

IN THE HIGH COURT OF LESOTHO

In the matter of :

REX

v

TSOTANG MATHAKHOE

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 20th day of December 1983

The accused before me Tsotang Mathakhoe is indicted on a charge of murdering Samson Mafata on or about the 23rd June 1982 at or near Mohalalitoe in the district of Maseru.

The accused pleaded guilty to unlawfully killing the deceased but said that he did not do it intentionally.

Mr. Matsau who appeared for the defence said that his instruction from the accused was to plead guilty to culpable homicide but not guilty to murder. Mrs. Bosiu for the Crown did not accept the plea of guilty to culpable homicide and the trial proceeded. Mr. Matsau admitted the evidence of the following witnesses who appeared at the preparatory examination, namely: James Mapetla (PW2) Thabo Shale (PW5) Nukozolo Mafata (PW6) Lance Sgt Ramalebo (PW7) Det. Trooper Ntsika (PW8) and Dr. Kasenge (PW9) which included the identification of the deceased. The shotgun Exhibit 1 was admitted as the weapon used by the accused.

If there is an appeal to the Court of Appeal the

/Registrar

Registrar should make the evidence of the above witnesses at the preparatory examination available in the appeal record. The witness James Mapetla was called by the Court to amplify certain points in his evidence at the preparatory examination.

The facts, which were mostly common cause, were as follows :

Samson Mafata (hereinafter referred to as the deceased) was the manager of a chain of stores in Lesotho known as Town Talk Furniture and his home was in Bloemfontein. He was in charge of the Lesotho operations of the company and would come to Maseru on odd occasions to supervise the local Management. He did not own a home in Maseru and would normally return the same day to Bloemfontein, but where the exigencies of the service demanded he would sleep a night or two with friends in Maseru. We know for certain that the deceased arrived in Maseru on the 22nd day of June 1982 and fell ill and was accommodated at the home of Mr. and Mrs. Dlangamandla at a place called Mohalalitoe. His second in command in the business in Maseru was Monty Khali (Pw1). The deceased owned a vehicle and during the day in which he was ill in bed (the 22nd of June) he allowed Monty to use it for business and private purposes.

Monty Khali testifies that having finished his official and private work at 8.00 p.m. he passed by a bar known as Ha Molefi in the stadium area to have a drink. His intention was to take the vehicle to deliver it to the deceased at Mohalalitoe. At Ha Molefi and purely by chance he met the accused and James Mapetla. The accused was not a special friend but he owned a vehicle and Monty asked the accused to accompany him to Mohalalitoe so that he would be able to catch a lift back home in the accused's vehicle. The three proceeded to Mohalalitoe, the accused driving his vehicle with Mapetla next to him, and Monty driving the deceased's vehicle to deliver it and its keys to the deceased. It is now certain that the accused and Mapetla had never met the deceased before and on

/their

their arrival at Mohalalitoe Monty introduced the accused and Mapetla. The deceased was in bed and having a drink, with a friend Thapelo Motlohi (PW3) also known as Billy and the lady of the house Mrs. Dlangamandla. When Monty, the accused, and Mapetla arrived another lady, Mamoholi Phakela (PW2), was invited from another house to join the party.

The deceased had a bottle of gin next to him but beer was stocked in the fridge. He offered the accused, Monty, and Mapetla a can each. Mapetla, however, refused to have any drink because he is a football player in a first division team and was abstaining that evening. Monty accepted the can of beer. It would seem that the accused also accepted the can of beer but did not open and drink it then and there, saying he had been drinking before and did not feel fit to have more drinks before food was procured. There was apparently no food in the house and it was decided that Monty, James Mapetla, and the accused would go to a cafe and get some. It was also realised that beer and liquor were getting short. Accordingly the three proceeded in the deceased's vehicle first to a cafe where sausages and chips were bought and then back to Ha Molefi in the stadium area to buy more drinks. The accused says that the food that was bought was shared between him and Mapetla and it was not much. All witnesses are agreed that at Ha Molefi Monty bought half a bottle of whisky and 12 cans of beer. They went back to the house where the deceased was staying. The time was approximately 9.00 p.m. or 9.30 p.m. and all partook of drinks except Mapetla. The accused says, and there is no reason to disbelieve him, that the deceased, who liked gin, wanted some more (when the bottle next to him was finished) and he and Monty and James Mapetla walked to the Lakeside Hotel, which was nearby, and bought a quarter of a bottle of gin and another 6 cans of beer. Monty and Mapetla do not remember this trip to Lakeside but both agree it could well have happened. The party was a quiet party with normal conversation and it is agreed, even by the accused himself, that there was nothing in the

/party

party that was rowdy or noisy. During the trips to the cafe to get food and to Ha Molefi to fetch drinks Monty used as I said the car of the deceased which he parked inside the compound. The car of the accused was parked outside on the road and was still there when they went to the cafe and to Lakeside. At about 1.00 a.m. the party broke up. James Mapetla and the accused, followed by Monty, proceeded outside when it was discovered that the accused's car was missing. It should be recollected that Monty and James Mapetla were to have a lift in the accused's car because the deceased's car was to be left at the compound where he was staying. The keys of his car were handed to him by Monty earlier. When the loss of the accused's car was discovered the deceased offered the keys of his car to the accused, Monty, and James Mapetla to enable them to go to Maseru Charge Office to report its loss. Monty took the keys. James Mapetla sat at the back and the accused sat next to Monty in the deceased's car in order to go and report. What happened afterwards seems a little strange because the accused had a sudden change of mind. He told Monty and Mapetla that he did not want to go to the Charge Office to report but wanted to be dropped at the home of his sister. It was getting late. Monty and James Mapetla were not keen on this detour and they tried to persuade the accused that it was better to go to the Charge Office first. At this moment in time the accused appeared to have become agitated and confused. He disembarked from the car very quickly, jumped over the fence of a certain house nearby, and proceeded along the Leabua Jonathan highway. In the meantime Monty and James Mapetla who were surprised at the accused's actions tried to intercept him to convince him to go to the Charge Office to report. They caught up with him near the Cash and Carry stores. Both testify to the accused's unusual behaviour, confusion and agitation. He refused their offer of help and said "I shall be all right". Monty and James Mapetla did not know the registration number of the accused's car and there was no point in going themselves alone to the Charge Office, so Monty first dropped James Mapetla at his home and

/then

then visited a friend and towards dawn he decided to go back to the house where the deceased was staying in order to return his vehicle because the deceased wanted to go that same morning back home to Bloemfontein.

The accused says he proceeded on foot to his sister's home. His sister owns a car and he wanted to borrow her car for the purpose, according to him, of searching for his missing car. The accused's sister did not give evidence but he says, and there is no reason to disbelieve his story, that his sister refused to lend him her car on the grounds that he appeared drunk. The accused adds, and there is again no reason to disbelieve him, that he proceeded thereafter to his younger brother's home which was nearby to borrow a car from a friend of his brother, but did not find him at home. The door of the house was open. He saw and picked up a shot gun. There is no evidence that he knew of its existence because the gun was not his brother's but belonged to a public prosecutor who left it with the accused brother in Maseru when the former proceeded on leave to Quthing. The accused testifies that he was by this time firmly under the impression that the deceased and or members of the party that he was with were the person or persons who had something to do with the theft of his vehicle. The accused then walked back to the house where the deceased was staying. The door was open and the deceased was still awake in his bed. Mamohale Phakela (PW2) and Thapelo Motlohi (Billy) (PW3) were also still there, but Mrs. Dlangamandla had retired to her own room. No one noticed the shot gun at first but the accused pulled it from under his blanket and addressed the three of them saying . "I want my car". Everyone was perplexed. Mrs. Phakela hid herself in a cupboard. The deceased exclaimed "but how do we know where your car is. I have myself lent you the keys of my car to go and report to the Charge Office ". According to Billy the accused aimed the shot gun at the deceased who was in bed and shot once killing him instantly.

/The accused's

The accused's story does not vary from what the Crown witnesses say except as to the extent of his sobriety. He testifies that he had been drinking at Ha Molefi continuously from 6 p.m. until the arrival of Monty at 8 p.m. He accepted Monty's invitation to accompany him to Mohalalitoe in order to give him a lift back after delivering the deceased's car and that when they got there he agreed to join the party. When he was offered a can of beer he accepted it, but did not drink it, and complained that he was not prepared to drink further on an empty stomach. This of course has been confirmed by independent evidence, but he says the food he ate was not substantial as he had to share it with Mapetla.

The accused's explanation of the events was that he had been drinking excessively and was tipsy but knew what he was doing. When Monty and Mapetla refused to take him to his sister's house to borrow her car he thought he can do without their help. It was only then or soon thereafter that the idea struck him, and he admits that it was irrational, that either the deceased, or someone else in that party, somehow engineered the theft of his car. He admits before the court, and the evidence is also abundant, that there was nothing in the demeanour of those at the party, or around the house, or the nature of the conversation that took place, which would have put anyone present as remotely responsible for the theft. He says that when he took the shot gun he did not know it was loaded and he did not intend to use it to kill anybody but to frighten those who were at the party to disclose to him where his car was. He says that he fired at the direction of the deceased because his finger must have been on the trigger and it just went off. When he realised that the deceased was hit he dropped the gun and walked all the way to his village at Ha Mofoka some 20 km away where he reported to his chief what happened and then came to the

/Maseru

Maseru Charge Office to surrender himself.

The contention of Crown Counsel is that the accused was not intoxicated to such an extent to bring him within the ambit of s.2(2) of the Proclamation 60 of 1938 (Vol. I Laws of Lesotho p.997). Mr. Matsau for the defence says the accused relies, not on s.2(2), but on s.2(4) and asks the Court to find that, on the facts, the accused, who had an unblemished record (he put his character in issue) ought to be believed that he had no subjective intent to kill but to frighten and that his state of mind was induced by the drinks he had consumed.

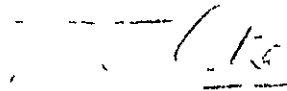
The amount of drinks at the party at the house where the deceased was staying was not particularly large. We know of 2 cans of beer offered when Monty's party arrived and we also know that there was a realisation that (even if there were more beer in the fridge) that the quantity available was insufficient. We also know that the accused preferred liquor to beer though he was not averse to the latter if the liquor was finished. We also know that the deceased preferred gin, had a bottle next to him (which was finished) and another $\frac{1}{4}$ had to be fetched during the evening (because he stuck to that kind of liquor) together with 6 further cans of beer. I make that a total of $\frac{1}{2}$ bottle of whisky and twenty cans of beer apart from any that were left in the fridge when the party arrived. Mapetla however was not drinking, and Mrs Dlangamandla went to retire to her quarters much earlier before the party broke up. The "hard core" who consumed this quantity were thus reduced to four persons, viz, Monty, the accused, Billy and Mrs. Phakela. The evidence is that the accused did not appear drunk at the party, indeed when it finished, he was supposed to drive his vehicle to give a lift to Monty and Mapetla. He still believed, when he discovered his car missing, that he could borrow his sister's, and roam Maseru City alone in the middle of the night to look for it. No man with his full sober senses would know where to start. I think that the accused's mind, as he says, just snapped,

/and I ought

and I ought to believe his testimony that he had been drinking for two hours before his meeting with Monty and Mapetla, that drink affected his mind to an extent that his actions thereafter, unreasonable as they are, negatived the subjective intent to kill.

We have, albeit reluctantly, decided that it would be a much safer course to convict the accused of culpable homicide as he had originally pleaded.

My assessors agree.


CHIEF JUSTICE
20th December, 1983

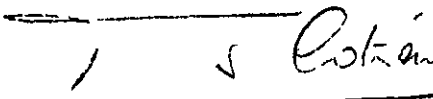
For Crown : Mrs. Bosiu
For Defence: Mr. Matsau

Sentence

Five years imprisonment of which three are suspended for three years on condition that during the period of suspension:-

- (1) the accused will not apply for a firearm licence of any description
- (2) the accused be not convicted of an offence involving possession of a firearm
- (3) the accused be not convicted of an offence involving violence to the person
- (4) the accused be not convicted of an offence of driving under the influence of drinks or drugs.

Order Firearm (Exhibit 1) to be returned to L.M.P.


CHIEF JUSTICE
20th December 1983