

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

THATO MAKUME
MANUEL MAKUME

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P.

Mofokeng on the 27th day of May, 1983

The two accused are charged on two counts. The first relates to the death of Lebeke Mothinya (hereinafter referred to as the deceased) it being alleged that he was intentionally killed by the accused on the 16th day of March, 1982. The second relates to the offence of the crime of assault with intent to do grievous bodily harm it being alleged that they seriously assaulted a number of people whose names are enumerated in the indictment. To both these counts the accused have pleaded not guilty.

The depositions of the following witnesses at the preparatory examination were admitted by both the crown and the defence and they thus became evidence in this trial. The depositions thus admitted were those of

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(.P.W.1) Dr. Sheila Martin, (P.W.3) Nkhere Ntoane, (P.W.4) No.4364 D/Tpr. Selete, (P.W.6) Lekhotla Morakabi, (P.W.7) Tau Hloolo, (P.W.8) Lejoe Poeea, (P.w.9) Pabalko Phatsisi, (P.W.10) Motlalentoa Khubetsoana, (P.W.11) Phore Khubetsoana, Dr. J.T. Klans. The names underlined are those of the complainants in respect on count two. The post-mortem report as well as the cause of death were admitted. The examination certificates issued by the doctor after examining the complainants were also admitted.

It is common cause that on the 16th March, 1982 Tpr. Mokoma (hereinafter referred to simply as the policeman) informed accused 2 that he was arresting him for having escaped from police custody and also in connection with the offence he had previously committed. Unknown to the policeman the accused had already been convicted of the offence of theft. Whether accused 2 had in fact escaped from lawful custody is not clear because since his alleged escape no effort was made to search for nor even to inquire his whereabouts from his village. However, after accused 2 was informed of his arrest, he requested to fetch his blankets. He was allowed to go. This I find incredible if the policeman originally had the intention of arresting this accused for the offence of escaping. One would not have expected the policeman to allow accused 2 to go out of his sight. The result of his folly was that when he went to fetch accused 2

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(who was now not coming as promised) he now found him with accused 1 and they resisted anybody arresting the former. Accused 1 issued threats that a person would die first before his brother, accused 2, could be arrested. The policeman acted wisely and returned to the chief's place, (i.e. Khomo). He told him that accused 2 was refusing to be arrested. Letsebelo Lekiba (P.W.3) takes over the story and says that when he arrived he found the policeman saying to Khomo, in the presence of Tau and the deceased, that he thought he had better leave accused 2 as he had been joined by accused 1 who was "stirring up trouble". The policeman also said he was leaving them because "he had no warrant for shooting". So the policeman had now given up the idea of arresting accused 2 in order to avoid trouble which he foresaw. Thereafter, continues Letsebelo Lekiba in his evidence, old man Phore arrived. He said he had been instructed by the chief (Khubetsoana) to arrest "these people". Accused 2 was to be arrested on the instructions of the chief.

Phore left to go to his chief and it is not clear whether he was going to get further instructions or reinforcements but eventually he arrived at the forecourt of the place where the stock fair was held and where both accused had entered after the initial resistance to arrest. He fell backwards. Some witnesses say it seemed as

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though he had been pushed. There were many people near Phore. He was kicked with booted feet, they also hit him. He could not get up on his own. Phore says that he saw the policeman near them who then asked the accused what they were doing to him. They answered. It was a challenge to the policeman to shoot. He saw him fire "upwards" in an attempt to threaten them. Tau Hloolo says Phore was pushed down and kicked and that the policeman came "racing" followed by man among whom was the deceased. The policeman said to the accused that what they were doing was not the right thing as he had come to them. Accused 1 asked whether he, the policeman, was trying to stop them and that he must shoot and issued an insult. They rushed to him and as they did so he pointed his gun "up" and fired "upwards" and both of them "set upon him". He tried to run but he tripped and fell. They stabbed him. Accused 2 was holding his head and they stabbed him at the back. The witness and the others, including the deceased, tried to intervene by throwing stones at the accused. The latter stabbed the deceased. The witness tried to run away and was chased by accused 2. While they struggled and warding off blows with knife aimed at him, accused 1 stabbed him behind the shoulder. He tripped and fell and accused 2 stabbed him on the head. This evidence in brief, has been admitted as being truth by the accused.

/Lekhotla

Lekhotla Morakabi had been sent to close the stock fair party. When he turned he saw "oldman" Phore entering the forecourt. Accused 2 asked the latter what put him there. Phore did not reply. He was pushed over and he fell. They kicked him while he lay down. The witness passed on to bugle Khomo's place and on the way he met the policeman. As he spoke to him the two accused left Phore and came towards them. The accused were brandishing knives and taunting the policeman to fight and at the same time issuing insults. They asked him to shoot. The policeman retreated until he tripped over a small wall behind him. They stabbed him "round the neck and uper body". His gun had fallen. Before he fell he had fired. As they were stabbing him the deceased arrived and tried to intervene but was stabbed by accused 1. Thereafter the policeman was chased and at the same time being stabbed by accused 1. On his return from chasing the policeman he found accused 2 still assaulting Tau Khubetsoana and he stabbed him at the back with a knife. The evidence of this witness has been admitted as the truth. It is corroborated by that of Letsabela Lekiba.

The evidence of Lejoe Poea has been admitted as the truth by the defence. Briefly it is as follows: He is a Bugle. He received information from Lekhotla Morakabi that a policeman had been stabbed and that the deceased had been stabbed to death. He summoned his

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available men to chase after the accused who were walking hurriedly with Paballo Phatsisi. When they caught up with them accused 2 pointed a gun at the witness. Accused 1 hit the witness with a stick on the forehead and on the waist. The witness struck him with a stone on the head. He then rushed to Paballo Phatsisi who was fighting with accused 2. The former parried the blows with his arms. The witness arrived at this scene also and hit accused 2 on the chest to "give Paballo Phatsisi a chance". Accused 1 ran away. The accused 2 was hit with a stone he fell down and lay prostrate and said "Father Lejoe, I am already dead". Apparently he had been hitting him until he uttered those words because thereafter he, Lejoe, desisted. He stood up and tried to run away. He left the Exhibits 1 and 4, blanket and gum-boots behind. Paballo Phatsisi gave chase. This accused was eventually found already arrested at another village called Romeng. He was taken to the clinic and the items mentioned were handed over to the police.

Paballo Phatsisi's evidence has been admitted. It is to a considerable extent similar to that of Lejoe Poeea. He was stabbed with a knife by accused 2. He was attacked by both accused and this was after an alarm had been raised by Lekhotla Morakabi. He eventually sustained a broken hand after accused 1 had repeatedly delivered a number of blows at him with a stick.

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It was conceded by the crown before the close of its case that accused 2 had been convicted and sentenced for the very same offence of theft for which the policeman purported to arrest him. The crown, therefore, conceded that the purported arrest of accused 2 was unlawful.

When the policeman left his station he was going to serve subpoenae. It was only when he heard that accused 2 was in the vicinity that he decided he was going to arrest him. He says he was arresting him on two counts viz. escaping from lawful custody and the old theft. Concerning the allegation of escaping from lawful custody, it is highly suspected that this did not come as an after thought, for, after the alleged escape no action was taken by any policeman to trace him. There was absolutely no interest. This was indeed a strange reaction. Accused 2's version put to the witness (P.W.1 at this trial) is that after he left the policeman who had accompanied him because of the former's strange behaviour due to excessive drinking, he went to Lepaqoa police station where the policeman they were going to meet was due to take him. From thence he was charged at Hlotse and convicted and had served the sentence. The second strange behaviour of the policeman who was purportedly arresting him for that escape, still affords a former escapee a second chance and of course he took it

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and refused to be arrested although this time for a different reason. Even if he had committed such an offence it was not in the presence of the present policeman. He had no power to have arrested accused 2 without a warrant. Apart from the fact that accused had already paid the penalty for the offence of theft the policeman had no right to arrest accused 2 without a warrant. In either situation the arrest of accused 2, by the policeman, was unlawful.

The fact that Phore said that the chief had instructed him (after the policeman had abandoned the idea of arresting accused 2 for reasons mentioned by Letsebela Lekiba and admitted by the defence as the truth) to arrest the accused did not make the unlawful arrest lawful. The position still remained the same. No offence had been committed in the presence of the chief and a chief is a peace officer in terms of the Criminal Procedure and Evidence Act 1982. But the chief referred to must be a gazetted chief and there is no such evidence before this Court that chief Khubetsoana is a gazetted chief or a traditional ungazetted chief. This compounds the problem. The Legislature has provided the conditions in terms of section 25 of the Act (supra) under which a peace officer may arrest a person without a warrant. If they are not observed or an arrestee is ignorant of them, that cannot be laid at

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the door of the accused. The result of all this is that the arrest of accused 2 is unlawful if it is not in terms of that section. It has been so decreed by an Act of Parliament. The onus of proving the lawfulness of the arrest is on the Crown and to establish that lawful arrest in the present case, the crown has to prove that the offence in respect of which the accused was arrested was committed in the presence of the policeman or alternatively had a warrant to do so. These are not mere matters of formality which can be dispensed with under the presumption omnia presumuntur rite esse acta (see R v Henkins, 1954(3) S.A. 560(C)).

It is common cause that where a person is unlawfully arrested he is entitled to resist. The principle is aptly put by WATERMEYER, J in Rex v Kleyn and Another, 1937 C.P.D. 288 at 293 as follows :

"..... every man has the right to offer reasonable resistance to an unlawful aggression upon his person and if he is unlawfully arrested he is entitled to do anything reasonable to free himself."
(My underlining).

It is also common cause that they acted in concert; that the accused's acts in resisting the unlawful arrest went beyond the stage of reasonableness. However, crown counsel submitted that not only did the accused exceed reasonableness but were reckless as to whether death ensued or not. There was, therefore, present, in each

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of them, dolus eventualis. They were, therefore, he submitted, guilty of murder. The defence conceded that the accused were guilty of Culpable Homicide.

The accused issued insults and uttered words which were not in my view indicative of an intention to kill but were part and parcel of the process of resisting the unlawful arrest by whomsoever. They used knives to kill the deceased and caused him opened wounds on the left side of the forehead, above the right ear, back of the head and left side of the chest. It is common cause that they were caused by knife or knives. Moreover, the evidence of Trooper Selete has been admitted as truthful and the accused cannot question it. The accused were highly negligent in their actions. They had made up their minds that they were going to resist the unlawful invasion of the privacy of accused 2 by whatever means at their disposal. However, they exceeded the bounds of reasonableness required in such situations and in the process became negligent. They are, therefore, found guilty of Culpable Homicide.

Concerning the assault on the policeman it has been conceded, and very properly too, that the accused are guilty as charged. The assault on him was savage in the extreme considering that the injuries were caused when there was no unlawful arrest to take place, the policeman had fallen down no longer armed and, worse still, even

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when he was running away he was chased and continued to be stabbed at the back until he fell. They are found guilty as charged.

The assaults on Tau Hlolo, Lejoe Poeea and Paballo Phatsisi respectively were unconnected with the events at Khomo's village i.e. where the unlawful arrest had taken place. The bugle Lejoe Poeea received information about two accused who had caused serious injuries to others and even caused the death of one person. They were, like good citizens would do, stopping the escapees to be sent to where allegations were made against them. Section 27(2) of the Act (supra) permits it. It was under these circumstances that they were attacked. It was submitted by the defence that as far as the accused were concerned these people were still continuing the illegal arrest and the least they are guilty of is the offence of assault common. All the complainants suffered stabbed wounds, two of them at least had a wound on the chest. They were open wounds. Paballo Phatsisi had an open wound on the forearm, back, left and scalp. The doctor examined Poeea, Paballo and Tau Hlolo and they seem to the court quite serious.

It is quite clear that the crown has proved its case beyond reasonable doubt that the assaults on them was intentional and in the circumstances unreasonable.

The assault on Phore, was at first just brushed aside by the defence as having been trivial. But he was

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described by Letsebela Lekiba and other witnesses as well, as an old man. For an old man to be kicked about while he lay on the ground by the two accused who are relatively still young men until he is unable to raise himself unless assisted is, in the circumstances, very serious indeed. The assault on him was therefore unreasonable and, because of his circumstances it was also savage. The accused are therefore found guilty as charged.

To sum up then the arrest (or even an attempt to do so) was an interference with his liberty and constituted an unlawful arrest. It made no difference that Phore purported to have acted under the authority of his Chief. (See an interesting and informative case on unlawful detention by a Policeman and being assaulted in the process. The principle involved is the same as in the present case. The case is that of Bentley v Brudzinski, 1982 Criminal Appeal Reports p. 217 (26th February, 1982)). That act was unlawful for two reasons: firstly, because it has not been shown that the said Chief was a Chief as defined in the Criminal Procedure and Evidence Act 1981 and secondly, if he is such a Chief in terms of that law,

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then like the policeman, he is a peace officer and has to be dealt with on the same basis as a policeman. A peace officer who wants to effect an arrest without a warrant is obliged to comply with the provisions set out in section 25(1) of the Criminal Procedure and Evidence Act (supra). Since the accused did not have the necessary mens rea they are found guilty of Culpable MHomicide and because of the savage assaults perpetrated on the complainats they are found guilty of assault with intent to do grievous bodily harm.

Both my assessors unanimously agree with all my findings.

The Court expresses its appreciation to the manner in which both counsel presented their case and the thorough manner of preparing their arguments. This has been of tremendous assistance to the Court.

W. M. Mokoena
J U D G E .

For the Crown : Adv. S. Peete

For the Defence: Adv. M. Mamashela (Miss)