09/01/19, he was on a journey escorting a truck that was loading a machine going to Mokhotlong. At 'Moteng the truck encountered problems and could not climb the slope. He phoned his boss, Pinare Nthane who was in Mokhotlong to ask for assistance. They waited there until late and he kept calling him. Accused also phoned him and he told him about their situation. At around 9:00 PM, a big truck from the mine arrived and they towed the loaded truck. It started raining

and there were many vehicles parked there. He drove in front of the towing truck and the towed truck capsized while it is being towed. The road was blocked then and they had to spend the night there. The next morning accused arrived with his driver, Moeketsi (PW2). They told him what happened and he was not satisfied with deceased's explanation. While accused is talking with deceased, he left them and went to the side of the truck head about 15-20 meters from where they were and could not see them. When he left them, there were many people on both sides of the road and they were grumbling about what was happening. He heard one saying accused was talking in an unacceptable manner. Accused was furious but not as furious as he knows him. Even those who were by the fire drew closer to accused and deceased. After a while, he heard a sound of a gunshot, he tried to take cover in the truck cabin, as he did not know where the sound is coming from, and he fell in the furrow. He stayed in the furrow and after some quietness, he got up and hide behind the guardrails. Someone then called him and he went to where the voice was coming. He found accused and Moeketsi (PW2) holding and carrying deceased to the car. He assisted them in taking deceased to the car. One of the people who were there mentioned the shell that was on the ground and he picked it. Accused was driving the car and it was already in

motion when he threw that shell inside the car to PW2. He stayed behind and Pinare arrived with a towing machine.

**[4]** Under cross-examination, he said the people who were grumbling continued grumbling even after the shooting and were getting closer. From their reaction, they were hostile to accused. He did not see if they were picking up stones as they get closer. Their getting closer would make one suspect that he is in danger and if he were accused, he would suspect that those people are about to attack him and he would have fired a warning shot. He cannot deny that accused discharged a bullet in a diagonal manner that hit a rock surface and reverted to deceased. When shown a lead taken out of deceased body, he said he would not know that it is a fired bullet due to the extent of its damage. In his observation and opinion, a soft body of a human cannot deform a bullet to that status. He would not have told police that the shooting of deceased was accidental, as he did not witness the shooting and someone else must have told police.

**[5]** PW2 Moeketsi Motsamai testified that in 2019, he was working as accused's driver and on 10/01/19, he was driving accused from Bloemfontein to 'Moteng where his truck had encountered problems. On arrival at 'Moteng, the truck had

tilted and it had a machine loaded on it. The driver of that truck, Kopang Mohapi (deceased) was there and accused went to speak to him. Deceased explained what happened and accused said the ones at fault are the ones who escorted him as they ran to their vehicles when it started raining. He parked accused's car at a safe spot and alighted it. There were people warming themselves by the fire and several trucks from and to Mokhotlong direction. One of those people who were by the hilltop said that they are many and they can attack deceased if they want to. He decided to move away from them to avoid being a victim of that attack. He went to deceased and as he approached him, greeted him. Before deceased responded, he heard a sound and he thought it is a tyre burst. After that, he saw deceased touching his left chest area and delibitate. He did not respond, he held him, and accused came and held him. Accused told him to bring the car to rush deceased to hospital. They took deceased and accused was driving. As he was driving, he kept looking at deceased and the car nearly capsized. He alerted accused as he was confused and asked him to let him drive and he did. They took deceased to Botha-Bothe hospital for medical attention. He waited outside and accused went in. When accused came back, he was crying and did not respond when he asked him why he is crying. A nurse who was coming behind accused told him deceased has passed away. Accused asked him to drive him

to the Police Station to report himself. He drove him to Botha Bothe Police Station and he left him there after he signed his statement without reading it. He went again to the police station on another day and his statement was read to him though he did not accept or agree with what was read to him.

- [6]** Under cross-examination, he said the people who were there were speaking in threatening tone directed to accused and he decided to walk away from them. He saw them picking up stones. He did not see accused taking out his gun and shooting in the air to scare them away as accused was behind him then.
- [7]** The identification statement of Mohapi Mohapi (**AD '1'**) is to the effect that on 16/01/19 he was at Queen II hospital mortuary where the post mortem of Kopang Mohapi who is his younger brother was going to be conducted. Kopang was shot dead on 10/01/19. He saw a gunshot wound by the left chest. He gave permission that post mortem be conducted.
- [8]** An LMPS 12 presented as part of evidence together with the listed items, a .45 auto pistol S/number BMB627, black magazine and 7 x .45 auto pistol bullets (silver and gold) and were marked **AD '2'** and **EXH '2A'**.

**[9]** The ballistic report compiled by A.M Mollo and sworn by Inspector Lehloaba recorded that on 21/01/19, D/P/C Rammutlanyana handed a .45 Glock pistol S/number BMB627 and a fired bullet for ballistic examination. The result is that the fired bullet and test ammo were fired from the said pistol and he was told the fired bullet was found at the crime scene. It was marked **AD '4'**.

**[10]** The LMPS 22 and the post mortem report were also handed in as part of evidence (**AD '3'** and **'5'**). The post mortem report by Dr. C.T Moorosi recorded that the cause of death is multiple organ injuries with severe blood loss consistent with gunshot wound. The history from the Investigating Officer given to the doctor is that deceased is said to have been accidentally shot on 10/01/19 at 'Moteng and was pronounced dead on arrival at Botha Bothe Hospital. He found that the gunshot wound is consistent with an entry into the chest cavity caused by a deformed bullet as was indeed found in the peritoneal cavity. There was rupture of spleen by radiator laceration, laceration of pancreas and perforation of stomach wall. A one liter of blood was present in the peritoneal cavity.

[11] This is the crown case and at the close of crown case, Adv. Teele for accused applied for discharge in terms of S.175 (3) of the Criminal Procedure and Evidence Act 1981. Adv. Rafoneke for the Crown opposed the application.

### **THE POSITION OF THE LAW:**

[12] The application is made in terms of S.175 (3) of the Criminal Procedure and Evidence Act 1981, which provides that;

**“If at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged, or any other offence which he might be convicted thereon, the court may return a verdict of not guilty.”**

A similar section is S 174<sup>1</sup> in South African Criminal Procedure and Evidence Act, which provides that;

**“If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.”**

This Section permits the court to return a verdict of not guilty at the close of the prosecution case if the court is of the opinion that there is no evidence that the accused committed the offence with

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<sup>1</sup> Act No.51 of 1977

which he is charged or an offence, which is a competent verdict on that charge<sup>2</sup>. It is trite that the words “no evidence” is not interpreted to mean absolutely no evidence but rather, ‘no evidence upon which a reasonable court, acting carefully, might convict<sup>3</sup>.

Accused before court is charged with murder, which is defined as ‘unlawful and intentional killing of a human being’. The essential elements of murder are that the killing must be of a human being, such killing must be unlawful, i.e it was not done in execution of any lawful authorization and it must be intentional. Therefore, in a charge of murder, the crown has to present prima facie evidence that satisfies all these essential elements and that it was committed by accused before court for accused to be called to his defence.

## **DEFENCE SUBMISSION:**

**[13]** In support of this application, Adv. Teele K.C submitted that none of the witnesses called by the crown testified that they saw accused shooting deceased. The post mortem report recorded that the investigating officer informed the doctor that deceased was shot accidentally and a deformed bullet was removed from the body of deceased. There is no sketch of the scene of crime made by the investigating officer. He

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<sup>2</sup> Khanyapa v S 1979 (1) SA 824 at 838 F-G

<sup>3</sup> S v Dewani (CC 15/2014) [2014] ZAWCHC 188, S v Mphetha & others 1983(4) SA 262, S v Luxaba 2001 (2) SACR 703 (SCA), Matsobane Putsoa & others v Rex 1974-75 LLR 201

further pointed out defects from investigation up to the prosecution of this case that the evidence is that there were many people gathered there but not called to testify on what they saw. That it is strange that the crown proceeded with charging accused with murder on the basis of this evidence without giving direction to the Investigating officer to conduct further investigation. He further submitted that defence realized the defect on the charge that it is vague and not informative to the accused person as to what act or omission accused did to cause deceased's death. However, they did not raise any objection or request further particulars with the hope that the defect will be cured by evidence as provided in S.158<sup>4</sup>. However, such evidence failed to cure that defect that accused intentionally and unlawfully or at least negligently shot and killed deceased.

### **CROWN SUBMISSIONS:**

**[14]** Adv. Rafoneke in opposition submitted that at this stage, the court has to determine whether an offence has been committed by accused person, not proof beyond reasonable doubt that it was committed intentionally or negligently. What is clear before court is that a bullet shot from accused's firearm killed deceased and that is enough for accused to be called to his defence.

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<sup>4</sup> Criminal Procedure and Evidence Act No.9 of 1981

## **EVALUATION OF SUBMISSIONS AND EVIDENCE:**

**[15]** In analyzing these submission and evidence before court in light of the guiding principles applicable in this type of application above, the finding of the court is that the crown dismally failed to present a prima facie case for accused to answer. It is common cause that the two witnesses called by the crown, despite evidence that there were many people gathered there, did not testify that they saw accused shooting at deceased. It is also common cause that accused, after this incident, handed himself to police and it follows that he gave an explanation of what transpired and the expectation under the circumstances was for the investigation to follow-up on that explanation with the purpose of proving or disproving its veracity. There is no evidence before court that such was done in the absence of a construction of the accident scene sketch. Accused's explanation put to the witnesses is that he obliquely fired a warning shot to ward away a foreseeable threat towards him by those people gathered there who were uttering threats and picking up stones. Accidentally the fired bullet hit the hard surface and reverted to deceased, hitting and entering his chest cavity. This explanation has not been challenged at all by the crown witnesses. PW1 in cross-examination said he cannot deny that accused discharged a bullet in a diagonal manner and it hit a rock surface and reverted to deceased.

When shown a lead taken out of deceased body, he said he would not know that it is a fired bullet due to the extent of its damage and in his opinion, a human body cannot deform a bullet to that status. Though he did not see those people picking up stones, he heard them grumbling and threatening to attack accused. PW2 saw those people picking up stones and speaking in a threatening tone. He did not see accused shooting at deceased as accused was behind him. There is no sketch of the scene including the said hard/rock surface and relevant measurements presented before court, which in my view was very crucial.

**[16]** Furthermore, the post mortem conducted on 16/01/19 recorded that a deformed bullet was removed from deceased's body, having damaged soft parts of his body. The gunshot wound found on deceased is consistent with an entry into chest cavity caused by a deformed bullet. The effect is that this bullet entered deceased's body already in deformed status. This deformed bullet story again corroborates accused's explanation. There is no forensic evidence by the crown of what could have deformed the said bullet and as a result, accused's explanation stays unchallenged. The ballistic report presented, also recorded that one fired bullet was presented by D/P/C Rammutlanyana on 21/01/19, said to have been found at the crime scene, not deformed bullet from deceased's body.

**[17]** As submitted by the crown, it is an issue of common cause that the bullet that took deceased's life was fired from accused's pistol. What is lacking before court is prima facie evidence that the firing was done with intention to kill the deceased or even that accused was negligent as a reasonable man, not to have foreseen the possibility that it would revert to deceased. There is no iota of evidence proofing those elements. In my view, even in the absence of oral evidence from the eyewitnesses, the forensic evidence including constructed sketch of the scene would have somehow helped the crown case.

**[18]** It is trite that every accused person has a constitutional right to fair trial<sup>5</sup>, which includes a right to be presumed innocent until proven guilty, by a competent court. Part of the fair trial is that an accused person should not be compelled to give self-incriminating evidence<sup>6</sup>. In light of these rights, where the crown fails to establish a prima facie case against the accused and the court rejects an application for discharge, that will be prejudicial to accused, resulting in a grave breach of his constitutional rights and an improper exercise of judicial discretion. Further, S.175 (4)<sup>7</sup> gives an accused person a right to choose whether to adduce evidence or not

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<sup>5</sup> Section 12 of the Constitution of Lesotho

<sup>6</sup> S. 12(7) of the Constitution

<sup>7</sup> Criminal Procedure and Evidence Act No.9 of 1981

in his defence at the close of Crown case. This Section is consistent with our Constitution and in light of this, calling accused to his defence where there is no prima facie case to answer is just a hopeless gamble. The court in the administration of justice operates with facts and evidence. It does not throw the bones in the finding of accused's guilt. Further, it is not the duty of the court to help build a case for the crown by ordering calling of witnesses and evidence that the crown decided not to call. That would be against the established principles of criminal procedure.

**[19]** This is one of the unfortunate cases initiated with no iota of evidence against the accused. As the court put it in **Michael Lubaxa v State**<sup>8</sup>, a person should not be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. There should be reasonable and probable cause to believe that the accused is guilty of an offence before prosecution is initiated. This is a 2019 incident and a charge of murder has been hanging on accused's shoulders since then. The end result is that no justice has been served on accused as well as the deceased's family who were given a false expectation that accused is at fault and justice will prevail over him. From the evidence presented before court, I still struggle to find what

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<sup>8</sup> S v Luxaba 2001 (2) SACR 703 (SCA) above

could have informed the decision to charge and prosecute the accused.

**[20]** The court has further noted with dismay the inelegance in the drafting of charges, more specifically in charges of murder where the charge does not make mention of the act or omission accused did to cause death of the deceased as submitted by Defence Counsel. The purpose of framing a charge is to give a clue to the accused person, of clear, unambiguous and precise notification of the accusations against him. This ambiguity calls for unnecessary objections to the charge or request for further particulars of the charge. It is trite that an accused person has a right to know what charge he is facing for him to prepare his defence and such charge should be clear and unambiguous. This is one of the basic requirements and failure to comply with it is a breach of accused person's constitutional right.<sup>9</sup> This is more importantly to the presiding officer to shift the compass on what accused is alleged to have done or omitted to do before proceedings commence and evidence led.

**[21]** In the result, the application for discharge is granted and accused is accordingly discharged. The .45 auto pistol (EXH 2A) be released to accused as he is in lawful possession of it.

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<sup>9</sup> Section 12 (2)(b) of Lesotho Constitution

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**RANTARA P.**  
**ACTING JUDGE**

**FOR THE CROWN: Adv. Rafoneke**

**FOR ACCUSED: Adv. Teele KC assisted by Adv. Phamotse**