

IN THE HIGH COURT OF LESOTHO

In the matter of :

REX

v

JANKI MOHEHLE

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr.
Justice T.S. Cotran on 1st day of June
1982

The accused before me stands indicted on three counts:

1. murdering Malefetsane Lenea(deceased) on or about 11th July 1981 at or near Ha Mahanyane in the district of Leribe.
2. attempting to murder Lempe Motinyane and Motsamai Matekane on the same date and place.
3. having in his possession a firearm, to wit, a 6.35 pistol (Exhibit 1 which is a small automatic with an 8 round magazine) without holding a firearm certificate therefor contrary to s. 3(2)(a) of the Internal Security (~~Arms~~ & Ammunition) Act No.17 of 1966.

Accused pleaded guilty to count 3 and such a verdict was entered accordingly.

Accused pleaded not guilty to counts 1 and 2. It is common cause that he shot and killed the deceased. It is also common cause that he shot at and injured Lempe and shot at and missed Motsamai but he says he cannot remember this particular shooting. The accused advanced two defences :-

1. that when he shot and killed the deceased he was acting in self defence, alternatively
2. that he did not subjectively intend to murder the deceased or attempt to murder the other two persons mentioned in count 2.

/(For alternative

(For alternative verdicts see s.188(3) of the Criminal Procedure and Evidence Act 1931 read in conjunction with ss 24, 25, 26, 27 of the Internal Security (Arms & Ammunition) Act, supra).

His counsel (Adv. Ramodibedi) admitted the evidence of the following witnesses who made depositions at the preparatory examination in terms of s. 273 of the Act: Sgt Tsilo(PW1), Matieho Sootho(PW2), Seboloki Mapoho(PW3), Lebajoa Khusu(PW5), Mafa Lenea(PW6), Litha Lenea(PW7), Dr. Ewals(PW9), Sgt Sekonyela(PW10), Molemi Khanare(PW11).

In exercise of its discretion the Court called Matieho Sootho (PW3 at the preparatory examination) to give evidence at the trial since she seemed to be an eye witness to the commencement of an altercation that eventually led to the shooting. This will be presently detailed. I would also have liked to call Khanare (PW11 at the preparatory examination) but he was not available.

The accused says he arrived at the village of Liphofung Ha Mahanyane from his cattle post armed with a pistol(Exhibit 1) - which was unlicensed - to look for some of his horses that have strayed. He is married to a woman from that village and her parents live there. He was not known to a large number of the villagers because his own matrimonial home is some 100 kilometers away, but his father and mother in law were living in the outskirts of Liphofung. He did not inform the headman of the village about his visit and his purpose for doing so. He arrived accompanied by another man called Makhutla on the 10th July 1981 a day before the incident. He did not put up at his in-laws place for the night, at any rate this is what he says. He had a friend in the village called Molefe and he spent the night there. It seems that a man had brewed some beer on the occasion of a circumcision ceremony and accused says he had a drink there earlier on the morning of the 11th July and then he and his friend proceeded to the house of Raletsoho who was having a stockfair party and joined his father and mother in law and Matieho Sootho. There was a large crowd both inside the house and outside in the forecourt.

Motsamai Matekane (PW1) testifies that he met accused inside the house first when buying beer and accused asked him for his name and enquired whether he was a policeman or a

/detective

detective. The witness gave his name and answered the second question in the negative. Motsamai also asked accused about his name.

Motsamai says he went outside and the accused followed him and both joined the group that included the accused's father and mother in law (the latter's name is Maseven) and Matieho above referred to. Maseven had originally bought some beer and they were all drinking when Matieho offered her scale to Motsamai to drink from it. Motsamai drank some and returned the mug to Matieho. The accused remarked that he (Motsamai) was a "bad mannered old man". Accused says that Motsamai took the mug of beer from Matieho against her will but Motsamai and Matieho entirely contradict this. Matieho says she offered Motsamai some of the beer and when the accused's belligerency became apparent she told accused "This is your brother". Furthermore Motsamai apologised saying he did not realise the beer was his (i.e. accused's or bought by his mother in law). Accused however kept repeating that Motsamai was a bad mannered old man and Motsamai apologised yet again and moved away from the group trying to join another group. The accused followed and kept mumbling the same thing. Matieho confirms this. The accused charged Motsamai that he was "talking" about him (accused). The deceased was amongst this other group and Motsamai appealed to him to intervene. The deceased then asked accused "What is the matter?" to which the accused replied "Ask him", meaning Motsamai. The accused walked away and stood by the door of the house where the drinks were being sold. The deceased then walked to the house (according to Motsamai) to buy beer and on his approach accused said "You Raletsoho!" to which the deceased replied "I am not Raletsoho". He heard no other words. Raletsoho as I said is the name of the person who owned the house where the beer was being sold. According to Motsamai (who was as far away from them as the width of the Court (Court No.1) the accused kicked deceased on the genital area with his foot. Motsamai says he heard the deceased exclaim "Hay, this man is fighting, catch him" and went towards him. The accused retreated a few steps, produced a pistol, and shot deceased from almost point blank range (3 - 4 feet) killing him on the spot.

If I may digress for a moment here the witness Lempe (PW2) says his attention was drawn when he was at a distance of

20 - 25 feet (and closer to the deceased than Motsamai) when he heard deceased saying "Arrest this man he is fighting" and noticed deceased chasing the accused. The witness Lempe says he too gave chase and he was behind the deceased. The accused ran towards a gap between two adjacent houses, the house where the drinks were being served and another house, also belonging to Raletsoho, which was adjoining. At the corner of the next house accused fired a shot at deceased who succumbed at the stoep (of that second house) and whilst Lempe was bending over to help him, accused fired another shot which grazed Lempe's head. Lempe fell unconscious also on the stoep. Lempe heard no altercation between the accused and the deceased and he did not see the accused kick the deceased on the groin. The accused as we shall see admits kicking the deceased but says the deceased had insulted him.

To resume Motsamai's narrative, he says he rushed from behind the houses and threw a stone at accused who was about to make off. Accused fired at Motsamai, and when Motsamai threw another stone, accused shot at him again and when a third stone was thrown, accused shot a third time. By this time there was a hue and cry, and accused was making his escape uphill towards the river and was chased by a large crowd. Accused's friend Makhutla was with him. A man called Khanare, earlier referred to, was on the other side of the river and heard someone shouting "stop these people, stop these people" pointing to the accused and his friend. Khanare saw the accused brandishing his pistol at the persons who surrounded him but he managed to dispossess the accused of his pistol and handed it over to Motsamai. Khanare saw someone hit the accused with a rifle butt which felled him. Khanare says the mob that converged nearly lynched the accused and his companion Makhutla, who is now said (by accused) to be so mentally disturbed as to be incapable of giving coherent evidence. Khanare says he protected the accused from receiving further punishment and escorted him (accused was staggering and being helped to walk the distance) to the chief's place. Although I have not seen Khanare in the witness box his deposition reads true, and being a stranger to what took place originally, there is no reason to disbelieve him.

The accused's story is different. He says when he was

/drinking

drinking with Matieho and his in-laws, Motsamai took the beer from Matieho by force and that she did not give it to him of her own free will. I referred to this already but Matieho was a most impressive witness and I have no doubt she was a truthful witness too. It was the accused who was unnecessarily provoking Motsamai who did not retaliate. The accused says that Motsamai behaved as if the beer belonged to him. The accused obviously resented this but there was objectively speaking no justification whatsoever for this resentment. The accused then says that he went into the house and bought another mugfull and Motsamai followed him there and snatched the beer mug from his hand. The accused adds that when he protested Motsamai made light of it saying "What is beer, beer is nothing". This is only the accused's version and there was no support for this allegation from anyone else and indeed it was not put to Motsamai in cross-examination. The accused says he went out and saw deceased, Motsamai, and others, in a group and deceased said "I hear you speak of beer, you should stop quarrelling". Accused says he replied that he was not quarrelling. Accused says that by this remark the deceased implied that he (accused) should not make too much fuss if someone drank his beer. Accused says he walked away but saw one man from under whose blanket he could see part of a rifle. Accused says he went to stand near the door of the house where the drinks were being sold when deceased approached him and said "You, you look down on people". Accused says he denied this, to which deceased allegedly replied: "You are staying with Molefe, he is a thief, so you too must be a thief". The accused says this remark annoyed him and when he saw deceased fiddling around his pockets, he thought the deceased, who also carried a sjambok, was looking for a knife, so he kicked him on the stomach, and tried to get away. Deceased then shouted "Hay, come and arrest this man he is fighting". Accused says he saw many people going into their houses and come out with knives and sticks and surround him. He says that 6 or 7 years ago the people of that village lynched a suspected cattle thief, and fearing for his life, he made off as people were following him. Deceased was behind him and hit him with a sjambok from the rear. He found it useless to run so took his pistol and shot at random killing deceased and this gave him an opportunity to escape. He was nevertheless chased by people on horseback and dogs. He does not remember shooting

/at others.

at others. He shot at one of the dogs which was at his thigh but missed, and the third bullet went off accidentally when he fell. He says he had 3 or 4 bullets only in the magazine. In my view this is a cock and bull story invented by the accused ex-poste facto the events. None of the witnesses whose evidence was admitted by the defence or who gave evidence before me say anything remotely resembling what accused says happened. No one saw a sjambok with the deceased. Both Motsamai and Lempe were at a distance that would have enabled them to hear insults if they had been uttered. Furthermore the man Molefe was not a cattle thief (and was not so known) and the deceased was very unlikely to have said this when his last words to the accused were to the effect that he should "stop quarrelling". The deceased fell dead on the stoep of the house next door and so did Lempe. It is not possible within this span of time for the people to have gone to their homes to collect weapons though I do believe Motsamai that he started throwing stones at the accused. The peril to life which accused says enveloped him clearly occurred after one man was dead and another man was injured. The accused was the initial aggressor by words of mouth to Motsamai and physically when he kicked the deceased. Self defence cannot be made a cover for aggression. If a man provokes and deliberately leads another to retaliate he cannot cry self defence. Here there was no retaliation at all by either Motsamai who apologised twice or by the deceased who told him to go and stop quarrelling. The defence of self defence does not in the circumstances of this case arise at all for the accused was the bully from the start and found added strength to pursue this knowing he was armed.

Alternatively Mr. Ramodibedi submits that the accused was so provoked by the words of the deceased (that he was thief) that he lost his self control and was thus unable to form a specific intent to kill. Mr. Ramodibedi suggested that Motsamai's evidence was not reliable since he himself was shot at and tried to put the accused's actions in the worst possible light and may have deliberately suppressed the fact that the deceased insulted the accused. An example of this Mr. Ramodibedi says is Motsamai's denial that he (accused) was beaten up by the crowd, although Khanare (whose evidence at the preparatory examination was admitted) says he, and his friend Makhutla, were. Mr. Ramodibedi adds that Khanare supports

/accused's

accused's testimony that one of those who rushed at him in the first instance to arrest him was armed with a gun which was protruding from his blanket. However at the earlier stage of the fracas no one saw a gun with anybody and the rifle butt incident happened at the river after the accused's apprehension. Motsamai does not admit that accused was badly beaten though he admits that Makhutla was. Motsamai was probably making light of this. I am prepared to accept that the accused was beaten up by the crowd but that in my view does not effect or throw light as to what happened earlier. I think the accused is lying when he says the deceased provoked him but assuming that the deceased did say the words complained of it does not seem to me that these words were sufficient, considering the fact that the accused was the aggressor, to reduce the killing to culpable homicide, since the means to repel the alleged verbal attack, consisting as they have been, of kicking the deceased and then shooting him, are out of all proportion to the alleged insult.

Shooting at a man from point blank range and killing him and shooting at two others, one of whom was hit but survived, for no legitimate reason, is murder. On the facts as I believe them to have happened I am not prepared to accept the proposition that the accused, subjectively, did not form the specific intent to kill. This case has no resemblance to S. v. Dlodlo 1966(2) SA 401.

In my view the accused is guilty of murder and attempted murder as charged beyond any reasonable doubt and I so find.

My assessors agree.



CHIEF JUSTICE
1st June, 1982

For Crown : Mr. Khaue

For Defence: Adv. Ramodibedi

EXTENUATING CIRCUMSTANCES

2nd June, 1982

There are two factors favourable to accused that justifies the Court in not passing a sentence of death, viz,

1. lack of premeditation,
2. consumption of drink

Otherwise it is a bad case of murder deserving a long period of imprisonment.

SENTENCE

12 years imprisonment on count I
5 years imprisonment on count II
1 year imprisonment on count III

sentences to run concurrently.


CHIEF JUSTICE

ORDER: Pistol to be forfeited to the State.


CHIEF JUSTICE