

IN THE HIGH COURT OF LESOTHO

In the Matter of:

R E X

v

MOHOLI KABI

J U D G M E N T

Delivered by Hon. Mr. Justice F.X. Rooney
on the 11th day of June, 1982.

Mr. Khaue for the Crown,
Mr. Sello for the Accused

The accused is charged with the murder of one Moeketsi Nokana.

It is not disputed that on the 16th December, 1980 at or near Ha Mafa in the Maseru district, the accused shot and killed the deceased. At the time of the killing the deceased was assisting a court messenger who had seized in execution some small stock and a horse, the property of the accused. The messenger and the deceased were driving the animals away to the local court. The deceased was hit in the right flank between the lower ribs and pelvis and over the right forearm by shot. Over one hundred pieces of shot hit him, some of which penetrated and punctured his bowels. He died shortly afterwards from internal injuries and bleeding.

The accused's defence is that he fired his shot gun in defence of his life and property in circumstances which amounted to justifiable homicide. It is for the Crown to prove positively that this was not the case and that the accused fired intending to kill the deceased without lawful excuse.

The first witness for the prosecution was Mohau Matete, who although not gazetted as such, claims to be a village headman with authority over the accused. He said that on the 14th December, 1980, Stemere Moahloli (PW.2) a court messenger showed him a writ of execution issued on the 21st November, 1980 by a local court (Exh. 8). This document recited that there was an outstanding judgment against the accused for twelve head of cattle at a valuation of not less than M80 per head and costs. On reading the document, Matete assigned the deceased to go with the court messenger to assist him in the execution of the writ. He told him to ask the accused to point out his stock so that execution could be levied upon it.

This witness said that he met the accused subsequently and told him to expect the court messenger. He said that the accused made no reply. When he next saw the deceased, he was dead.

In cross-examination, Mr. Sello established that this witness had a faulty memory as to the time of the occurrence. Originally he said it happened in January 1981, while it is not disputed that the death of the deceased occurred before Christmas, 1980. While one does not expect witnesses to be precise in the matter of dates Christmas is a focal point in the year. Matete agreed that he was aware that the court messenger was looking for him a few days before, but, he did not know what his business was. He was not very clear as to the reason why the deceased was the person selected to accompany the court messenger. The witness was also somehow confused on whether he went in search of the court messenger or it was the latter who sought him out.

Matete insisted that he told the accused of the impending execution. He said that he should make his arrangements accordingly. The witness agreed that the accused was employed by His Majesty to look after stock at the cattle posts in the area. However, he maintained that the accused was no longer working for the King at the time of the incident. He claimed that he did not know what

the duties of the accused were while in the King's service. In particular he knew nothing about the impounding of stock trespassing upon the grazing area reserved for His Majesty. Matete agreed that the accused would have the right to impound stock. He knew nothing about any difficulties which the accused may have experienced with people arising out of his employment. However, he knew that the accused has lost many of his own animals through stock theft.

Stemere Moahloli (PW.2) is a court messenger attached to Mants'onyane Local Court. When he received the writ of execution, he called upon Chief Mafa (not a witness) on the 15th December and received from him a letter for Matete (PW.1). When Stemere called to see Matete he was absent, but, he subsequently met him at Mateu village. He showed him the letter and the writ. He was then joined by the deceased.

The two men went to the accused's cattle post which is some distance from the latter's village. The deceased was to point out the accused's stock. The accused was not present. Stemere took possession of 26 goats and 14 sheep pointed out to him by the deceased. He proceeded to drive the stock to Chief Mafa's place. On the way they passed through the village at which the accused lives. The witness said that the accused was not present at his home. According to Stemere they met the accused at the village. The deceased told the accused that Stemere was a court messenger. Stemere read the contents of the writ of execution to the accused. He said that in response the accused said "There is my horse" pointing to the animal tethered outside his house. The deceased seized the horse and handed it over to the court messenger. Stemere proceeded on his way, leading the horse, while the deceased drove the remaining stock in the direction of the Chief's place. The distance to be travelled was approximately 5 kilometers.

Also present at the time the horse was taken was one Mathai Kabi (PW.3) who spoke to the accused and asked him if he had not money to pay instead of allowing his

4/ stock to be

stock to be taken away. The accused replied that he would not pay.

As to what took place shortly afterwards I made the following note of the evidence :

As I led the horse down a slope, it jerked upwards. I turned back and saw the muzzle of a gun which touched me at the back of my head. It was carried by the accused. I went and hid behind the horse and shouted at the deceased and told him to run away as the accused had a gun. I heard a shot. The deceased was standing with his left hand under his blanket. The accused came into my sight from behind the horse. He aimed at me but nothing happened. The gun did not fire. Something fell to the ground. It was a cartridge. The accused reloaded. The deceased was still standing and the accused fired at him. The deceased staggered towards me and fell on his left side. I asked accused if he realised that he had killed the deceased. The accused said he will kill us all. He ejected the spent cartridge and as I saw he was reloading, I ran away."

Stemere later saw the body of the deceased. On the following day, he said that he handed the cartridge which he found near the place of the shooting to Chief Mafa. He claimed that there were two cartridges, one spent and another unused. He pointed out the spent cartridge to the Court.

Cross-examined by Mr. Sello, the court messenger agreed that he and the deceased went straight to the cattle post of the accused. They did not first call at his home. He explained that there was nothing in the writ which required him to see the accused. He said that it was his duty to call upon the chief who would then contact the accused.

The witness admitted that he had been a court messenger for about six months. The court which issued the writ was approximately four kilometers from the accused's village. He said that he knew nothing about the accused filing an appeal to the Judicial Commissioner against the decision of the Matsieng Central

5/ Court. He denied

Court. He denied telling the accused that it was useless for him to appeal. He denied ever demanding sheep from the accused and threatening to fix him up on a previous occasion. He claimed that the accused was well aware that he was a court messenger.

The witness agreed that on his appointment, he was instructed as to his duties as court messenger. He claimed that he had acted in accordance with the procedures laid down. He did not call upon the accused, because the deceased said that the accused was not at home. He did not call personally at the accused's house to ascertain the position because, as he said "I am not required to do so by law". It was the deceased and not this witness who was looking for the accused. If the accused was absent, he was under no obligation to go in search of him. He said that he knew that 30 days had elapsed since the judgment and there had been no appeal lodged by the accused.

The witness maintained that he read out the contents of the writ to the accused but he did not give him a copy of the document. He made no inventory of the stock seized as he was not instructed to do so.

Forty head of stock were taken from the accused's cattle post and brought to the accused's village. The messenger felt that the stock seized would be insufficient to satisfy the writ. The deceased fetched the horse after the accused said that they should take it away. Stemere had never known a judgment debtor to add additional stock to that seized by him. He said that the accused was co-operating with them in ensuring that the writ was satisfied.

Stemere agreed that when an appeal is filed, execution cannot be lawfully levied. If he had known of any appeal, he would not have proceeded with the execution of the writ. He knew nothing about any pending appeal. He was unable to deny that an appeal had in fact been filed. Stemere agreed that it would have been foolish of the accused to have offered his horse, if an appeal had been filed. He insisted that he had acted lawfully throughout in the seizure of the animals.

When they reached the accused's village with the seized stock, they found the accused watching an ox being skinned. Stemere did not speak to him. It was Mathai who called him. There were other people present who were named. Of the forty head of small stock seized, Mathai made a claim to two animals, a goat and its kid, which he said he had already paid for. These animals were then removed leaving the balance of the stock in the messenger's custody at 38. Stemere denied that he would not listen to anything that the accused said to him or that he told him to "voetsak". He denied that there was any possibility that the accused might have got the impression that he and the deceased were carrying away his stock without lawful excuse. He claimed that as the accused had lost his case in court, he had made a decision to resist the execution of the writ.

Stemere was cross-examined at considerable length concerning his description of the shooting. He does not know why the accused did not decide to shoot him. He considered that he was fortunate to have survived. He heard the deceased shouting at the accused and asking why an old man like him should behave in that fashion. It is apparent that when the shooting took place, the deceased was standing on higher ground than the accused or this witness. Stemere claimed that after the shooting the accused threw stones at him. After the deceased had fallen, this witness did not go to his assistance. He had warned the deceased to leave the animals immediately before the shooting. He denied that he and the deceased threw stones at the accused or that they placed his life in danger.

After the accused was arrested, Stemere obtained a new writ and seized 21 small stock and a horse belonging to the accused. He said that this stock was handed over to the plaintiff. He denied that he received any benefit from this stock or that any portion of it was subsequently given to him by the judgment creditor.

The writ held by Stemere authorised the seizure of 12 head of cattle to the value of at least M80 each beast which means that the writ could be satisfied by a payment of M960 and about M10 costs. Stemere valued the small stock seized at M40 each. Thus he took M1600 worth of small stock and a horse in addition. He did not attempt to explain this considerable over attachment .

In answer to a question put by me, Stemere agreed that he made no inquiries about the whereabouts of the accused before he proceeded to the cattle post. He agreed that in general, it is better to interview a judgment debtor before attaching his property.

Mathai Kabi (PW.3) said that the accused was his paternal uncle. He said that he met the deceased and the court messenger when they came to the village driving 40 small stock. He spoke to the two men in his capacity as bugle of the village. He confirmed to them that the stock belonged to the accused. Stemere read out the writ (as this witness is not literate) and they then called the accused who was a little distance away.

Mathai said that the accused acknowledged that the stock seized was his. The accused said

"This is the first time you and I have
seen my stock taken by a court messenger".

The accused said that he did not know about the execution as the ~~cattle~~^{deceased} had been taken from his cattle post. Mathai told him to listen to what the court messenger had to say. Stemere then read out the terms of the writ. The accused pointed^{at} a chestnut gelding and said that the court messenger should take that as well. The deceased took the horse. Mathai spoke to the accused again. He said that he should pay M5 to prevent the animals being taken to the court immediately and further suggested that the accused should go and draw money from his bank and pay the amount of the writ. He pointed out that if the stock were taken to the court he would never get them back.

8/ The accused replied

The accused replied that they should let the animals go. At this point Mathai said that two of the goats belong to him. The accused said that they should go to the court as well. Mathai spoke to Stemere who agreed to release the goat and the kid. The remaining 38 animals were driven off and this witness followed the party a little distance. The accused also followed his stock. The accused explained that he had no cash. He carried a stick and wore a blanket. Mathai did not see a gun.

Sometime later, Mathai met the accused again riding his horse. He had a gun. The accused said to him "Go and see that I have done something unusual, I have killed a person I am now going to the Marakabei police station to report myself". The accused rode off and this witness went to the place where he found the deceased lying dead.

In cross-examination, Mathai's right to claim the office of bugle was challenged. He has an elder brother called Letuka, but, he said that as he does not live in the village he became bugle in the absence of his brother. His brother's senior wife, who lives in the village, had agreed to this. Mathai denied that Letuka was the village headman and that his wife was acting for him.

Mathai said that he did not remember ever being charged with stealing His Majesty's sheep. He denied that he had ever been charged with stock theft. He denied that the accused had given evidence against him at a trial. He was never contacted by the police in regard to the theft of the accused's stock. He denied that the accused recovered 4 sheep from him.

Mathai insisted that the accused offered his horse to the court messenger. He was unable to explain why the accused did this. He had sympathy with the accused. Although he knew nothing about court procedure, he suggested that a sum of M5 would be sufficient to prevent the animals being driven away to the court. He

agrees that he knew that an appeal prevents the levying of execution. He knew nothing about an appeal in this case, but, he agreed that if the accused had noted an appeal, he would expect him to have protested about the execution.

Sekalebeng Ralitabo (PW.4) said that he witnessed the shooting of the deceased from a distance. First, he saw the deceased and the court messenger driving sheep and goats and leading a horse. He did not know whose stock they had taken. He noticed someone coming up behind them whom he recognised as the accused.

When the accused caught up with Stemere the latter ran away. He had been leading a horse. The deceased was driving the small stock. He saw what was happening from a distance of 800 metres. He heard Stemere shout as he fled "Leave them alone". He saw the accused turn towards the deceased and then he heard a gun report. The accused turned towards Stemere who was running down the ridge followed by the accused. He saw the court messenger turn back and the accused started throwing stones at him. He saw the deceased walk with a staggering gait until he fell near the road. The accused drove the stock away in the direction of his house. This witness ran to the scene and when he reached the spot where the deceased lay, he saw that he was already dead.

Cross-examined by Mr. Sello, this witness said that when he first saw Stemere and the deceased, he was tethering a horse outside his house. He had just dismounted. He was about to go indoors. When he saw the men, he stopped. He started to watch them. He was interested in what was going on. Although he heard the gun shot he did not see a gun. He denied that his attention was first attracted by the gun shot. He did not see anyone throwing stones at the accused.

Ralitabo knew something about the execution levied upon the stock of the accused and it was this which made him interested in what was happening.

Before the accused gave evidence, it was formally admitted by his counsel that the shot gun produced in court was the property of the accused, that it was the gun used in shooting the deceased and that the ^{deceased} ~~accused~~ died as a result.

The accused gave evidence in his own defence. He is a man of 54. He said, he works for His Majesty at his cattle post at Linane and he is responsible for the King's livestock generally and the supervision of his herdboys.

The accused is also a stock owner. At one time he owned as many as 388 small stock. They have been diminished over the years by stock thieves. He said that one of the persons responsible was Mathai (PW.3). He denies any relationship and says that once upon a time Mathai was employed by his brother and has since assumed the family name.

In the course of his work in the King's service, the accused has had on occasion to impound stock found encroaching on the King's land. These activities did not endear him to his fellow villagers. One of those who was particularly displeased with him on this account was Matete (PW.1).

The accused became involved in civil litigation with his father-in-law over bohali. Having lost his case in the Mants'onyane Local Court, he appealed to the Matsieng Central Court. On the 19th March, 1980, the central court dismissed his appeal. On the 24th March, 1980, he noted a further appeal to the court of the Judicial Commissioner. As he understood things, pending the hearing of this appeal, no execution could be levied upon him at the behest of the successful plaintiff.

On the 16th December, 1980, Stemere and the deceased arrived at his village driving 40 small stock which belonged to him. He had been at home all that day with his family. When the stock arrived at the

11/village, Mathai

village, Mathai (PW.3) spoke to the men who were driving them. Without leaving his own yard, the accused shouted that the stock were his and he wanted to know what they were doing with them. Stemere replied that he would tell him nothing. Although the accused knew Stemere, he said that he was unaware that he was a court messenger.

The accused saw Mathai take a goat and a kid and drive them to his own home. The accused, in some perplexity, asked some of his neighbours what he should do about his stock. The deceased came and took away the accused's horse and handed it over to Stemere. The accused denied that he ever offered his horse to the men. When the deceased and Stemere drove away with all the stock including the horse, he followed them. Before leaving he picked up his gun. He was accustomed to going about with his gun. He said that he did not, at that time, intend to make use of it. The accused denied that he was aware that his stock was being taken under a writ of execution.

The accused said he followed the two men. At one stage the deceased threw a stone at him. The accused said that he carried his gun openly and it could be seen by anyone. He was hit by the stone thrown by the deceased and this caused him to fall down. He lost hold of his gun and he saw that the deceased was running towards him, intending to pick it up. He threw a stone at the deceased which hit him. The deceased set off for higher ground. The accused picked up his shot gun and loaded it. He thought that he was acting in self-defence and that his life was at stake. Furthermore, his stock was being taken from him. He fired his gun in no particular direction and thereafter he saw the deceased pass behind him running. Stemere was also throwing stones at him. The accused maintained that in firing his gun, he merely intended to frighten the two men and not to hit either of them. He had been hurt by the stone which had hit him in the lower stomach and rendered him unable to walk. When he fired his gun he felt incapacitated. The deceased fell below the

road and Stemere ran away. The accused rounded up his stock including the horse and set off for Marakabei police post. As he passed through the village, he saw Mathai standing there but he did not speak to him.

Cross-examined as to why he took his gun with him, the accused explained that it was his normal practice and that he carried a gun in the same way as other men carry their sticks. He agreed that the gun was a dangerous weapon. He followed the two men because his stock was being taken away without his consent. He agreed that he was angry to see his property taken away. He denied that the writ of execution was read out to him. He agreed that he could have retrieved the stock while they were still at the village.

In answer to other questions put to him, the accused agreed that he shot the deceased. He endeavoured to explain that he fired in the air, but, the deceased, who was on higher ground, had been hit. He did not see the deceased after he fell down. He did not tell anyone that he had appealed against the judgment, as he had not been informed that the stock was seized by way of execution. He said that he was unaware that Stemere was around the village.

The accused had three cartridges in his possession. They were in his pocket. When he fell, he lost one of them. He said that he handed over the remaining one to the police at the time that he reported himself.

The Crown does not dispute that the accused filed an appeal against the judgment of the Matsieng Central Court. The Crown does accept that this had the effect of a stay of execution. There is no explanation for the issue of the writ of execution in November, 1980. It is however unnecessary to go into this matter in detail because this Court is concerned primarily with what the accused believed. Having filed an appeal, the accused was entitled to assume that execution would not be levied against him pending the hearing of his appeal.

The accused's statement that he was unaware that Stemere was a Court Messenger and that he had come to levy execution on his property is difficult to accept. Although the accused is deaf, it is most unlikely that he was completely isolated from his fellow villagers and was unaware that something was afoot. However, he was entitled to assume that Stemere was acting in an irregular fashion and that there was some kind of conspiracy to do him an injury. Stemere did not seek out the accused before he went to the cattle post. His ~~excuses~~^{actual} for not doing so are not satisfactory. Stemere's proceedings were high handed and included the seizure of far more stock than was necessary to satisfy the judgment.

I find it inconceivable that the accused, who was aware that he had noted an appeal, would have offered his horse as an addition to the stock already seized. Stemere and Mathai, for their own good reasons, have given this explanation to justify what amounted to misconduct on the part of the court messenger. It indicates that Stemere, the deceased and Mathai were hostile to the accused. They did not give him a copy of the writ. I am unable to accept that the document was read to him at any stage.

I take the view that when the accused went in pursuit of his stock carrying his gun, he was angry, ~~as~~ he has been provoked in his own village by the actions of Stemere and the deceased. It is probably true that they added insult to injury by refusing to hear him or explain their actions. They may even have thrown stones at him, which could only provoke him further.

On the evidence before me, I find that the accused was armed with a gun while the deceased and Stemere were unarmed. Even if the accused was hit by the stones thrown at him, it would not be reasonable to hold that his life was in danger.

It was said in the case of Ex parte Minister van Justisie : in re S. v. Van Wyk 1967 (1) S.A. 488 that a killing or wounding in defence of property may be justified. However, it must be said that the deliberate

killing in defence of property would be justifiable only in very exceptional circumstances. In the present instance, the accused was in the stronger position. Armed with the shot gun, he could have demanded that his stock be released to him, by threatening or warning the deceased and Stemere. He could have emphasized his position by firing a shot in the air. To deliberately fire at or in the direction of either of the two men was not a justifiable action. When the deceased was shot by all accounts he was standing still and no element of misadventure was present. In my opinion, the accused exceeded the demands of the situation and in killing the deceased, he acted unlawfully.

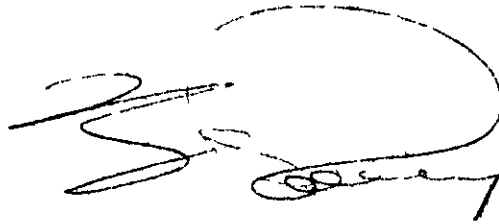
The Criminal Law (Homicide Amendment) Proclamation 1959 defines the extent and limitations of the concept of provocation in cases of unlawful killing. Section 4 (d) reads "A lawful act is not provocation to any person for an assault". This provision appears to be designed to exclude the defence of provocation where the conduct of the victim is expressly authorised by law e.g. a policeman using reasonable force to effect a lawful arrest. In England an unwarrantable imprisonment of a mans person has been held sufficient to make a killing, even with a sword, manslaughter only. R. v. Withers 1. East P.C. 233 and R. v. Curvan 1. Mood 132 referred to in Archbold 36th Edition paragraph 2502.

In this case the deceased was assisting a court messenger in the execution of a writ issued on the authority of a court of competent jurisdiction. It is common cause that the issue of the writ was an irregularity. If the accused had resorted to the Court he might have succeeded in having his stock released from attachment.

However, there is a subjective element to be considered. As I have mentioned there were irregularities in the manner in which the messenger proceeded and the accused had reason to believe that the seizure of his

property was an unlawful act. There were other factors present which increased the accused's perception of the wrongful nature of the proceedings. For these reasons, I do not consider that Section 4(d) of the Proclamation has any application in the present case.

The provocation offered to the accused in this case is sufficient to reduce his crime from murder to culpable homicide. The verdict of this Court is that the accused is not guilty of murder but guilty of culpable homicide.

A handwritten signature in dark ink, appearing to be 'F.X. Rooney', written in a cursive style with a large loop at the end.

F.X. ROONEY

11th June, 1982.

Attorney for the Crown : Law Office
Attorney for the Defendant: Mohaleroe, Sello and Co.