

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CRI/T/0008/20

In the matter between:

REX

CROWN

AND

KHAFA MAQEKOANE

ACCUSED

No.1

LEBOHANG TLHAKANELO MATSINYANE

ACCUSED

No.2

Neutral Citation: Rex v Maqekoane and One [2022] LSHC 91 Crim (8 April 2022)

CORAM: RANTARA P. - ACTING JUDGE

DATE OF HEARING: 16 /18/ 21, 23 and 24 MARCH 2022

DATE OF JUDGMENT: 28/03/22 and 08/04/22

SUMMARY

CRIMINAL LAW: *murder, attempted robbery, unlawful possession of firearm-accused raising alibi belatedly during trial and bare denials to allegations linking them to the offences committed-evidence to be evaluated as whole not in isolation-circumstantial evidence proves that accused were at the scene and committed the offences-doctrine of common purpose.*

ANNOTATIONS:

STATUTES:

Criminal Procedure and Evidence Act No.9 of 1981

Penal Code Act No.6 of 2010

CASES:

R v Blom 1938 AD 188

Rex v Ts'eliso Lempe C of A (CRI) No. 7 of 1996

Molapo v R (CRI/A/25/2001) [2002] LSCA 67

S v Thebus & Anor 2003 (2) SACR 319

S v Mathebula 2010(1) SACR 55 (SCA) 6

Tshiki v S (358 of 2019) [2020] ZASCA 92

Rex v Malefetsane Potlaki 1980(1) LLR

Letuka v Rex LAC 1995-1999 @ 405 G

Rex v Mkhize 1979 (1) SA 461 (A)

BOOKS:

Burchell and Milton *Principles of Criminal Law* 2nd ed at 393.

Snyman *Criminal Law* 4th ed at 261

Hoffman & Zeffert- *South African Law of Evidence* 3rd Ed. At 484

[1] The accused are before this court indicted of three counts as follows;

Count I: murder- in that upon or about 19th day of February 2018 and at or near ha Tsolo in the district of Maseru, the said accused sharing a common intention or purpose to pursue an unlawful act together, and in the pursuit of such common intention, did perform an unlawful act or omission with the intention of causing death of Lebohang Monyatsi. The said accused did commit the offence of murder of the said Lebohang Monyatsi, such death resulting from their act or omission, the said accused did thereby contravening the provisions of the Code as aforesaid.

Count II: attempted robbery- in that upon or about the 19th February 2018 and at or near Ha Tsolo in the district of Maseru, the said accused sharing a common intention or

purpose to pursue an unlawful act together, and in the pursuit of such common intention did with intent to commit robbery, an act which is more than merely preparatory to the commission of robbery, and they committed the offence of attempted robbery.

Count III: unlawful possession of firearm- in that upon or about the 19th day of February 2018 and at or near Ha Tsolo in the district of Maseru, the said accused sharing a common intention or purpose to pursue an unlawful act together and in the pursuit of such an intention did acquire or have in their possession a firearm to wit, 45 Glock pistol, serial number ALA 247 without the requisite firearm Certificate.

[2] Accused No.1 entered plea of not guilty in all three counts.

Accused No.2 entered a plea of not guilty in Count 1 and II and declined to plead on Count III in that he has already pleaded to it at a pending case before Maseru Magistrate Court. The crown withdraw count III against him in that he will proceed with it before Maseru Magistrate Court.

[3] In proving the charges against accused, the crown called five (5) witnesses. There are also admitted documentary

evidence including post mortem report and firearm certificate of PW1, shells, firearms and LMPS12.

- [4]** PW1 Teboho Ntoane testified that he has a shop at ha Tsolo and reside at Motimposo. On 19/02/2018 at dusk around 8:00 PM, he was in his car outside the shop when he saw three customers arriving. They were walking slowly and following each other and he did not identify them. That movement made him suspicious as he was previously attacked two times and they were mimicking the walk of his previous attackers. They had a bag that looked empty. They got inside the shop and from where he was, he could see the inside of the shop. There were electric lights inside and outside the shop. As they get next to the counter, they spread as they were and he saw two of them pulling out guns from the navel area and pointed at the employees behind the counter. This was his observation based on guns shape/build. He got out of his car to see what is happening. One of those men who had a gun came out and they met at the door. He fired a shot at that man from his 7.65 Taurus sidearm S/N FBR 695851 and that man fell down. He then saw the other one through the window also coming to the direction of the door. He hides on the side of the shop and the second man started firing back at him and he fired back to distract him or prevent him from coming out. The first one who fell down did not fire back at him. Only the second

man with a gun. He was surprised to see the one who fell down getting up and going to the other side of the shop and he thought he want to attack him from behind. He stopped firing and went to the side the first man went, hoping to stop or face his attack. He did not see him and he went back. He then heard a gunshot inside the shop. He moved next to a heap of sand to take refuge and lied down. The second and third man came out of the shop and he shot at them. When he shot at them, they were between the shop door and the gate. The distance between the shop door and the gate is about 12 paces. Then the other man joined the two as they approach the gate. He just appeared next to the gate and he suspects it was the one he shot down. He shot at them and the one in the middle seemed to be falling down. The ones on the side tried to assist him to get up and he tried to shoot their heads but missed them. One of those men fired back. He stopped shooting as he ran out of bullets and they were leaving.

- [5]** He ran to the shop to check his employees, Thapelo Makhata and Lebohang (surname forgotten). As he entered in the shop, he called them by their names asking where they are. Thapelo responded coming out of the storeroom. He asked him about Lebohang and after checking, saw him lying down and he (Thapelo) showed him. He got inside the counter and found Lebohang lying in a pool of blood (PW1 was sobbing

when relating this part). He realized that Lebohang was shot on the head and he told Thapelo that they should take him to hospital. He called his neighbor Seraohela who is a Headman and they rushed to Ts'epong Hospital. The doctor examined Lebohang in the car and told them he is dead. The hospital staff took him to a vehicle and told them to leave. They went back to the shop where they phoned Police and the shop was closed by Thapelo. Police came at around 10:00 PM, inspected the scene and asked them questions about what happened.

[6] The following day he went to the shop and they washed that pool of blood. Outside the shop, he found two shells that he took to the police station. He was later called to the Police Station to hand over his firearm and firearm certificate. To his observation, those men used only one gun.

[7] Under cross-examination, he said the shells he found are from his firearm, as he knows his firearm ammunition. The bullet that shot deceased was found in the shop as it found exit and police officers found one bullet and about two shells. The two shells he took to the police station were stored in a plastic bag in his presence and they wrote on it.

[8] PW2 No. 10717 PC Molongoana testified that on 19/02/2018 while on duty at Thetsane Police Station around 9:00 PM, he

received a call reporting a shooting at Ha Tsolo. He proceeded there with a driver and upon arrival at that place, there were several people including the shop owner. The shop door was closed and he asked them to open for him to inspect the place. Inside the shop, he found two 0.45 shells on the floor behind the door. Behind the counter, he found another 0.45 shell and a fired bullet on the floor in a pool of blood. The fired bullet seemed like it hit a hard surface, as it was a bit blunt. The shop owner (PW1) told him one employee is shot and already taken to Ts'epong Hospital. After he was given the names of the victim, he proceeded to Ts'epong Hospital where he was told the victim is dead. With permission, they took the deceased to Lesotho Funeral Services Mortuary for examination. He saw an open wound on the right cheek and back. On 20/02/2018, he gave the items he collected to DPC Rakeiti for safekeeping. It was three 0.45 shells and two leads.

- [9]** Under cross-examination, he said he gave the items to DPC Rakeiti who is in CID while he works in Uniform Branch. DPC Rakeiti told him he took them to Ballistic Laboratory with necessary forms. After picking the five items, he wrapped them with a toilet paper and kept them inside a plastic bag to avoid friction as that might interfere with ballistic examination.

[10] Under re-examination, he said he has no full details about ballistic examination but just that the shells or bullets should not rub each other.

[11] PW3 No. 9296 D/L/SGT Mokole testified that he knows about a murder incident that happened at PW1's shop on 19/02/2018 at Ha Thetsane as the report was made to his office. On 22/02/18 PW1 presented two (2) 7.65 shells at his office and he took them, labelled them after wrapping them and kept it in Exhibits Chubb. On 09/03/18, he took those shells for ballistic examination. Later he called PW1 to bring his firearm and he did bring it on 28/04/18. It was a 7.65 auto pistol S/N FRB 69581 which he labelled and kept. On 31/05/18, he gave it to DPC Kolozi to take it for ballistic examination. PW1 told him he picked those shells at the scene of crime at his shop. He told him he was outside the shop in the evening when the men who attacked him arrived. He fired a shot after he heard a gunshot from his shop and the shells are from his firing. He presented those shells to the clerk of court with LMPS12. He presented the LMPS 12 and it was marked EXH "B" as well as the said shells, marked EXH '1'.

[12] Under cross-examination, he said he does not know if it is possible to determine a gun the lead comes from among other guns. He took the shells to the clerk of court after ballistic examination. When he received the shells from PW1, they were not wrapped. He went to inspect the scene the following day but did not find anything.

[13] PW4 No. 10726 DPC Koloji testified that on 31/05/18 he was on duty as usual when PW3 handed over a 7.65 S/N 69581 firearm to him and he took it to Ballistic Laboratory. He parted with it since then.

[14] PW5 No. 10722 DPC Rakeiti testified that he is one of the investigators in the murder of Lebohang Monyatsi that happened on 19/02/18. On 20/02/18 PW2 handed to him three 0.45 shells and two fired bullets which he said he collected at the scene. He kept them after labelling them and on 21/02/18, he took them for ballistic examination. Their investigation led them to both accused and one Balone Fooko. On 07/03/18, he was part of the investigation team at Pitso Ground investigating several cases including this one. He was with D/SGT Kubutu, DPC Mohale DPC Pihlela and all of them were from different police stations. On 07/03/18, D/SGT Kubutu informed him that Accused No. 1 and Balone have been arrested and kept at Rural Police Headquarters.

He proceeded with his team members and found them. They introduced themselves to them before requesting their explanations, which led him to prefer a charge of murder to them. Accused No.1 later gave a voluntary explanation that he was shot in the thigh at ha Tsolo when he tried to flee and does not know the person who shot him. On 09/03/18, they took him to Queen 'Mamohato Hospital and he was admitted and discharged the following day, 10/03/18. The doctor gave him a fired bullet extracted from Accused No.1's thigh and he kept it as an exhibit. On 14/03/18, he gave that fired bullet (lead) to DPC Nomoroane and asked him to take it for ballistic examination, as he was still busy at Pitso Ground.

[15] On 09/03/18, DPC Kubutu informed him that Accused No.2 is at Caledon Police Post. He proceeded there with his team and found Accused No.2. They introduced themselves to him and his explanation led him to prefer the charge of murder to him. PC Marinakhoe handed Accused No.2 to them together with a 0.45 auto pistol with S/N ALA 247, which he said he found in Accused No.2's possession. On 14/03/18, he took that firearm for ballistic examination. He filled LMPS 12 for both the lead and firearm. LMPS 12 marked EXH 'C' and lead EXH '2'. He also handed a 7.65 firearm and its LMPS 12 marked EXH "3" and EXH "D" respectively.

[16] Under cross-examination, he said during interviews with Accused No.2, he confirmed that the firearm found in his possession by PC Marinakhoe is his and not licenced. He denied that Accused No.2's passport disappeared in police custody. The fired bullet the doctor gave him was in a plastic bag. Accused No.1 did not volunteer to make a confession before a magistrate despite his explanation. He told them the firearm was with Accused No.2 in his explanation.

[17] PW6 No. 54046 PC Marinakhoe testified that on 08/03/18, he was on duty as usual with PC Raphoolo. When they were between Block A and B next to the taxi rank, they saw a man using a route to South Africa as entry to Lesotho. They approached that man and asked him why he is doing that and the man said he did not know. They introduced themselves to him before requesting to search him. They also asked for relevant document permitting him to cross to South Africa. They were expecting a passport and Accused No.2 failed to produce it. Upon searching him, they found a 9mm Austria auto pistol with S/N AL 247 and 11 rounds of ammunition, which he failed to present his firearm certificate. He preferred a charge of unlawful possession to him and arrested him. He later handed him over to DPC Rakeiti together with the firearm. He later presented it to the clerk of court with an LMPS 12. In court, he presented them

as part of evidence. The firearm is marked EXH “4” and LMPS 12 EXH “E’.

[18] Under cross-examination, he said though he preferred a charge to Accused No.2, he is not an investigator of that case. He denied that Lesotho Police kidnapped Accused No.2 in South Africa and took his passport.

[19] PW7 No. 75123 P/C Nomoroane testified that in 2018, he was stationed at Thetsane Police Station. On 14/03/18 when he arrived on duty, DPC Rakeiti (PW5) gave him a lead and told him it is from Ts’epong hospital and the doctor gave it to him. DPC Rakeiti asked him to take it for ballistic examination. He did take it to Ballistic Laboratory. It was wrapped with a toilet paper and inside a plastic bag. That is the last time he parted with that lead.

[20] PW8 No. 11071 Senior Ballistic Technologist Nkhabu testified that in 2018 he prepared a ballistic report which he referenced 57/18 and he read it to the court. He confirmed the firearms that Adv. Joala showed him that they are the ones he examined. It was a 0.45mm clock with S/N ALA 247 (EXH ‘4”) and a Taurus 7.65mm by 17mm with S/N FRB 69581 (EXH ‘3’). He identifies them as he marked them on

the magazine housing with F57/18. The shells and fired bullets presented to him matched the said firearms as recorded in his report.

[21] Under cross-examination, he said the bullet handed to him by P/C Nomoroane (PW7) on 14/03/18 was of a 7.65 mm/17 mm firearm and he told him a medical practitioner extracted it from a suspect. The purpose of wrapping bullets and shells found at a scene is to preserve the markings on them. He is also qualified to do DNA testing though they still do not do them at the laboratory but there was a need for it in relation to that bullet. He conducts examination based on the request given to him. He can actually confirm that a bullet found in a suspect is from a certain firearm, not any other of the same caliber. The said ballistic report is marked EXH 'G'.

[22] PW9 No. 55787 P/C Raphoolo testified that on 08/03/18 he was stationed at Caledon Police Station when he came across someone suspicious. He was on night shift from 6:00 PM- 6:00 AM. Between 8:00-10:00 PM he was between Block A and B with P/C Marinakhoe (PW6). While in that vicinity, they saw a man coming from Lesotho trying to cross to South Africa but using a route by people entering Lesotho, not the exit route to South Africa. They stopped him and introduced themselves to him as police officers as they were

wearing freezer suits on top of their police uniform. They asked for his travelling document (passport) as he was heading to South Africa. He failed to give them his passport/document. After that they searched him for any illegal items and upon searching him, they found a firearm. They asked for his firearm certificate and he failed to produce it. PW6 (P/C Marinakhoe) then cautioned him, preferred a charge of unlawful possession to him, and arrested him. To his recollection, the said firearm was forwarded to PW5 (PC Rakeiti) from CID. The caliber of that gun is a black .45 auto pistol. The suspect introduced himself as Lebohang Thlakanelo Matsinyane (A2). He can recognize that firearm if he sees it and he identified it when Adv. Joala showed him (EXH '4'). Block A and B that they are referring to are on Lesotho side.

[23] Under cross-examination, he said he appeared before Maseru magistrate court though he does not remember the prosecutor and magistrate of that case. He gave evidence but does not know how the verdict went. He knows about a question that A2 was arrested in South Africa. A2 said they took his passport and kept it.

[24] The Crown by consent with Defence Counsel submitted two statements, statement of Thapelo Makhata and ID statement

of 'Mapoloko Nkeane, a medical report of A1 and a post-mortem report as part of evidence.

[25] Statement of Thapelo Makhata is to the effect that he works at PW1's shop as a seller and was working with deceased, Lebohang Monyatsi. On Monday the 19/02/18 they were on duty at around 20:15HRS. Three men arrived and they thought they are customers. It was his first time to see them and they were not covering their faces. While they were expecting them to say what they want, one of them pulled out a gun and pointed it at them. It was a small gun and he hid under the counter. Deceased remained standing and one of those men got into the counter while the one with a gun was still pointing a gun at Deceased. Lebohang hit the one who got into the counter with a fist. He then heard a gunshot and he tried to run out of the shop. He then saw another one standing outside and he thought he would shoot him. He went back and saw deceased lying down bleeding. Those men went out without taking anything from the shop. PW1 got in and asked where deceased is and he showed him where he was lying. They took him to PW1's car for referral to hospital. PW1 left with another man to hospital and when they come back, they told him Lebohang has died.

[26] The statement of 'Mapoloko Nkieane is to the effect that on 01/03/18 at around 10:00 AM, she was at Queen II hospital

where he identified a corpse of Lebohang Monyatsi before a post mortem was conducted. He died on 19/02/18 due to a gunshot. She identified him, as he is her younger sibling's child.

[27] Medical report of Mapekoane Khafa (A1) by Dr. Alexander Rastegaev at Ts'epong Hospital recorded that A1 was admitted to the general Surgery in the male ward via accident and emergency unit being shot at the right thigh two weeks before examination. The bullet was lodged in upper medial aspect of the thigh under the skin and FBC, x-ray right thigh was done. On 10/03/18, bullet was removed and send to police for further investigations and the patient was discharged from hospital in stable condition for nearest outpatient clinic care.

[28] Post-mortem report by Dr. Phakoana dated 01/03/18 recorded that the cause of death is intracerebral hemorrhage especially damaged medulla oblongata. On external appearance, deceased sustained puncture wound on the right side of the face and exit wound at the back of the neck.

[29] At the close of crown case, Adv. Lesuthu for accused applied for discharge in terms of S175 (3) of the Criminal Procedure and Evidence Act and the application was dismissed.

[30] DW1 Lebohang Tlhakanelo Matsunyane testified that on 08/03/18 he was not at ha Tsolo and never attempted to rob a shop there. He did not fire a shot and killed one Lebohang. He has never been at ha Tsolo on 19/02/18 or attempt to rob anybody there. He did not fire and kill anybody at ha Tsolo. On that day, he never had a firearm. Around 08/03/18, he was charged with unlawful possession of a firearm. On 08/03/18 at around 7:00-8:00 PM, he was crossing to South Africa. He arrived at the border and stood on the queue to present his passport. He did present his passport on Lesotho side and after, he proceeded to South African side.

[31] On South African side, he was first searched as usual with a machine and nothing was found. He proceeded to present his passport and he was given dates. He went to the taxi rank and boarded a taxi to Johannesburg. There were three (3) passengers and he was the fourth (4th) one. He sat on back passenger seat and while sitting, made some calls to his family to inform them about where he was. Few minutes later, a taxi door opened and he thought it is a passenger. One person got in wearing private clothes and told him to

take all his belongings and follow him. He got up and took his bag. Outside the taxi, there were other people dressed in Lesotho police uniform who took his bag, wallet and passport. They pulled him to Lesotho side where he presented his passport when he crossed earlier. He presented an uncertified copy of a passport with his names and passport No. 468291111722 as part of evidence and it was marked **D '1'**. They all got into an office where there was another police officer. The police officer who got into a taxi introduced himself as Motseko Marinakhoe and he testified before this court. One police officer took out a gun from a drawer and asked him how he knows it. He told the police officer that he knows nothing about that gun. They asked him where he was going and he told them he works at a construction in South Africa. They told him he works at Litotomeng and Marinakhoe told him the gun is his despite his denial. He was kept in a cell and the following morning, three (3) police officers arrived who introduced themselves as Rakeiti, Ratsebe and Mohale. He was handed over to them together with his passport, wallet and bag. He had M1,800.00 in his wallet. Those police officers took him to Central Police Station where he was kept in a room. After that, they took him to Pitso Ground police station handcuffed. After few minutes, he was taken to another room where he found several police officers. They told him they are from Thetsane Police Station, Lithoteng Police

Station and Flight 1 Police Station. He was asked about several cases in which he is implicated including this one before court. They told him that the firearm they showed him is the one used in the commission of those offences. He denied all that and they assaulted him forcing him to admit and even electrocuted him. That night he was taken to TF police where he spend the night. The Following day he was taken to Pitso Ground police station where he was interrogated again about what he was asked the previous day. While there, another suspect came in and he was told that he is charged with him. They were interchangeably interrogated and in the evening, both of them were taken back to TF Police where another suspect arrived. He identified that last suspect as the person he had a feud with and he did not ask him anything. The following day, the three (3) of them were taken to Pitso Ground police station for questioning. Police told him the three of them are charged together. He denied the accusations and told them he is not in good terms with the third suspect. During the interrogation, they were writing and took photos of them.

[32] On 13/03/18 in the morning, they were brought to court and only his bag given to him. Police kept the passport, wallet and phone. He did not ask about them as it was his first time to be arrested and he thought they would be handed over to his relatives. They were taken before a magistrate and

remanded in custody and has been in custody until now. He applied for bail through a lawyer but that lawyer disappeared. The other suspect is in Correctional Facility. Police never found a gun in his possession and the evidence that he was arrested in South Africa can be found at South African Control Gate. He was charged before Magistrate Court after being charged with these offences. That case is still pending as police denied that they took his passport and the court is awaiting that evidence from South Africa. His clash with the third suspect continued in prison and one Correctional Officer intervened. He has never been at ha Tsolo and committed armed robbery with accused No.1. He denies all the charges against him.

[33] Under cross-examination, he agreed that he did not put it to police witnesses that he did not get involved in any shooting at ha Tsolo and never had a gun. However, he denied that it is because this denial is an afterthought. He did not deny in cross-examination to DPC Raphoolo that they were wearing freezer suits when they arrested him in Lesotho side. He did not put it to police witnesses that they retrieved that gun from the drawer. He did not put it to PC Marinakhoe that they got him from inside a taxi in South Africa. He did not ask DPC Rakeiti about his passport, wallet and phone as it was his Counsel asking him. He was assaulted by police to admit this gun in relation to other cases though it was not

put to DPC Rakeiti. He did not admit to police that he took part in these ha Tsolo incidents. He denied that the magistrate ordered him to secure evidence that he crossed to South Africa on that day.

[34] DW2 Khafa Mapekoane testified that Flight 1 Police who handed him to Morija Police arrested him on 03/03/18. It was on a Saturday when he was going to a funeral at ha Nts'ohi. They did not find a gun or ammunition in his possession. On 19/02/18, he was not at ha Tsolo and did not shoot and kill Lebohang or committed an attempted robbery. He was not there with two other people though he was charged with them before magistrate court. Though PW1 testified that there was exchange of fire and he shot one attacker, he does not know about that. Police did take him to Ts'epong hospital and a bullet was extracted from his thigh but he got that bullet when there was a battle between rival Likobo (blankets) groups at home. For two weeks, he did not report to Police or go to hospital as those people are always tracing their moves and he was afraid they would follow him. He did not get that bullet at ha Tsolo. Accused No.2 is also a member of a rival group and their bad relationship continued in prison but now settled by intervention of a Correctional Officer. Under any circumstances would he be at ha Tsolo with Accused No.2. He did not admit to police officers that he killed deceased.

[35] Under cross-examination, he said though he did not tell the court where he was on 19/02/18, he was not at ha Tsolo. He did not put to DPC Rakeiti in cross-examination that he was shot at home by rival Likobo (Blankets) group members. He intended to attend the funeral at ha Nts'ohi as the wound was not giving him a problem. He did not know that police were looking for him.

This is the defence case.

CROWN CLOSING SUBMISSIONS:

[36] In closing submissions, Adv. Joala submitted that the crown managed to prove its case beyond reasonable doubt in that as regard murder, there is evidence by PW1 that he exchanged fire with the intruders on that fateful day. Circumstantially, the intention was to induce submission to the shop clerks for commission of robbery. When they went there, they were armed with a gun with the intention in a form of *dolus eventualis* that if there is any resistance, they will use it. What connects accused to these offences are the shells found at the scene of crime, which matched the firearm found in possession of A2. A bullet found in his thigh that matched PW1's firearm connects accused No.1. The firearm found in A2's possession is unlicensed and both accused benefitted from the use of that firearm. Even if it is

argued that the third perpetrator is the one who shot deceased, the doctrine of common purpose connects all of them. However, in this case the evidence of DPC Rakeiti and possession of this firearm connects these accused. He referred the court to S140(1) (a) (b) of the Criminal Procedure and Evidence Act which provides for people charged together in one charge even if the principal offender is not included in the same charge. As to defence, they seem to be raising alibi. A2 also raised lack of jurisdiction. Accused admitted in cross-examination that they did not tell police about their alibi. They only mentioned it in their evidence-in-chief and just put to DPC Rakeiti in cross-examination that they were not at ha Tsolo. In law, an alibi disclosed at a later stage does not help the one raising it and this alibi cannot be reasonably possibly true. On defence of lack of jurisdiction, he submitted they presented evidence that A2 was arrested in Lesotho and he was given an opportunity to secure and present evidence that he was in South Africa but failed to present it. On exhibit D '1', by the look of the eye, it is a copy of a passport, which is not certified, and no officer from Home Affairs was called to attest to it.

DEFENCE CLOSING SUBMISSIONS:

[37] Adv. Lesuthu in his written submissions said since the intruders did not demand money or goods and no

eyewitnesses to identify the intruders, there is no evidence implicating these accused. A withdrawal of count III against A2 was tantamount to splitting of charges and thus prejudicial to defence since evidence of unlawful possession was presented. A2 denied possession of the said .45 calibre that the crown alleges was found in his possession and matched the shells found at the scene of crime. That evidence failed to prove what gun A1 used in killing the deceased. There is no evidence by the crown that A1 was shot at ha Tsolo. A1 cannot be found guilty of unlawful possession when it was not found in his actual possession. The crown did not challenge the story that these accused belong to rival Likobo groups. As this is a session and cases have to be completed within a reasonable time, he could not secure an officer from Home Affairs as Crown could not secure a doctor who conducted a post mortem from Russia.

EVALUATION OF EVIDENCE:

[38] The proper approach to the evaluation of evidence was laid down in *S v Chabalala*¹ as follows;

“...the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those

¹ 2003 (1) SACR 134 (SCA) @ 15

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.”

It is trite that the onus rests on the Crown to prove the guilt of accused beyond reasonable doubt and accused has no obligation to convince the court of his innocence. The issue for determination is therefore whether the crown has established the guilt of accused beyond reasonable doubt. It having been common cause that an attempted robbery and murder by men armed with guns were committed on this fateful day, the issue remaining is whether the said offences were committed by accused before court.

CROWN’S CASE:

[39] The Crown’s case is that on 19/02/18 at around 8:00 PM, there was an attempt to commit robbery at PW1’s shop situated at Ha Tsolo. The assailants were three unknown men who arrived in a suspicious manner carrying an empty bag. There were two sellers inside the shop and PW1 was outside sitting in his car where he could see inside of the shop. There were electric lights inside and outside the shop. Inside the shop, two of the assailants took out guns and

pointed at the sellers without asking for any service. PW1 went to see what is happening after he heard a gunshot and by the door, met one of the armed assailants. He shot at the assailant who fell down though he got up later. Another armed assailant came and there was exchange of fire between him and PW1. The evidence is further that deceased was shot after one of the assailants got inside the counter and deceased hit him with a fist. Deceased eventually died from that shot and the bullet exited his body. Consequently, he suffered intracerebral haemorrhage and damaged medulla oblongata per the post mortem report. This is evidence of common cause that attempted robbery and murder were committed on this fateful day.

[40] Investigations of these crimes were initiated and PW2 at the scene, found five (5) items, three (3) .45 shells and two (2) leads. PW1 also presented two (2) 7.65 shells and his firearm, 7.65 auto pistol as requested. All these were eventually taken for ballistic examination though the two 7.65 shells were not examined as they lost their markings due to poor handling.

[41] It is an issue of common cause that no witness identified the perpetrators of these offences during the incident. On that, the Crown relied on circumstantial evidence to link accused

to these offences. The issue for determination thus is whether the crown succeeded in that endeavor.

[42] Accused No.1 was arrested on 07/03/18, about two weeks after the incident with one Balone as suspects of several cases that PW5, DPC Rakeiti and his special team were investigating. During the interviews, Accused No.1 gave explanation that he was shot on the thigh at ha Tsolo by someone he does not know when he tried to flee. Based on this explanation, the Investigators took him for medical attention at Ts'epong Hospital and a bullet was extracted from his thigh per his medical report (**EXH 'H'**). The said bullet was taken for ballistic examination and the result is that, it matched PW1's 7.65 firearm, that is, it was fired from it per the Ballistic Report and PW8's (ballistic expert) evidence. This is evidence that the perpetrator that PW1 shot is Accused No.1 and that connects him to these offences.

[42] Accused No.1 further told the Investigators that he was with Accused No.2 at ha Tsolo and the firearm they used is with Accused No.2. That made Accused No.2 a suspect in this case. Accused No.2 was arrested on 09/03/18 based on his suspicious conduct of walking alone in entry route from South Africa while he seemed to be going to South Africa. His

conduct attracted PW6 and PW9 to him and when they inquired him, his explanation was that he did know that it is an entry route. They requested him to present his passport to see if he is eligible to cross to South Africa, which he failed to present. As part of their job, they requested to search him for any illegal items. Upon searching him, they found this .45 firearm in his possession, which he failed to present his firearm certificate saying it is unlicensed. By then he was already a suspect based on Accused No.1 explanation during interviews. This firearm was eventually taken for ballistic examination and tested with the .45 shells found at the scene of crime. The ballistic examination result is that those shells were fired from this .45 firearm, not any other .45 calibre. This is evidence that connects Accused No.2 to these offences.

[43] It is an issue of common cause that the perpetrators of these crimes were not identified. As a result, there is no evidence that one of these accused is the one who fired the fatal shot that killed deceased. However, the evidence before court is that the three assailants arrived at PW1's shop with a common intention to commit robbery that was interrupted. They went there armed with firearms to use them in case they are interrupted in their mission and to clear their way when escaping to anyone preventing them to escape. The said firearm was used when one of them was interrupted by

deceased and PW1 and Deceased lost his life. There is no evidence that one of them was not aware that there is a firearm. Therefore based on the principle of common purpose², the results of their actions are imputed on all of them.

[44] Another issue of common cause that the perpetrators of these offences were three unidentified men. There is evidence before court that Accused No.1 was arrested with one Balone as a suspect on this case and the said Balone is still in custody. However, the decision of the Crown not to include him on these charges is permitted by Section 140 (1)³ of the Criminal Procedure and Evidence Act 1981. Based on this Section, accused are not prejudiced and not absolved from taking responsibility of their actions as argued by Defence Counsel.

DEFENCE CASE:

[45] Accused No.1 in his defence denied that he got the bullet extracted from his thigh at ha Tsolo. His story is that he got it during the battle between rival Likobo groups at home, as

² See Principles of Criminal Law 2nd Ed at 393, Criminal Law 4th Ed at 261, S v Mgedezi 1989 (1) SA 687 where the doctrine is defined and its essence and pre-requisites are expounded.

³ The Section provides; "Any number of persons chargedMay be charged with substantive offences in the same charge and may be tried together, notwithstanding that the principal offender or is not included in the same charge or is not amenable to justice."

he belongs to one of those groups. He did not report that incident to police or seek medical attention as the rival group members were looking for him. This gives the impression that he was in hiding. However, he was arrested on his way to a funeral, making his story that he was in hiding improbable, more so based on scientific proof that the said bullet extracted from his thigh was fired from PW1's 7.65 firearm, not any other firearm.

[46] On his presence at ha Tsolo on this fateful day, he just made a bare denial that he was not at ha Tsolo and did not commit these offences without saying where he was at that time and day.

[47] On common purpose, he argued that they could not have a common purpose to commit these offences at ha Tsolo as they belong to two rival Likobo groups and the crown failed to disprove that.

[48] Accused No.2 in his defence also made a bare denial that he was never at ha Tsolo on this fateful day. On his arrest, his version is that he was kidnapped in South Africa by Lesotho Police and some of them were in police uniform. Those police officers took his passport, wallet and phone. They also

showed him a gun he did not know and told him to admit it. His evidence goes as thus;

“One person got in wearing private clothes and told me to take all my belongings and follow him. I got up and took my bag. Outside the taxi, there were other people dressed in Lesotho police uniform who took my bag, wallet and passport. They pulled me to Lesotho side where I presented my passport when I crossed earlier.”

What is not convincing is his reaction to this. He didn't act surprised when someone wearing private clothes whom he did not know just ordered him to take his belongings and get out of the taxi in the presence of other passengers. He just complied with that instruction. Outside the taxi, he saw police officers dressed in Lesotho police uniform who just took his bag, wallet and passport and pulled him to Lesotho side. He did not raise an alarm or ask for help in a country where Lesotho Police officers have no jurisdiction. It is not convincing that they passed the South African border control without reporting themselves. This story in my considered view is untenable and cannot be reasonably possibly true. He undertook to bring evidence to prove that he was in South Africa when he was arrested but failed to do so despite the opportunity given to him since 2018 to secure such. It is a fact that passengers travelling to different places in South Africa, including Johannesburg are registered upon payment of taxi fare before boarding taxis and Accused No.2's family or lawyer could

have secured such proof from registering offices since 2018 when he was charged at Maseru Magistrate Court as he was in custody.

[49] Both accused raised what seems like an alibi. It is trite that a defence of alibi must be raised by an accused person right from the outset when accused is informed of the charges against him or her. This is the law of general application. However, in a constitutional dispensation where an accused person has a right to remain silent, late disclosure of an alibi alone does not justify an inference of guilt. It can justifiably be taken into consideration in assessing evidence as a whole **(Tshiki v s (358 of 2019) [2020] ZASCA 92)**. Their alibi in my view cannot be reasonably possibly true on the presence of the scientific evidence connecting them to these offences and the improbabilities in their evidence in challenging such forensic evidence. Accused No.1's evidence that after he was shot during rival Likobo battle at home and did not report it to police or seek medical help as he was in hiding is not convincing as he testified that he was able to move around freely and even attending funerals without fearing the rival group members. This points to an inference that he did not report it or seek medical attention, as he knew that police are looking for him as a person shot at ha Tsolo. Accused No.2's story that he was kidnapped in South Africa is highly improbable in that it is unreasonable that Lesotho Police Officers in uniform or not, can just cross in

and out of South Africa without reporting themselves at the South African border control and come back pulling someone without raising a suspicion to South African Police Officers and border control officers and he did not raise any alarm or asked for help. In addition, his reaction to the person who called him out of the taxi is questionable.

VERDICT:

[50] The crown's case is that accused went to PW1's shop at ha Tsolo with intention to commit robbery. They went there armed with lethal weapons, loaded guns to wade off any resistance before and after the completion of their mission. They also had an empty bag. However, PW1 and deceased interrupted their mission, which resulted in an attempt to commit robbery. Their acts were more than just preparatory⁴. Even though they did not demand cash or grocery, they pointed guns at the sellers to induce submission and one of them got into the counter where deceased interrupted him. In my view, the intention to rob is the only possible inference drawn from their conduct.

[51] As to murder, their initial intention was to commit robbery. Accused went there carrying these offensive weapons with clear foreseeability that the use of such loaded weapons

⁴ S.22(1) of the Penal Code Act No.6 of 2010

may result in death. They did use that firearm when they were cornered and that use resulted in deceased's death. This is evidence that accused had intention to commit murder in a form of *dolus eventualis*.

[52] On charge of unlawful possession of firearm withdrawn against Accused No.2, Accused No.1 was aware of the presence of this gun and benefitted from its use as they all managed to escape. Therefore, Accused No.2 was in constructive, as opposed to actual, possession of the said firearm.

[53] From these facts, there is no direct evidence connecting the accused to the commission of these offences. However it is settled law that a court may convict based on circumstantial evidence, provided that the following requirements set out in *R.v Blom*⁵ are met;

- (a) Whether the inference sought to be drawn is consistent with proven facts.
- (b) Whether the proven facts are such that they exclude all other possible inferences.

The proven facts in this case are that upon their arrest, A1 had a gunshot on his thigh and a bullet stuck which was fired from

⁵ 1938 AD 188

PW1's 7.65 auto pistol as evidenced by the ballistic report. A2 on the other hand was found in possession of a .45 firearm that matched the shells that were found at the scene including the one that shot and exited deceased's body per the ballistic examination. To these allegations, accused offered bare denials. I find no other possible inferences from these proven facts other than that accused are the perpetrators of these offences.

[54] From the above, it is concluded that there is overwhelming evidence proving that that accused were at the scene of crime and committed these offences. This court therefore finds that the alibi defence cannot be reasonably possibly true, is false beyond reasonable doubt, and stand to be rejected.

[55] Under the circumstances, it is this my considered view that the crown's evidence weighs heavily against accused and the crown managed to prove its case beyond reasonable doubt. Accused are accordingly found guilty as follows;

Accused No.1: Count 1- guilty of murder

Count II- guilty of attempted robbery

Count III- guilty of unlawful possession of firearm

Accused No.2: Count 1- guilty of murder

Count II- guilty of attempted robbery.

Now the last issue to decide on the conviction of murder is whether extenuating circumstances exist. It is settled law that the onus rests on the accused person to prove that extenuating circumstances exist⁶. Extenuating circumstances are defined as “any facts associated with the commission of the crime, whose effect in the minds of reasonable persons will reduce the moral blameworthiness of the Accused as distinct from the Accused’s culpability”⁷. Furthermore, the court is at liberty to consider all evidence before it in order to determine whether such factors exist. Vessels JA⁸ in summarizing this said:

“The court is entitled and bound to have regard to the evidence as a whole in order to determine whether or not an accused person has discharged the onus resting upon him on the issue of extenuating circumstances.”

Steyn P⁹ listed factors to be considered in order to establish the existence of extenuating circumstances including youth, absence of dolus directus and absence of premeditation or planning. In expounding on the court’s duty in establishing the existence of extenuating circumstances, His Lordship¹⁰ had this to say;

“Each factor must be weighed and assessed in the light of the evidence as a whole and its relevance to the conduct and state of

⁶ Rex v Malefetsane Potlaki 1980(1) LLR

⁷ Letuka v Rex LAC 1995-1999 @ 405 G

⁸ S v Mkhize 1979 (1) SA 461 (A) @ 463

⁹ Letuka v Rex-supra @ p.422

¹⁰ Letuka above @ 423

mind of the accused, as well as cumulatively with any other factor associated with the commission of the offence.”

I have considered defence evidence on this issue that accused have been denying involvement in the commission of these offences despite the overwhelming evidence presented by the crown. However, the court considered that accused are still at their young age and have an opportunity to reform. Their intention to commit murder is *dolus eventualis* as opposed to *dolus directus*. Based on these factors, the court accepts that the appropriate finding is that extenuating circumstances exist herein.

My assessors agree.

SENTENCE:

[56] I now come to a stage of passing an appropriate and just sentence. The purpose for which the sentence is intended to serve must be informed by proper consideration of the triad of factors, viz, the seriousness of the crime, the interests of the community and the interests of accused person (**S v Zinn 1969(2) SA 537 (A)**). The objects of punishment, namely retribution, deterrence, preventative or rehabilitative also ought to be properly balanced.

In light of the above, I have considered that no submissions were made in relation to personal circumstances of the accused. In

mitigation, the court was invited to consider that accused are still young, in their 20's. They have no record of previous convictions and that they have been in custody since 2018 awaiting trial and that was not at their fault. I concede that these factors should be taken into account, together with other factors in sentencing.

[57] Again, the court considered that accused have not shown any remorse as they have been consistent with their bare denials before court. I have also taken into consideration how deceased met his death. He was going on with his lawful means of survival and trying to protect the property from which he earns a living when he was shot. The society's interest is that perpetrators of these heinous crimes must get a commensurate punishment, given the prevalence of armed robberies resulting in killing of innocent people. Punishment is justifiable as a deterrent not only to the criminal himself, but also, and even more importantly, to those who may have similar criminal propensity. A way must be found to protect society from the activities of these criminals and to me, this way is confinement for a considerable length of time in order to mark the disapproval of society in such conduct.

[58] Murder is in my view the most serious offence as the deceased cannot be replaced and his life cannot be

substituted. Section 5 of our constitution protects life by providing that everybody has an inherent right to life. In imposing the appropriate sentence, our courts must send a strong message that crime, especially serious offences like murder and robbery are abhorred.

In the circumstances, accused are sentenced as thus;

Accused No.1

Count I- 18 years imprisonment

Count II- 5 years imprisonment

Count III- 2 years imprisonment

Accused No.2

Count 1- 18 years imprisonment

Count II- 5 years imprisonment

[59] The sentences imposed in respect of count II and III are to run concurrently with the sentence imposed on count I. Effectively therefore, Accused are to serve 18 years imprisonment to be calculated from the time they were in custody pending trial of this case.

RANTARA P.
ACTING JUDGE

FOR THE CROWN: ADV. JOALA ASSISTED

BY ADV. MAKAMANE

FOR ACCUSED: ADV. LESUTHU