

LESOTHO / JUDGMENT

Rex V Motlatsi Rantaoana (CRI/T/0061/2018) [2023] LSHC 259 (3 May 2023) [2023] LSHC 259

COURT

High Court

CASE / FILE NUMBER

CRI/T/0061/2018

Source: lesotholii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CRI/T/0061/2018

In the matter between: -

REX

V

MOTLATSI RANTAOANA

CORAM

: M. P. RALEBESE J.

HEARING :

07 NOVEMBER 2022

08 NOVEMBER 2022

10 NOVEMBER 2022

26 JANUARY 2023

10 FEBRUARY 2023

JUDGMENT:

25 APRIL 2023

SENTENCE:

03 MAY 2023

SUMMARY

Criminal law – Charges of murder, attempted murder and unlawful possession of a firearm – Accused member of Famo music or blanket gang – Accused believing that he was in imminent threat of attack by members of rival blanket gang – The two victims were soldiers patrolling the border area in civvies – Another victim a street vendor – Use of unlicensed firearm - Private defence raised – Accused excessively exceeded the limits of private defence -Accused had intention in the form of dolus eventualis to murder the two soldiers victims – Crown failed to prove beyond reasonable doubt that accused committed the actus reus in one charge and accused given benefit of the doubt – Extenuating circumstances found

ANNOTATION

CITED CASES

LESOTHO

Linake and Another v R (C of A (Cri) 10/08) [2009] LSCA 8 (09 April 2009)

Mothobi v Director of Public Prosecutions (C of A no.4/2019) [2023] LSCA 24 (15 May 2022)

Paamo v R (C of A (CRI) 6 of 2013) [2014] LSCA 51 (24 October 2014)

R v Lehula and Another (CRI/T/44/1994) [2006] LSHC 219 (16 November 2006))

R v Mpoka (CRI/A/29/2000) (CRI/A/29/2000) [2001] LSHC 16 (19 February 2001)

R v Sekautu (CRI/T 30 of 83) [1984] LSCA 60 (29 May 1984)

S v Mabaso (CRI/T\60\91) (NULL) [1993] LSHC 49 (20 August 1993)

SOUTH AFRICA

R v Difford 1937 AD 370

R v Krull 1959 (3) SA 392 (A)

R v Ndara - 1955 (4) SA 182 (A)

R v Patel 1959 (3) SA 121

S v Baloyi 2000 (2) SA 425 (CC)

S v De Oliveira 1993 (2) SACR 59 (A)

S v Humphreys 2015 (1) SA 491

S v Motleleni 1976 (1) SA 403 (A)

S v Ntanzu 1981 (4) SA 477 (N)

STATUTES

Criminal Procedure and Evidence Act No.9 of 1981

Penal Code Act No.6 of 2010

Internal (Arms and Ammunition) Security Act No. 17 of 1966

BOOKS

Birch D at al. Blackstone's Criminal Practice, 8th Edition, 1998, Blackstone Press Ltd.

Burchell and Hunt. South African Criminal Law and Procedure. Vol. I. 1997, Juta & Co.

Burchell and Milton, Principles of Criminal Law (2005)

CR Snyman – Criminal Law, 3rd Edition 1995 Butterworths

CR Snyman – Criminal Law, 6th Edition 2014 Butterworths

JUDGMENT

Ralebese J.

Introduction

- [1] Tragedy struck on the 13th day of May 2017 at or near Gateway filling station (Gateway) within the vicinity of Maseru border post when two people died from gunshots, and another was shot but was only wounded. This followed an altercation that erupted between Motlatsi Rantaoana, the accused, and two members of the Lesotho Defence Force Military Intelligence Unit who were at the time patrolling around Maseru border post. One of these military men, Private Katleho Seliane (Private Seliane), and one Moeketsi Joseph Makhabane (Makhabane) who was a vendor of traditional hats in one of the shacks around Maseru border post were the two who died from the gunshots while another military man, Private

Halekhethe Nkonyana (Private Nkhonyana) was favoured by fate as his life was spared.

- [2] The accused, a Mosotho male from Ha Qoane in Mohale's Hoek who was 24 years old in May 2017 when the incidents occurred, was indicted in respect of the events of that day with four counts as follows: -
- (a) In Counts 1 and 2, he was charged with contravening section 40(1) read with Section 40(2) of the Penal Code Act¹ in that on or about the 13th day of May 2017 at or near Gateway filling station in Maseru, the accused with intent to cause death shot Moeketsi Joseph Makhabane (in count 1) and Private Katleho Seliane (in count 2) and he thereby committed the offences of the murder of these two people.
- (b) In count 3 he was charged with contravening section 22(1) of the Penal Code Act, it being alleged that on or about the 13th day of May 2017 at or near Gateway filling station in Maseru the accused with intent to commit murder, shot Private Nkonyana, and he thereby committed the offence of an attempt to commit his murder. ¹ Penal Code Act No. 6 of 2010
- (c) In count 4 the accused is charged with contravening section 3(2) (a) of the Internal (Arms and Ammunition) Security Act No.17 of 1966 as amended in 1999 in that on or about the 13th day of May 2017 at or near Gateway filling station in Maseru he unlawfully and intentionally acquired or had in his possession a 7.65mm CZ83 Auto Pistol Browning serial number 054491 without a requisite firearm certificate.
- [3] The accused who was legally represented entered a plea of not guilty in respect of counts 1, 2, and 3 and he pleaded guilty to count 4. The crown accepted the plea on count 4 and rejected the pleas on the first three counts. The Facts
- [4] The accused person is a member of one of the notorious Famo Music or blankets gangs that are normally identified with the colours of the blankets worn by members of such groups. The gangs are known for the peculiar way in which they dress, and they are notorious for fighting and killing members of rival gangs. The accused associates with a group called Phula- Bobete or Fefenene whose main rival gang is Seakhi. On the evening of Saturday 13th May 2017, the accused was traveling with members of his gang from Matelile to Welkom, South Africa where he was then working and residing. They had attended the funeral of a member of their gang in Matelile who had allegedly been shot and killed earlier in Welkom by members of the Seakhi rival gang.
- [5] The accused and his colleagues, about six of them, were traveling in two vehicles. They stopped at Gateway filling station (Gateway) which is within the vicinity of Maseru border post to refuel the vehicles and buy alcoholic beverages. It is common cause that the accused was at the time armed with a 7.65mm CZ83 Auto Pistol Browning serial number 054491 and he did not have the requisite firearm license. It is also common cause that he was seen holding and brandishing the firearm openly.

- [6] Private Seliane and Private Nkonyana were patrolling around Maseru Border Post around the same time. Being members of the Lesotho Defence Force Military Intelligence Unit, the two soldiers were in their civvies. A squabble ensued between the accused and the two army men. There is a dispute between the Crown and the defence as to the actual cause of the squabble that ended up in the shooting of the two soldiers and the vendor by the accused.
- [7] The Crown's version is that as Private Seliane and Private Nkonyana were patrolling around Maseru Border Post on that afternoon, they saw the accused brandishing a firearm and randomly saying he could shoot. One vendor even made a report to that effect to the two military men who indicated that they had already noted the accused. Private Nkonyana's evidence was that when they realised that the accused had a firearm in his possession, Private Seliane called out the accused. The accused did not heed the call but rather called out to his gang members telling them that there was someone who wanted to attack him. It was Private Nkonyana's evidence that when Private Seliane realised that the accused was not heeding his call, he introduced himself to the accused, who was then a pace or two away from them, and he even showed the accused his identity card. We will revert to the issue of this alleged introduction later in this judgment. Private Nkonyana said their reason for calling the accused was to find out if he had the firearm certificate in respect of the firearm that he was brandishing. [8] It is common cause that the accused and Private Seliane ended up in a physical encounter at Gateway forecourt. It was during that encounter that a knife fell from Private Seliane's pocket which was picked up by a security guard working at Gateway. It is also common cause that their physical encounter at Gateway forecourt stopped after the manager of the facility instructed them to leave the business compound and not to fight thereat. The only Crown witness who could have shed light on how the squabble started was Private Nkonyana but he conveniently, and for reasons known only to himself, refrained from disclosing in his evidence what transpired immediately after the alleged introduction and he made no mention of this physical squabble.
- [9] The accused on the other hand gave a different account of the cause of the squabble. He contended that after alighting from the vehicle and as he was approaching Gateway, he saw his fellow gang member, one Khothatso Makibinyane (Khothatso) who was reported to have since passed on when the matter was proceeding, in a physical squabble with a man he did not know (Private Seliane) and he went towards them to find out the cause of the squabble. He said Khothatso informed him that the man (Private Seliane) wanted to take his hat which apparently had the colours of the Phula-Bobete gang, and he had even asked him, in the language of the Famo music gangs, whether he wanted a fight (oa foma). The accused said when he tried to come between them to stop the squabble, Private Seliane turned to him and they started fighting. The accused said at that time, he did not know who Private Seliane was as he maintained that he and Private Nkonyana never introduced themselves.
- [10] The question is which of these two divergent versions is a true reflection of the cause of the conflict that ended with the fatal shootings. The accused's version cannot reasonably be true firstly because it was never put to any of the crown witnesses in cross-examination,

especially Private Nkonyana and it came up for the first time when the accused was in the witness box (S v Mabaso²). The irresistible implication, given other factors, as will hereinafter be demonstrated, is that it was a fabrication. Secondly, there is no logical explanation why, amongst people who must have been within the vicinity of a busy Maseru border post, soldiers on patrol could have an interest leading to a fight with a stranger over a hat. Thirdly, all the eyewitnesses said they saw the accused, not any other person, in a physical squabble with Private Seliane. Mahali Makoa (PW1) was the lady vendor of traditional hats in one of the shacks below Gateway, her evidence was that she saw the accused and Private Seliane (she did not know both at the time) being ejected from Gateway and they went nearer to their vending shacks with Makhabane. She said she heard Private Seliane telling the accused that he was not fighting with him, but he just wanted the firearm that the accused was holding. She said the accused told Private Seliane that he would not surrender his firearm and that if Private Seliane insisted on demanding his gun, he would give him his mother. Notwithstanding the foregoing evidence of Mahali, the accused did not mention or deny in his evidence or in cross-examination that Private Seliane ever said anything concerning the firearm. 2 S v Mabaso (CRI\T\60\91) (NULL) [1993] LSHC 49 (20 August 1993)

- [11] There is no reason to disbelieve the Crown's version. Reasonably, the military officers deployed to the country's border post would have an issue with a person who is publicly seen brandishing a gun and they would have a reason to enquire about its legality. We therefore find it as a fact that Private Seliane must have approached the accused because he had a firearm in his possession, and he wanted to enquire whether he had the requisite licence to possess the firearm.
- [12] It is common cause that after the accused (with his other two or three companions) and the two soldiers had been instructed to leave Gateway, they ended up behind the vending shacks of the late Makhabane and Mahali. This was where the second encounter erupted between the accused and the two soldiers and it ended with the fatal shootings of Makhabane, Private Seliane, and Private Nkonyane. The accused admitted having shot Private Seliane, but he contended that it was in private defense.
- [13] Following the shooting, the two soldiers were referred to the hospital. Private Seliane died later, the same day. Private Nkonyana was admitted for about two weeks. It turned out a month later following his release from hospital that the lead of the bullet that shot him had gotten stuck in his abdomen. He was operated and the lead was removed on 5th June 2017. The vendor, Makhabane on the other hand was found dead in his shack soon after the shooting.
- [14] The accused fled to Maseru Border Police Station soon following the shooting and along the way, he was seen ditching the firearm into a pit behind the municipal toilets. Upon arrival at the police station, the accused reported that he was being shot at by people whom he thought were members of the Seakhi gang. The firearm that the accused had ditched was picked by PW6 (Daniel) who handed it over to Maseru Border Post police. Daniel found the

accused reporting to Detective Sergeant Masupha and he gave the gun to the Detective Sergeant indicating that the accused had just ditched it into a pit behind the municipal toilets. It later transpired that the accused did not have the requisite certificate to possess the firearm.

- [15] The accused was arrested on the same day together with the comrades that he had been traveling with. These other gang members were later released while the accused was given the charges as already outlined above and he was incarcerated. The Issues
- [16] The issue to be determined by this court regarding the death of Makhabane (count 1) is whether the accused is liable for his shooting and resultant death.
- [17] Concerning count 2, it being common cause that the accused shot Private Seliane, the issue is whether the accused person indeed acted in private defence and therefore not liable for the death of Private Seliane.
- [18] In count 3, the issue is whether the accused is liable for the gunshot that injured Private Nkonyana and therefore whether he is guilty of an attempt to murder him.
- [19] We now proceed to analyse the evidence in respect of each of the foregoing issues, and for the logical flow, starting with the second issue, proceeding to the third, and ending with the first issue as they are stated above. Is the accused liable for Private Seliane's death?
- [20] Before going into the circumstances that led to the shooting of Private Seliane and determining whether the accused person indeed acted in private defence, it is apposite to discuss the law on self-defence. The law on Self-defence
- [21] Self-defence is a subset under the general rubric of Private defence. It is one of the defences that excuses an otherwise unlawful criminal act. This means that the use of force that is ordinarily unlawful is justified if it is found to have been necessary to repel an unlawful attack on the accused person. In our jurisdiction, the defence of private defence is governed by Section 20(1) of the Penal Code Act which provides as follows- "20. (1) No person shall be criminally responsible for the use of force in repelling an unlawful attack -
- (a) upon himself or herself or another person if -
 - (i) it was not reasonable to avail himself or herself of any means of retreat of which he or she was aware; and (ii) the degree of force used in repelling the attack was no greater than that which was reasonably necessary in the circumstances..."
- [22] Within the context of a charge of murder, this provision means that the accused who kills another person within the permissible bounds of self- defence is not guilty. It is now established that for private defence to be successfully raised, (a) the accused should have been unlawfully attacked and he should have had reasonable grounds for thinking that he was in danger of death or injury at the hands of his attacker(s); (b) the means used by the accused to defend himself must not have been excessive in relation to the danger; and (c) the means used by the accused in defending himself should have been the only or least

dangerous means through which he could have avoided the danger (Linake and Another v R3). What is deducible from the foregoing three requirements is that the accused, at a minimum, bears the burden to lead evidence to establish these requirements on the balance of probabilities. Once the accused has discharged the evidential burden, the onus and the legal burden then shift to the Crown to negate and disprove the accused's explanation and private defence beyond a reasonable doubt (Burchell and Milton Principles of Criminal Law4). Should the Crown fail to discharge this persuasive burden to the required standard of proof beyond a reasonable doubt, it falls on the risk of non-persuasion which calls for the acquittal of the accused (Birch D at al. Blackstone's Criminal Practice5).

- [23] The court assessing a defence of private defence should consider the exigencies of the occasion and it must be cautious of being an armchair critic wise after the event. The court must endeavour to imagine itself in the position in which the accused was at the time of the attack (R v Patel6). The test, therefore, is whether the accused had reasonable grounds for thinking that he was in danger of death or serious injury. That is, whether the accused's belief that his life was in danger would have been shared by a reasonable man in his position. This means that the test to be applied by 3 Linake and Another v R (C of A (Cri) 10/08) [2009] LSCA 8 (09 April 2009) 4 Burchell and Milton, Principles of Criminal Law (2005) 231 5 Birch D at al, Blackstone's Criminal Practice, 8th Edition, 1998, Blackstone Press Ltd at page 1901 6R v Patel 1959 (3) SA 121 at 123 the court is the objective one taking into consideration the particular circumstance of a case before it (Burchell and Hunt. South African Criminal Law and Procedure7).
- [24] We now proceed to consider whether the elements of self-defence have been satisfied from the perspective of the accused person. Was there an unlawful attack or an imminent threat of attack?
- [25] The uncontroverted evidence of the accused is that it is a norm, unorthodox as it is, within the Famo music/ blanket gangs that wherever they meet members of the rival gang, they shoot and kill one another for no apparent cause whatsoever. An unfortunate situation indeed where fellow Basotho are resolute in their fortitude that just because they vow by a particular colour of a blanket, they will indiscriminately kill a fellow Mosotho who vows by a blanket of a different colour!
- [26] The accused person admits that he shot Private Seliane but he maintains that he acted in private defence as he laboured under the impression that he was under attack by members of the rival Seakhi gang. The accused maintained this story from the time he ran to the police station immediately after the shooting. PW4, Lieutenant Sergeant Lephutha testified that after he had heard gun-shot reports within the vicinity of Maseru border post, the accused arrived at Maseru Border Post Police station reporting that he was fleeing from people who were shooting at him and whom he suspected to be members of the Seakhi gang. 77 Burchell and Hunt, South African Criminal Law and Procedure. Vol. I. 1997, Juta & Co. at page 79

- [27] The accused indicated that on the day in question, they were returning from the funeral of a member of his gang who had been gunned down by a member of the Seakhi gang. He was armed with an unlicensed firearm, the subject matter in count 4, which he had borrowed from his acquaintance in Welkom for his safety while attending the funeral of their comrade as he anticipated an attack from members of the rival gang at any moment. He indicated under cross-examination that the gun was always corked as he was ready to shoot anyone who could attack him.
- [28] It is common cause that Private Seliane and Private Nkonyane were in their civvies on that day, being members of the Military Intelligence wing who do not normally wear the army uniform. It is apposite at this stage to consider whether, throughout the ordeal of that day, the accused was aware that he was dealing with members of the army.
- [29] There is a dispute whether the two soldiers or in particular Private Seliane, ever introduced themselves to the accused as members of the army when they first approached the accused in the vicinity of Gateway. Private Nkonyane's evidence was that Private Seliane introduced himself to the accused as a member of the army and he even showed him his identity card. Private Nkonyana said the alleged introduction happened prior to the first physical encounter between the accused and Private Seliane which took place at the Gateway forecourt. Mahali on the other hand testified that she heard Private Seliane telling the accused that he was a soldier and even displayed his identity card when the two men approached her vending shack. According to Mahali this was after the accused and Private Seliane had been expelled from the Gateway forecourt and they had gone towards their shacks. There is an inconsistency between Private Nkonyana and Mahali as to when and where the alleged introduction took place. As deduced from evidence and how the events of that day evolved, the shacks and Gateway forecourt are some distance apart. If the introduction happened before the encounter at Gateway forecourt, Mahali would not have heard it from inside her shack and she could not have seen the display of the identity document. The accused vehemently denied any such introduction and he maintained that he always laboured under the impression that the two men he had an encounter with could be members of the Seakhi gang.
- [30] Private Nkonyana in his evidence indicated that from the time the accused had the first physical encounter with Private Seliane, the accused was always in the company of his comrades. Private Nkonyana further testified that after he and Private Seliane had left the Gateway forecourt, the latter followed the direction that had been taken by the accused and his comrades and he went after him. He said one of the accused's posse asked him who they were as they seemed to have an interest in them. Private Nkonyana said he did not tell that man who they were, but he instead asked him in turn who they were. If Private Seliane had earlier introduced himself to the accused, the accused's colleague, who from the evidence had always been around the squabble could have heard the introduction and could not have asked Private Nkonyana who they were.

- [31] PW8, Lekhahla Lenka (Lekhahla) was working at Gateway at the time of the incident. He went out of the building after he had heard his manager evicting some people from the forecourt. He found the accused and Private Seliane already in a physical scuffle holding one another. His evidence was that after the accused with his companions and the two soldiers had left the Gateway forecourt, and they had followed the same direction, he heard some people within that vicinity saying the accused and his companions did not know that the people they were fighting with were members of the army. Lekhahla said he then followed these two warring factions intending to inform the accused's faction that the two men they conflicted with were soldiers. If Private Seliane had introduced himself to the accused and he had even displayed his identity card as alleged by Private Nkonyane, members of the public in the vicinity could have heard the introduction, more so when Private Seliane was allegedly a pace or two away from the accused and must have done so loudly. Consequently, those people in the vicinity could not have commented as Lekhahla indicated, that the accused posse did not know that they were fighting with the soldiers.
- [32] Under cross-examination, Private Nkonyana admitted that in the statement that he made to the police soon after the incident while he was still admitted at Queen 'Mamohato Memorial Hospital, he did not mention that they ever introduced themselves to the accused. The explanation he gave for that grave omission was that he was still not well when his statement was recorded. That explanation is not convincing considering how crucial the issue of their introduction to the accused was in the circumstances of this case. If they had introduced themselves to the accused, it is reasonably unlikely that he could have left out such a critical fact in his statement to the Police.
- [33] Given the foregoing considerations, it is doubtful that Private Seliane ever introduced himself to the accused at any point. The accused's explanation that he thought the two men who were picking on him were members of the rival blanket gang, is reasonably probably true. This is more so considering that he maintained this impression from the onset when he fled and reported to the police station. If the finding was that the accused knew that he was dealing with members of the army who were lawfully authorised to enquire about the legality of his firearm, the issue of self- defence would not arise since one cannot knowingly defend himself against lawful conduct (C. R. Snyman – Criminal Law8).
- [34] The next consideration is whether there was an attack that entitled the accused to act in his defence. The undisputed evidence shows that after the accused's posse had left the forecourt at Gateway, they went behind Mahali and Makhabane's vending shacks just below the Gateway. Private Seliane and Private Nkonyane on the other hand left Gateway forecourt through the main gate. According to Lekhahla, Private Seliane, with Private Nkonyane behind him, immediately proceeded toward the direction that had been taken by the accused and his comrades. As already indicated, Mahali said as Private Seliane approached the accused, he told the accused that he was not fighting and that his interest was in the firearm that he was holding and the accused's response was that the gun was his, and he would give Private Seliane his mother if he insisted that he wanted his gun. Though Mahali

wanted to give the impression that she saw what transpired thereafter, we are convinced that she fled the scene and therefore did not witness the shooting. 8 CR Snyman – Criminal Law, 3rd Edition 1995 Butterworths at page 98.

- [35] Private Nkonyana's evidence was that as he approached Private Seliane and the accused and he had just responded to the accused's companion who asked who they were, he heard two gunshot reports and he saw Private Seliane falling into the nearby furrow having been shot by the accused. Lekhahla is the other person who witnessed the shooting of Private Seliane. His evidence was that when he got behind the shacks, the two soldiers and the accused's group stood facing each other. He heard Private Nkonyane pleading with Private Seliane to let go of the accused while the accused's companions were likewise urging the accused to let go of the two men. Lekhahla told the two groups that their problem was that they each did not know who they were fighting with. Before he could tell the accused that the two men he was in conflict with were the soldiers, the accused retrieved the gun from his back and shot Private Seliane in the neck area. Lekhahla said he got scared and fled but he thought he heard two gunshots.
- [36] It is common cause that neither of the two army men was armed with any weapon when the accused shot Private Seliane. The knife that had fallen from his pocket had been picked by a guard at Gateway and there was no suggestion that Private Seliane ever regained its possession. The accused's explanation is that after he had left Gateway forecourt with his companions, he saw Private Seliane, followed by two men, hurrying bellicosely towards him. The two men must have been Private Nkonyana and Lekhahla as the latter said he followed the two warring groups as they went behind the shacks intending to tell the accused that he was fighting with the soldiers. The accused said as Private Seliane, with Private Nkonyana behind him, approached them, he enquired from the two soldiers who they were and what was happening, probably meaning why they were persistently picking on him like that. This must have been at the point when, according to Mahali, Private Seliane told the accused that he was not fighting and all that he wanted was the firearm he was holding.
- [37] The accused said he was scared as he thought that he was being attacked by Seakhi gang members. His testimony was to the following effect- "What was going through my head at that time my Lady was these people might be some of the gang members that wherever we see each other, we fight because we do not see eye to eye with members of these other gangs. More particularly Seakhi gang my Lady. So, my Lady owing to the fact that we had just buried one of our fellows who had been killed by the same people whom I suspected were the same people who were after us, I got very frightened. That is the point where this person was still approaching and while I was still asking for his identity and who he was, I became very scared of him and shot at him." The accused said he shot Private Seliane when he was about 3-4 paces away from him.

- [38] The court finds that it is reasonably probably true that the accused was objectively scared as he laboured under the impression, though mistaken, that he was being confronted by members of the rival gang and that his limb and life were in danger. He objectively had reasonable grounds for thinking that he was in danger of death or injury at the hands of the two men who were then unknown to him, and whom he subjectively believed to be members of the rival gang (R v Ndara⁹). This conclusion is premised firstly on the uncontroverted background of how the Famo music gangs generally behave towards members of rival gangs. Secondly, on that same day, the accused and his companions were returning from the funeral of 9 R v Ndara - 1955 (4) SA 182 (A) at 184-185 their gang member who had been shot dead and whose death must have still shocked, scared, or even angered him, hence the decision to arm himself with a firearm upon leaving Welkom to attend the funeral.
- [39] The Crown argued that the accused's fear was not reasonable since Private Seliane had introduced himself as an army member. We have already dismissed this as unfounded. It was further argued that from the onset, Private Seliane picked on the accused, and not his other colleagues, and he should have realised that it was because he was publicly holding the firearm, more so when Private Seliane made it clear to the accused that he wanted the gun that he was holding. The court has already found that the accused did not know that Private Seliane was a law enforcement officer, who was lawfully justified to enquire about the lawfulness of the firearm that the accused was holding. The crucial question is what was operating in the accused's mind at the material time that he decided to shoot Private Seliane (S v De Oliveira¹⁰). What the court has on record is the accused's version of his subjective and reasonable fear that Private Seliane and his colleague were members of a rival gang. A reasonable man in the circumstances in which the accused found himself would have believed that his life was in imminent danger. There are facts on record that the accused has established that entitled him to reasonably believe that he had to use force to ward off what he perceived to be an imminent attack by rival gang members, mistaken as he was. As stated in R v Ndara¹¹ a mistaken belief will operate in favour of an accused person if it is reasonable. The approach in assessing private defence was stated as follows in S v Motleleni¹²:- 10 S v De Oliveira¹⁹⁹³ (2) SACR 59 (A) at 63 11 Supra at 185 12 S v Motleleni 1976 (1) SA 403 at 406 C "The question whether an accused, who relied on self- defence, has acted lawfully must be judged by objective standards. In applying these standards, it must decide what a fictitious reasonable man, in the position of the accused and in the light of all the circumstances would have done."
- [40] It is common cause that the first physical encounter between the accused and Private Seliane had ended when they were expelled from Gateway forecourt, and they left the premises going in different directions. Considering that Private Seliane again followed the accused and his comrades bellicosely, the court is unable to reject his explanation that he had a reasonable apprehension to think that he was at the risk of an imminent threat to his life. In seeking to place a reasonable person in the position of the accused, the court cannot say that, in the light of the background about the blanket gangs and the earlier physical

encounter at Gateway, the accused was unjustified in his fears. The crown failed to negate the accused's subjective fear as unreasonable beyond any reasonable doubt. Was the use of a firearm necessary to avert the perceived imminent danger?

- [41] Having found that the accused had a reasonable fear of imminent danger to his life, the court must now consider whether the force used by the accused was reasonably necessary to ward off the perceived imminent attack and also whether he had no other means of retreat that he could have resorted to. If he exceeded the limits of private defence moderately, he is guilty of culpable homicide and if he exceeds the bounds excessively, he is guilty of murder. C. R. Snyman in his book *Criminal Law*¹³ says: 13 C R Snyman *Criminal Law* 6th Edition, 2014, Butterworths at 110-111 "...there should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place. In order to decide whether there was such a reasonable relationship between the attack and defence, the relative strength of the parties, their sex and age, the means they have at their disposal, the nature of the threat, the value of the interest threatened, and the persistence of the attack are all factors (among others) which must be taken into consideration. One must consider the possible means or methods which the defending party had at her disposal at the crucial moment. If she could have averted the attack by resorting to conduct which was less harmful than that actually employed by her, and if she inflicted injury or harm to the attacker which was unnecessary to overcome the threat, her conduct does not comply with this requirement for private defence."
- [42] In terms of the post-mortem report (Admission D) and the admitted statement of Detective Sergeant Masupha (Admission A), who examined the body of Private Seliane immediately after the shooting, the deceased had three open wounds around the neck area. The post-mortem report described these as (a) a puncture wound on the front neck on the right side,
- (b) an abrasion and wound on the neck, and (c) an exit wound on the left side of the neck. The deceased had a ruptured trachea and a damaged cervical spine. Since the third wound was a bullet exit, it can be inferred that the accused shot Private Seliane twice as a single bullet cannot reasonably cause the three wounds as described on three different parts of the neck. This inference is consistent with the evidence of Private Nkonyana who said he heard two gunshot reports and saw Private Seliane collapsing. It is also consistent with the evidence of Lekhahla who said though he was scared, he could recall that the accused shot Private Seliane twice in the neck area.
- [43] Bearing in mind that Private Seliane was not armed; that there was no positive evidence or a suspicion by the accused that he was armed; and that the knife that had fallen from Private Seliane during the first encounter at Gateway forecourt had been picked up by a security guard, the force used by the accused in the circumstances of this case was without a doubt extremely excessive. For the first time in his testimony, the accused tried to suggest that he saw Private Seliane reaching for something in his pocket. This was never put to the Crown witnesses and the court considers it as an afterthought. The accused was well aware the knife that had fallen from Private Seliane during their first encounter was picked by the

guard and it was never suggested that it was handed back to Private Seliane. At the time when the accused fired two shots at Private Seliane who was said to have been belligerent, Private Seliane had not done anything suggestive of exerting a physical attack on the accused. The shooting of such a man in a delicate part of the body like the neck, not once but twice, was extraordinarily excessive. The accused did more than was reasonably necessary in the circumstance to avert the attack. He could have aimed at lower limbs just to immobilise Private Seliane from advancing any further. The accused person without a doubt extremely exceeded the bounds of self-defence. He used excessive means than was necessary to ward off the perceived threat to his life (R v Lehula and Another¹⁴).

- [44] Furthermore, the accused had at his disposal other means by which he could have avoided the danger (See section 20(1)(a)(i) of the Penal Code Act). Lekhahla indicated that accused's comrades were imploring him to let go of the two men. He had an alternative to do as they were advising, 14 R v Lehula and Another (CRI/T/44/1994) [2006] LSHC 219 (16 November 2006). See also section 20(1)(a)(ii) of the Penal Code Act. he could have retreated to their vehicle. Alternatively, he could have warned Private Seliane that he would shoot if he advanced any further. Furthermore, he could have shot in the air to scare Private Seliane from advancing any further. What is more, he could have sought refuge at the police station just like he did immediately after the shooting. Shooting Private Seliane twice in the neck was not the only option available to the accused to ward off the perceived danger to his life.
- [45] We are satisfied that the requirements of private defence in terms of section 20(1) of the Penal Code Act have not been satisfied in the instant case. The Crown has thus proved beyond any reasonable doubt that the degree of force used by the accused to repel the perceived attack was greater than that which was reasonably necessary in the circumstances; and the accused could have availed himself of other means of retreat or repelling the danger, of which he was aware. The shooting of Private Seliane was therefore without any doubt unlawful. Is the accused guilty of the murder of Private Seliane?
- [46] Since the accused has admitted the actus reus and the unlawfulness of the shooting has been established, the ultimate issue for consideration is whether the accused had the necessary mens rea to cause the death of Private Seliane. As the starting point, the accused indicated in his testimony that when he left Welkom, he armed himself with a firearm which he intended to use should his life be threatened in any way. His gun was always coked, in ready mode to shoot anyone who could try to threaten his life. He said the norm within the Blanket gangs was that they shoot and kill members of rival gangs wherever they meet even for no apparent reason. The funeral of his colleague must have fuelled him to be trigger-happy and he was ready to shoot on the slightest provocation. He was publicly brandishing the firearm and even randomly saying he could shoot.
- [47] The accused's state of mind at the material time when he shot Private Seliane was that he was shooting a rival gang member and he was shooting to kill. When he shot Private Seliane twice in the neck area, undoubtedly a delicate part of the body, he subjectively foresaw the possibility that he could die from the gunshots. Because he thought Private Seliane was a

member of the rival Blanket gang, he reconciled with that possibility and persisted nonetheless regardless of whether death ensued or not. The accused therefore subjectively foresaw the possibility of the death of Private Seliane ensuing from the shooting. He reconciled himself with that possibility and it was immaterial to him whether he died or not. The accused was under the impression that he was shooting a member of the rival Seakhi gang, and he said they normally shoot and kill one another wherever they met. He reconciled with the possibility that Private Seliane could die, hence he targeted the neck area twice (*S v Humphreys*¹⁵). The accused therefore had the intention to cause the death of Private Seliane whom he perceived to be a member of the rival gang in the form of *dolus eventualis* (*S v Ntuli*¹⁶). We have already found that the requirements of private defence have not been satisfied as the accused excessively exceeded the reasonable limits of private defence. The court therefore finds the accused guilty of murder as he has been charged under count 2 (*R v Krull*¹⁷). ¹⁵ *S v Humphreys* 2015 (1) SA 491 (SCA) 496-497 at paras 12-17 ¹⁶ *S v Ntuli* 1975 (1) SA 429 (A) at 437 ¹⁷ *R v Krull* 1959 (3) SA 392 (A) at 399C – D). The shooting of Private Nkonyana.

- [48] Private Nkonyana's evidence is that upon realising that the accused had shot Private Seliane, he lurched towards the accused trying to grab him, but the latter shot him in the chest on the right side. He did not fall, and he managed to grab the accused and get hold of the gun in the accused's hand. He said the accused's companion who had earlier enquired who they were, came and pushed him (Private Nkonyana) into the furrow in which Private Seliane was lying, and that helped the accused to snatch the gun and flee. No other crown witness saw when and how Private Nkonyane got shot. Though Private Nkonyane was evasive on some of the events of that day, nothing could suggest that he lied about how and when he was shot.
- [49] The accused gave his account of how and when Private Nkonyane was shot. The accused denied ever shooting Private Nkonyana. His evidence was that after his comrade, Molise, had come to his assistance as they were wrestling over the gun with Private Nkonyana, Molise managed to wrest the gun from Private Nkonyana and the latter fell into the nearby furrow. He said Molise then shot Private Nkonyana from where he had fallen in the furrow. He then took the gun from Molise and ran to the police station. This story is beyond any reasonable doubt false as we hereinafter illustrate.
- [50] Firstly, the accused failed to put to Private Nkonyana under cross-examination that Molise was the one who shot him after he had fallen into the furrow. Failure to confront a witness under cross-examination with an issue that affects him directly and which is the core issue in respect of which the witness has been called to testify can lead to an inference being drawn that the issue is an afterthought when it is raised while the witness can no longer comment on it. We find the following sentiments by Kheola AJ in *R v Sekautu*¹⁸ apposite in the circumstance of this case: "This point was not even put to 'Maabel in cross-examination because it was obviously an afterthought on the part of the accused. I see no reason why the defence counsel would not have canvassed this very important point to show the witness that she was fabricating evidence against the accused because there was this hatred of long-

standing between them. I come to the conclusion that the accused was lying on this point.” In the same vein, the allegation that Private Nkonyana was shot by another person other than the accused is the core of the accused’s defence and it is reasonably unlikely that the defence counsel could have forgotten to put it to Private Nkonyana. The object of cross-examination is very clear, and it is to elicit from the witness, evidence supporting the cross-examining party’s version of the facts in issue; to weaken or cast doubt upon the accuracy of the evidence given by the witness in chief; and in appropriate circumstances, to impeach the witness’s credibility.¹⁹

- [51] The accused’s failure to put to the crown witnesses, particularly Private Nkonyana, that Molise was the one who shot him, the point which was so significant to his defence, leads to only one inference, that the issue was an afterthought and false beyond a reasonable doubt.
- [52] Secondly, if indeed Molise had been actively involved in the scuffle to the extent that he shot Private Nkonyana, Molise could have also fled from the scene and sought refuge at Maseru border post police station just like the accused. The accused indicated in his evidence that his comrades went to 18 R v Sekautu (CRI/T 30 of 83) [1984] LSCA 60 (29 May 1984) 19Blackstone Supra at page 1964 the police station to check on him. It is even unreasonable that the accused would readily accept a firearm from Molise after the latter had unlawfully shot Private Nkonyana.
- [53] Lastly, if the accused had, from the onset maintained that Molise was the one who shot Private Nkonyana, and he had given this explanation to the police, Molise could not have been released by the police, but he would have been given a charge alongside the accused. The accused failed to explain why he took the rap for Molise and he let him be released by the police, yet he was also the aggressor.
- [54] Having ruled out the accused’s narrative of how Private Nkonyana got shot as false beyond any doubt, and having no grounds to disbelieve Private Nkonyana’s account of how he got shot, there is no doubt that the accused is the one who shot Private Nkonyana in the manner explained. The accused simply tried, but vainly, to deflect the blame to Molise whom he was aware that he was dead and therefore unavailable to controvert his allegation.
- [55] The next question is whether the Crown has established beyond a reasonable doubt that at the time that the accused shot Private Nkonyana, he had the requisite intention to murder him. For an accused to be convicted of an attempt in terms of section 22(1) of the Penal Code Act, in this case, attempted murder, there must, at the very least, have been a formulated intention on the part of the accused to commit murder. The following excerpt quoted with approval by Kumleben J in S v Ntanzu²⁰ is apposite: “Since there can be no conviction for a criminal attempt without proof of a specific intent to effect some consequence which constitutes a crime, it follows as a necessary corollary and is indeed self-evident, that one cannot blunder into an attempt. However grossly negligent and, therefore, criminal, the defendant’s conduct may be, without proof of a specific intent to effect the particular criminal consequence for attempting which he is indicted, there can be no liability for a

criminal attempt.²¹”

- [56] The accused in his own words under cross-examination indicated that when he borrowed the firearm, he intended to kill anyone who would be against him. The line of cross-examination from the record goes as follows: - “Q: So why did you decide to borrow the firearm, yet you knew you didn't have the license? DW1: I realized that it was not safe for me not to own a gun especially coming to Lesotho. I happened to have an uncle who got to be part of these gangs and he was also killed. Q: So, what were you intending to do with that firearm? DW1: My Lady the reason is that I did not feel safe coming here without a gun because I have already shown that we were always at war with people from other gangs so I felt if I came here to Lesotho without a gun my life was not safe. Q: So, your intention was to kill anyone who would be against you? DW1: That is so my Lady because for anyone that would be against me, that means they would also be wanting to kill me.”
- [57] It can be deduced from the accused's responses that he had the intention to kill anyone who would provoke him. He indicated in his evidence in chief that the gangs to which he has taken allegiance shoot and kill members of rival gangs wherever they meet one another even for no apparent reason. He had the gun on coked mode all the time and this 20 S v Ntanzu 1981 (4) SA 477 (N) at 482 21 Quoted from Francis Bowes Sayre writing in the Harvard Law Review vol XLI (May 1928) at 84 goes on to show that he was ready to shoot and of course to kill at the slightest provocation. Did the accused have the direct intention to kill Private Nkonyana?
- [58] Since the accused defence was a total denial that he shot Private Nkonyana, it follows that the court has no evidence of his state of mind (*mens rea*) at the time that he shot him. Notwithstanding what the accused had been harbouring all along, that he would shoot anyone who would provoke him, there is no evidence to prove that he had the direct intention to kill Private Nkonyana. He shot Private Nkonyana as the latter tried to lurch at him. In the circumstances and considering that everything must have happened at heightened speed, it is unlikely that he could have formed a direct intention to kill Private Nkonyana.
- [59] The accused shot Private Seliane in the chest on the right side at close range as the latter lurched towards him. A chest is undoubtedly a delicate part of the body, and a gunshot thereat could cause death. The accused subjectively foresaw that Private Nkonyana could die from that gunshot. Since the accused was labouring under the impression that Private Nkonyana and his colleague Private Seliane were members of the rival Seakhi gang, he was shooting to kill. He therefore reconciled with the fact that Private Nkonyana could die from the gunshot in the chest, but he nevertheless proceeded and shot him regardless of whether death would ensue or not. Fate indeed favoured Private Nkonyana and he survived. As stated in *Paamo v R22* intention in the form of *dolus eventualis* is a twofold subjective test involving in the first place whether the accused subjectively foresaw the 22*Paamo v R* (C of A (CRI) 6 of 2013) [2014] LSCA 51 (24 October 2014) at para 23 possibility of the death of a person, and in the second place whether he reconciled himself with that possibility. There is

no doubt that the accused satisfied these two elements. He had the intention in the form of *dolus eventualis* to kill Private Nkonyana²³. He is thus found guilty of the attempted murder of Private Nkonyana as he has been charged. Makhabane's death

- [60] The undisputed evidence of Mahali shows that immediately before the second encounter that ended in the shooting, Makhabane was well and about. Mahali said Makhabane even rebuked the accused when he told Private Seliane that he would give him his mother, and he said he would not do that in front of them. Immediately after the shooting, Makhabane was found lying down dead inside his shack with a gunshot wound.
- [61] In terms of the post-mortem report (Admission E) Makhabane had sustained a gunshot wound on the right side of his back and he had a bullet exit wound on the left side of his chest. His heart and right lung were perforated, and he had a tear of a right blood vessel (haemothorax) which led to a massive collection of blood in the right thoracic cavity. These injuries suggest that he had been shot from the back and the bullet exited through the chest. A dead bullet was found stuck in Makhabane's clothes and it was later confirmed by the ballistic report of Detective Sub-Inspector Mollo (Admission F) that it had been fired from the accused's firearm (a 7.67mm pistol). ²³ S v Ntuli supra
- [62] There is no direct evidence whatsoever to shed light on how and when Makhabane got shot. The only reasonable inference that can be drawn, therefore, is that Makhabane got shot during the squabble between the accused and the two army personnel. The question however is at what point he got shot and who can be held liable for the fatal shot that ended his life.
- [63] It is worth commenting at this stage, on the sloppy and deplorable manner in which this whole case was investigated by the police. There is no sketch or notes whatsoever of the scene of the crime showing the location or position of relevant items of evidence and other information which could shed more light on the occurrences at the scene of the crime. No photos of the scene were available. Notwithstanding that this was a case involving of unlawful shooting, the investigating officers never tried to locate shells or dead bullets at the scene. The only dead bullet that was used as evidence was the one that was found stuck in Makhabane's clothes. No wonder it could not even be conjectured immediately after the incident that the other dead bullet could be stuck in the body of Private Nkonyana. That fact was only discovered by the doctor a month later when the bullet was threatening Private Nkonyana's health.
- [64] As a result of the poor manner in which the case was investigated, there is information whatsoever of the scene that could enlighten the court on how Makhabane could have sustained the fatal gunshot. There is no information on the position of the shack in which Makhabane was found vis a vis where the wrestling for a gun between the accused and Private Nkonyana took place. Though the investigating officers attended the scene of the crime, they never bothered to examine the scene. Lekhahla is the only witness who indicated that after they had found Makhabane dead in his shack, they examined the scene

and discovered a bullet hole at the back of his shack. While it is common cause that the squabble between the accused and the two military officers and the shooting happened behind Makhabane and Mahali's shacks, the following issues remain unclear:

- (a) Whether the bullet hole seen behind Makhabane's shack had been caused by the bullet from the accused's gun or it had always been there prior to the incidents of that day, this was never investigated; and
- (b) The position of the hole on the back of the shack vis a vis where Makhabane's body was found, and whether the position of the hole could suggest that the bullet that caused it must have been the same one that killed Makhabane.

[65] It is common cause that immediately after the accused had shot Private Seliane, Private Nkonyane tried to wrest the gun from the accused, and they started fighting over it. The accused contended that there was a time, during the struggle over the gun, when Private Nkonyana's finger was on the trigger. The accused's story is that the firearm went off several times during that time and he even got shot in the hand, though he realised that later when he got to the police station. PW6 (Daniel Khomari) and PW4 (Lieutenant Sergeant Lephutha) confirmed that the accused seemed to be bleeding in his hand when he arrived at the police station. While the accused could not produce medical evidence of his alleged injury, and no other person testified that he indeed had a gunshot wound, we are not able to reject his allegation in the absence of proof beyond reasonable doubt that he never sustained a gunshot wound. It is possible that the accused's hand was not necessarily bleeding, and that it could have been stained in blood when he was fighting over the gun with Private Nkonyana who at that time had already been shot and must have been bleeding. This however remains a speculative possibility. None of the police officers who were involved in the investigation of this case bothered to examine the accused's hand to check if he had indeed been injured. The accused put to the Crown witnesses that he had sustained a gunshot and he even went to see the doctor though his medical records got lost. The Crown failed to follow up on that story before it could close its case and thus failed to prove beyond any reasonable doubt that the accused never got shot during the wrestle for the gun.

[66] It was the duty of the Crown to rebut the accused's allegation that as he wrestled for the gun with Privat Nkonyane, there was a time when the latter's finger was on the trigger and the gun went off during that time. PW2 (Rethabile Makhabane), PW3 (Makhahliso Molupe), Private Nkonyane, and Lekhahla all said they heard three gunshot reports while Mahali said she heard five to six. From the post-mortem reports in respect of the two deceased persons, the medical report regarding Private Nkonyana and the alleged gunshot injury on the accused's hand, it is apparent that about five shots were fired, one that killed Makhabane, two that killed Private Seliane. one that injured Private Nkonyana and one that injured the accused. The accused's story is that the gun went off several times during the time that he and Private Nkonyana were wrestling for it. Given the discrepancy in the number of gunshot reports heard by the Crown witnesses and the real evidence of gunshot injuries sustained by the deceased persons, Private Nkonyana and the accused, the latter's version that the gun

went off as they wrestled over it is probable.

- [67] The accused denied ever shooting at Makhabane. He said he might have gotten shot when they were each trying to seize the gun from one another with Private Nkonyana. Even though Private Nkonyana vehemently denied under cross-examination that the gun went off when they were wrestling over it, the crown failed to refute the accused contention beyond a reasonable doubt. The accused's contention that Makhabane might have been shot when he and Private Nkonyana were wrestling over the gun and that there was a time when Private Nkonyana's finger was on the trigger has not been refuted by the crown beyond a reasonable doubt. It is trite that if there is contradictory evidence on a material element of the charge, in this case, causation, the accused must be given the benefit of the doubt. Furthermore, where the accused gives an explanation, he bears no onus to convince the court of its truthfulness. It is sufficient that he gives an explanation, however improbable it may be, the onus still rests with the Crown to satisfy the court not only that the explanation is improbable, but that it is false beyond any reasonable doubt²⁴.
- [68] The inevitable conclusion in the circumstances of this case is that the Crown has failed to prove beyond a reasonable doubt that the accused is the one who shot Makhabane. There being doubt that the accused committed the actus reus, there is no need to even consider the other elements of the offence. The accused is given that benefit and he is acquitted in count 1. 24 R v Difford 1937 AD 370 at 373 Unlawful Possession of a firearm
- [69] The charge in count 4 is that the accused is guilty of contravening Section 3(2)(a) of the Internal Security (Arms and Ammunition) Act No. 17 of 1966 as amended in 1999 for having been found in possession of a firearm without the requisite firearm certificate. The accused person pleaded guilty to the charge. The accused admitted under cross-examination that he did not have the firearm certificate for the firearm which he used on 13th May 2017 and he is thus found guilty as charged.

Conclusion

Count 1 – The accused is found not guilty, and he is acquitted. Count 2 – The accused is found guilty as charged. Count 3 – The accused is found guilty as charged. Count 4 – The accused is found guilty as charged. The Assessors agreed. The accused was said to be the first offender. Extenuating circumstances – Count 2

- [70] The court considered the defence counsel's submissions on the extenuating circumstances namely; that the accused genuinely believed that he was being attacked by members of the rival gang; he was still distraught having just buried his comrade who had been gunned by the rival gang member; he was intoxicated as had been drinking alcohol throughout the day; and he has been convicted of murder with dolus eventualis as opposed to direct intention. All these factors viewed collectively had a bearing on reducing the moral blameworthiness of the accused. The representative of the Crown also conceded that extenuating circumstances existed in this case.

- [71] The accused is therefore found guilty of murder with extenuating circumstances under count 2. Sentence
- [72] The relevant factors determinative of an appropriate sentence were set out by the Court of Appeal in *Mothobi v Director of Public Prosecutions*²⁵ as (a) the nature and circumstances of the crime; (b) the personal circumstances and characteristics of the accused; and (c) the interests of society considering its welfare concerns and the impact of the crime. These should be considered in light of the general objectives of punishment which are deterrence, prevention, rehabilitation, and retribution. In this regard, the court will be guided by the facts of the case, the mitigating and aggravating factors, and other factors that have a bearing on the case and the sentence. In all these considerations, the court should strive to strike a judicious counterbalance where one element is not overly emphasised to the exclusion of others. The court should make a sagacious decision to determine the appropriate weight to be placed on each of the relevant factors to reach a proper and fair sentence. This myriad of contradictory considerations makes sentencing one of the most daunting tasks of a judicial officer.
- [73] As a starting point, this court has considered that the accused's association with the Famo or blanket groups is the factor that motivated the 25 *Mothobi v Director of Public Prosecutions* (C of A no.4/2019) [2023] LSCA 24 (15 May 2022) commission of the offences that the accused has been convicted of. He borrowed a firearm notwithstanding that he did not have the licence to possess it because he anticipated the need to shoot any member of a rival gang should such need arise. He became suspicious of the two army men in their civvies because he already anticipated an attack by members of the rival gang at any time. In his own words, the accused said members of these blanket gangs indiscriminately shoot and kill members of rival posses wherever they meet and for no apparent reasons. That is a very sad situation that should not be encouraged to maintain in a civil society. The sentence of this court should serve as a deterrent to members of these groups, and it should send out a message that the courts and society do not tolerate their barbaric and unorthodox practices.
- [74] This court takes judicial notice of the fact that killings amongst these groups have become a serious national concern as they are characterised by incessant retaliatory homicides. In some extreme cases involving these gangs, families or even villagers have been vengefully massacred under the banner of the warring rival groups.
- [75] The sentence of this court should reflect the court's and the nation's displeasure at the barbaric acts of the blankets/Famo music cults. Should the actions of these cults, and more specifically the unnecessary and arbitrary homicides go unpunished, the groups and their barbaric actions can swell out of control in vengeance and retaliation to the extent that this nation might drift into a civil war.
- [76] Murder is a very serious offence that calls for the possible highest sentence. This is because life is a one-time sacred gift that should not just be taken. The rate at which human life is being unlawfully taken in this country is alarming. Day in and day out there are media

reports of brutal homicides in this country. No wonder our country is rated so high worldwide in homicide rates²⁶. This court believes that it is only when the courts impose deterrent sentences that people will be discouraged from unlawfully taking the lives of others, and the sanctity of life will again be venerated. The courts in this country have the responsibility to maintain law and order and to instill a sense in Basotho that their lives are protected lest they resort to self-help out of exasperation.

- [77] The killing of Private Seliane was very unfortunate and unnecessary. Private Seliane was merely 23 years old when his life and career were cut short. The lives of those who depended on him for livelihoods have been shattered. His family was robbed of his love and support and his employers of his service that must have been at the nascent stage judging from his young age. The sentence should therefore serve as some form of retribution to the deceased's family, his employers, and everyone who was affected by his passing.
- [78] The court has taken note of the fact that Private Nkonyana was indeed fortunate to have survived as the accused's intention was clearly to take his life. He targeted the chest which is the most delicate part of the body with 26 Lesotho Murder/Homicide Rate 1990-2023. www.macrotrends.net. Retrieved 2023-09-22 - World Bank. most of the vital parts. The trauma that he must be going through as a result of the gunshot is unimaginable.
- [79] The other disconcerting aspect of this case is the rate at which unlawful firearms are circulating in this country. The accused unlawfully imported an unlicensed firearm into Lesotho with a clear intention to use it should such a need arise. The unlicensed firearms are in most cases used in the perpetration of hideous crimes since they cannot be traced to their owners. The court should impose sentences that discourage unlawful possession of firearms. The fact that the accused pleaded guilty to this charge will be a consideration in determining the sentence.
- [80] The court has considered that the accused said he joined the blanket gang that he associates with while he was young, having been lured by money that the members were allegedly making in South Africa. He said though he lately realised the trouble that he got himself into, he was in too deep to retract. It can be deduced from this latter statement that there are consequences should he decide to quit the group. The fact that he lives his life in constant fear that he might be shot dead at any minute and for no apparent reason must be taking a psychological toll on him. A considerable custodial sentence will therefore assist the accused to reflect on his life and what he wants without any influence from the gang.
- [81] A custodial sentence will serve to rehabilitate and reform the accused person to renounce the violent practices and behaviour of the Blankets cults. At the end of such a sentence, he will go back into society as a responsible citizen who will dissuade others from the criminal practices of the cults. I say this bearing in mind that the Lesotho prisons are now referred to as correctional services and they do offer rehabilitative services that prepare the offenders to return to their communities as better people at the end of their terms of incarceration.

The offenders are even capacitated with skills to help them make a living for themselves and their families once they are released.

[82] The court has also considered that the accused is the first offender and that he has been awaiting his trial in custody for over five years, though it was out of his choosing as he indicated. The accused was 24 years old when he committed the offence. Though he was young, he was not immature. He is not yet married and he probably dreams of having a family of his own in the future upon his release from jail. The fact that the accused was found guilty of murder with extenuating circumstances has also been considered.

[83] In balancing all the foregoing factors, the court is convinced that the just and fair sentences befitting the circumstances of the accused, the offences, and the interests of society are as follows: -

- (a) Count 2 - Murder of Private Seliane in contravention of section 40(1) of the Penal Code Act - He is sentenced to twenty (20) years imprisonment.
- (b) Count 3 – Attempted murder of Private Nkonyana in contravention of section 22(1) of the Penal Code Act – He is sentenced to ten (10) years imprisonment.
- (c) Count 4 – Unlawful possession of a firearm in contravention of section 3(2)(a) of the Internal Security (Arms and Ammunition) Act – He is sentenced to one (1) year imprisonment. All the sentences in all these counts shall run consecutively. Order

[84] The exhibits being the firearm and the shells are forfeited to the state.

M. P. RALEBESE JUDGE For Crown For Defense : : Advocate Mofilikoane Advocate Maseli 42

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://lesotholii.org/judgments/all/2023/?alphabet=r>

CASE PAGE <https://chat.esheria.ai/case-law/lesotho/rex-v-motlatsi-rantaoana-cri-t-0061-2018-2023-lshc-259-3-may-2023>

Prepared on 30 October 2026 · Esheria