

**CRI/T/76/2011**

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**In the matter between:-**

**REX**

**VS**

**TEFO MOLEFI MASILO  
JOEL MASERU MOHALE**

**CORAM : HON. T. MATOOANE ACTING JUDGE**

**DATE OF JUDGMENT: 7<sup>TH</sup> MARCH 2022**

**JUDGMENT**

**Neutral Citation**:- Rex vs Tefo Molefi Masilo & Joel Maseru Mohale  
(CRI/T/76/2011) [2022] LSHC 40

The accused **Tefo Molefi Masilo** was charged and indicted by the **Director of Public Prosecutors** on three counts namely *Count i murder, Count ii malicious damage to property* and *Count iii unlawful possession of the firearm*.

It is important to note the original indictment included **Joel Maseru Mohale** who was charged under *count iii*.

The charges were withdrawn at the commencement of the trial against **Mohale** who gave evidence in this trial as **PW10**.

It emerged from this trial that **PW10**, had acquired the illegal firearm which was used in this case to commit the murder of '**Malebohang Takatso** thus he should be treated as an accomplice in *count iii*

This will depend on whether at the material time when the deceased was shot, was he still in possession of the said firearm.

The following facts are common cause:-

The accused was employed as a herd boy by **PW10** between the months of July and September 2010 at **Khukhoane Ha Mohale**.

On the 17<sup>th</sup> September, the accused was seen by **PW2 Molefi Mohale** sharpening or flattening an iron rod over a fire.

On the 18<sup>th</sup> of September 2010 the accused had a verbal clash with the deceased at shearing shed. Where the deceased refused to allow the shearing of the sheep of one **Simeone** over the issue of the bewys.

On the night of the 20<sup>th</sup> September 2010 the deceased house was broken into and deceased was shot three times and she died as the result of the gun shot wounds.

The ballistic report established that the bullets which killed the deceased were fired from a certain 9mm pistol Z88 serial number Q112689.

The said pistol was acquired illegally by **PW10 Joel Maseru Mohale**

The deceased and her seven years old child were sleeping at her home on the fateful night and they were attacked by an unknown assailant, who broke down the door of the house and entered the house around midnight.

The deceased and her son managed to escape through the window. During their flight from the house, the deceased was shot three times and she succumbed to her injuries on the spot.

The Post-mortem reports confirmed that death was caused by the gun shots wounds. The wounds were at the back between the shoulders, and the sternum. They penetrated the back of the deceased to the front part of the body.

During the night in question the accused was present at the village.

The crux of the matter is who was in possession of the 9mm pistol during the night of the 20<sup>th</sup> September 2020.

To answer this million dollar question the Crown led evidence of three witnesses namely: **Masupha Mohale**, **'Mamasupha Mohale** and **Joel Maseru Mohale** respectively.

The evidence of **PW8 Masupha Mohale** was to the effect that he was instructed by his father, **PW10**, to tell his mother that there was a gun under the bed in their bedroom at **Khukhoane**. The gun should be given to the accused to enable him to guard the livestock against thieves. This was sometimes in July 2010.

He accordingly passed the message to his mother when he came home from the mines. **Masupha** and **PW10** were working at **Harmony** mine in the **Republic of South Africa**.

He testified that the gun was given back to him by the accused in September 2010 after the death of the deceased '**Malebohang Takatso**.

He testified that on Sunday 20<sup>th</sup> September he heard the alarm raised during the night, but he did not attend the scene. It was in the morning when he became aware of the deceased death.

**PW9** was '**Mamasupha Mohale** who is the mother of **PW8**. She confirmed that in July 2010 she received instructions from her husband via **PW8**. She was instructed to give the accused the gun that was under the bed in their bedroom.

She duly called the accused on his phone to convey the message. She did not make the follow up to check whether the accused did take the gun or not. She was not aware of the existence of the gun before.

**PW10** was **Joel Maseru Mohale**, who is the father and husband of **PW8** and **PW9** respectively. He testified that he had hired the accused as his herdboyc to look after his livestock at the cattle post and at his home stead.

Later, in the same month of July, he ordered his son who was coming home for the weekend to ask his mother to give the gun to the accused, which he had hid in his bedroom.

The father and son were working together at the mine in **Harmony the Republic of South Africa**.

Sometime, in August he came home for the weekend. As he was preparing to leave home to visit one of the neighbouring villages during late evening, the accused offered to give him gun for his protection but he declined the offer. That's how he confirmed that his instruction had been adhered to. He concluded that the gun was in the accused possession.

The accused gave evidence on his behalf. He testified that he has never seen or touched the gun. He testified that during the months of June and July 2010, he was attacked twice by some people while he was at the PW10 cattle post. On the last occasion he was admitted at **Mantsonyane hospital**.

After he left the hospital, he left the **Khukhoane** and went back to his home village of **Qeme Ha Mohasoa**.

While he was still at **Ha Mohasoa**, he received a phone call from **PW10** who requested him to come back to work.

During their negotiation, they agreed that he would not go back to herd the livestock at the cattle post. He would look after the livestock at the homestead and

look after the initiates who were being prepared to attend the circumscion school.

He testified that the death of **'Malebohang** was a result of a feud between the families of **Takatso/Mohale** with another family of **Letsolo**. According to him the deceased was killed by one **Lebona Letsolo** who was later killed by the family of **Mohale** with the assistance of **PW10**.

As I had earlier pointed out, the crucial question is the possession of the firearm at the material time which is the night of the 20<sup>th</sup> September 2022.

**PW8, PW9** and **PW10** were subjected to a lengthy and vigorous cross examination by the accused Counsel. They were not shaken. They give their evidence in a forth right and direct manner.

On the other hand, the issue of the assaults at the cattle post and the re-negotiation of the terms of employment were not mentioned to the Crown witnesses under cross-examination. They were introduced for the first time in accused evidence in chief.

Secondly, his theory that the deceased was killed by a certain **Lebona** was based on hearsay.

He was asked to furnish a reason why the witnesses would give false evidence against him. He replied that they conspired against him because they were rich and he was poor.

There was no evidence of bad blood between the Crown witnesses and the accused at any given time.

In his testimony the accused came up with a conspiracy theory which was far fetched and improbable and was based as hearsay. He avoided questions by giving long and unnecessary answers.

It is trite principle of the Law that an accused person should not be convicted because he lied in his testimony, if his evidence is probable, he should be given the benefit of doubt, unless the court is satisfied that his explanation is improbable and that it is beyond reasonable doubt that it is false.

See **Pelea v Rex LAC 2000 – 2004** p.223 at 232 and cases quoted therein, **Rex v Difford 1939 AD 370** at 389-90 **S v Jaffer 1988 (2) SA 84**

The evidence in this case rests on circumstantial evidence as opposed to direct evidence. For its requirements see **Rex v Tšosane LAC 1995 – 1999** p634. **Rex v Bloem 1939 AD at 202**. See also **Rex v Mtembu 1950 (1) SA 670 at 679**.

*“I am not satisfied that a trier of the facts is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. The*



*conclusion of guilt can only be if certain evidence is accepted or if certain evidence is rejected then a verdict of guilty means that such evidence must have been accepted, as the case maybe, beyond reasonable doubt. But that does not necessarily mean that every factor bearing on the question of guilt must be treated as a separate issue to which reasonable must be distinctly applied”.*

I am satisfied that the gun was in the possession of the accused on the fateful night. This factor taken cumulatively with other admitted facts makes me conclude that the Crown has proved beyond reasonable doubt that the accused is guilty as charged, in all three Counts.

No previous conviction.

Postponed to tomorrow 8<sup>th</sup> March 2022.

Bail cancelled accused to be taken to prison.

### **Extenuating circumstances inquiry**

**Mr Lephuthing** invited the accused to give evidence. Accused Sworn in and testifies as follows; we were at the wool shearing shed, where were shearing sheep belonging to my employer **PW10**. Among his sheep there were others belonging to **Simeone**, who is **PW10**'s nephew. **Simeone**'s mother is the sister of **PW10**. **Simeone** did not have money to pay the costs of the shearing at the shed. He had requested his uncle to include his sheep (**Simeone**'s) under his list.

On the day of the actual shearing, **Simeone** wanted to separate his sheep from his uncle's as he claimed that he now had money to pay for his sheep. Accordingly, I passed the message to **PW9**, who had no objection. She instructed me to give one of the rams to **Simeone**. The reason being that according to the Rules of the shearing shed, no one was allowed to shear his sheep if he did not have ram in his flock.

It emerged that even though he had the money, **Simeone** could not shear his sheep ultimately, as he did not have bewys which proved ownership of the sheep. The deceased was employed at the shearing shed as a supervisor. She came to me to inquire why my employers and I, wanted to include **Simeone** sheep in our list for the purposes of shearing. She accused us of trying to cheat **Simeone** by shearing his sheep while he was present at shed, without his permission.

I replied that we did so because **Simeone** had indicated that he did not have money to pay for himself. That was the end of our discussion. I am surprised to hear people saying that we had a fight.

**Court adjourns 11.00 am.**

**Court resumed at 11.00 am**

I was referred to the case of **Letuka vs Res LAC 1995 – 1999** at page 416 para I. Where the court enumerate the factors which may be considered as extenuating circumstances. For this case in issue I considered the following factors:-

The accused is a simple herdboyer who is semiliterate. He has subnormal intelligence and up to this stage does not realize the gravity of the situation he is in. This fact may have influenced him to feel aggrieved when the deceased who was female accused him of cheating Simeone. He obviously felt undermined as a man.

Despite his age forty two (42) years, the accused does not show maturity that befits his years. That was obvious in the way conducted his defence.

The accused throughout his defence seems obsessed with the fact that his employers and other villagers were rich and that he was poor. He has resentment for people who are more fortunate than him economically.

The Court finds that there are extenuating circumstances.

#### Mitigation by **Mr Lephuthing**

Accused is a first offender

He was married and divorced, but he is looking after fifteen (15) year old boy.

He is presently unemployed, but he has joined a church where he is being groomed to be a pastor.

The offence happened as far back as 2010 and it has been hanging over him for the last twelve (12) years.

I have also considered the following aggravating factors (a) the prevalence of gender based violence in **Lesotho**.

The killing of the deceased of the accused deprived a child of very tender of his mother prematurely.

The source of their quarrel was over a very mundane issue (that is) (the shearing of sheep).

He broke into the deceased house where the deceased and her son were in safe place and cowardly shot the deceased while she was running away.

Thus the sentence that I find appropriate is as follows

**Count I     12 years imprisonment**

**Count II    12 months imprisonment**

**Count III   6 months imprisonment**

The sentence to run currently

My Assessors agree.

**T MATOOANE**

**ACTING JUDGE**

**For Crown : Mr Thaba**

**For Defence : Mr Lephuthing**