

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

LETSOSA HANYANE

Appellant

v

REX

Respondent

HELD AT MASERU

Coram :

SCHUTZ, J.A.

VAN WINSEN, J.A.

GOLDIN, J.A.

J U D G M E N T

Schutz, J.A.

The appellant was convicted by Mofokeng J, sitting with one assessor, of the murder of Thulo Matselletsele at Upper Thamae during the night of 28th August 1981. Extenuating circumstances having been found, the appellant was sentenced to ten years imprisonment.

The deceased died of two frontal gunshot wounds the one entering the left shoulder region and inter alia rupturing the aorta, and the other entering the stomach. It was common cause that these wounds were inflicted by the appellant with his 6,35 mm pistol. The range at which the shots were fired was not established by the medical evidence.

The appellant relied on self-defence, alleging that he shot the deceased as the latter was attacking him with a knife. There is a complete conflict between the two major Crown witnesses on the one hand and the appellant as to the circumstances leading up to the shooting.

Mamaipato Moletsane, the Crown's only eye-witness, was the deceased's lover. On the night in question she first went with him to Maphiela's home where the deceased drank. As a result he became drunk. Mamaipato denied that she herself was drunk. Whilst they were at Maphiela's she clashed with

the deceased and he slapped her hard in the face. The witness went back to her home but the deceased caught up with her and they then went together to the shebeen of Maletsatsi Damane. Not long after they had entered, the accused came in. After greeting the persons present he asked the deceased whether he was still proud and the deceased answered affirmatively. From the manner of their speaking she deduced that they were not strangers to each other. She then told the deceased to stand up, and that they should leave. Her voice was raised as the deceased was being drunkenly resistant. Maletsatsi joined in saying that they were making a noise which would wake the children, and that they should leave. The accused, the deceased and herself then left, more or less together. Essentially Maletsatsi confirms this version of events in her house. The deceased, she says, was talking loudly and was drunk. The accused arrived. After Mamaipato had called on the deceased to leave, and she herself had called on them to leave, they began to leave. As they were going out the accused asked the deceased if he was still boastful. An important fact on which she and Mamaipato are agreed is that the deceased did not assault the latter at her (Maletsatsi's) house. This statement is in conflict with Crown counsel's opening, which contains the statement that the deceased slapped Mamaipato at Maletsatsi's house. Maletsatsi's evidence proceeds to the effect that she then went to bed and heard no more. According to her she heard no shots, despite the evidence to which I shall refer presently, that at least three shots were fired shortly after the departure of the three persons mentioned from her house. According to Maletsatsi the deceased's body lay some 130 yards from her house when she saw it the next morning.

I return to Mamaipato's account of what happened after the three persons left Maletsatsi's house. She and the deceased were together. The accused followed them. After a time the latter passed them. He then fired three shots in quick succession at a distance of ten paces or less. The accused said nothing before firing. At the third shot the deceased fell down and the accused ran away. Mamaipato then went to Maphiela's house to report. This she did and returned to Maletsatsi's house. On the way there she passed the deceased who was prostrate. He was "sort of panting". Asked if she left him to die, she said "I left him to go and sleep". Maletsatsi confirms that Mamaipato then came to her home and made a report. In the morning the latter says she went home and reported to her sister, asking her to

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report to the deceased's family. Later in the morning, the police having located her through her key that was found attached to the deceased's left wrist, she went to where his body lay. In or close to the deceased's right hand lay a "brown" unclashed knife, which she positively identified as Exhibit 1, and as belonging to the deceased. She said that he had opened it when they had quarrelled at Maphiela's. She had not been questioned at all about the knife at the preparatory examination nor was any mention of it made in her evidence in chief.

Detective Sergeant Lerotholi described how he came to the dead body of the deceased on the morning of 29th August. It was lying in a "corridor" between two fences. Close to the deceased's right hand lay a knife. This was not handed in at the preparatory examination. The extraordinary reason given was that the deceased's brother is supposed to have told him that it was not the deceased's knife. The knife had a "white" <sup>(actually yellow)</sup> handle. He denied that the "brown" knife Exhibit 1 was the one he had seen. Detective Sergeant Thoahlane was also at the scene. The knife lying near the body he identified as Exhibit 2 (the "white" knife). Exhibit 1 (the "brown" knife) he says he found in a clasped position in the deceased's trousers pocket. Both knives were Okapi knives. There was evidence that there had been a change of the numbers on the exhibit labels. The explanation for this, which he says that trooper Ntsika gave him, was that "he heard as if only one knife was wanted here". A defence witness, the purpose of whose calling is obscure, confirmed the police evidence that it was exhibit 2 which lay exposed, whilst "another knife" came out of the deceased's pocket.

The witness Maphiela Mapetla confirmed that Mamaipato and the deceased had been at her home earlier in the evening and that the latter had slapped the former there. When she was already asleep she was awoken by three shots, and some time later Mamaipato came to her home and made a report.

The accused's version differs entirely from that of the two direct witnesses for the Crown. According to him, he had been drinking and arrived at Maletsatsi's "drunk but not that drunk". On arrival, and while he was looking for a place to sit, the deceased, who was a stranger to him, rushed at Mamaipato and slapped her and hit her with his fists. There was noise and Mamaipato pushed the deceased and said that they should go out. He took hold of the

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deceased, said that he should not fight and pushed him towards the door, the deceased meanwhile resisting. Having succeeded in pushing the deceased out, the accused let go of him and the deceased rushed at him. The accused ran away, and, taking his pistol out of his pocket, fired in the air. He ran round the house, but, at a stage, the deceased reappeared round a corner of the house. The deceased asked him whether he was there again. The accused said that he should stop fighting. The deceased responded "Are you boasting of shooting?", put his hand in his overcoat, and took it out with "some object" in his hands. The deceased rushed at him with his arm raised. The accused turned and fled towards the gate, the deceased chasing him at a distance of 6-7 paces. The accused was still firing in the air. During the whole evening he expended eight cartridges. The accused ran until he became entangled in a barbed wire fence. The deceased was close, with his hand raised. It was dark, and he could not see anything in the deceased's hand, but assumed that it bore a dangerous weapon. Being entangled in the fence the accused fired twice in rapid succession. The deceased stumbled backward and fell. The accused, having disentangled himself, ran away. Mamaipato was not present, according to him. He acknowledged the un wisdom of the deceased's conduct in rushing at him, the accused, when he had demonstrated by firing it that he had a loaded firearm.

The defence called Maakata Motoa. She heard a rapid succession of reports at about 1 a.m., more than five. She then heard the footsteps of one person running away.

Evidence favourable to the defence was given by Dr. Mapetla who examined the appellant on 1st September, 1981, that is three or four days after the shooting. She found multiple scratch marks on the left leg and on the chin, the left palm and the back of the head. These marks were consistent with injuries caused by a barbed wire fence. The doctor stated that the injuries were "not fresh".

During questioning by the Court the appellant was asked whether any neighbour had heard the commotion to which he had deposed. He said one had, one Mantsela Mara. This was the first mention of this person in the trial. No version had been put as to what she might say. After the appellant had given his evidence his counsel asked for and obtained an adjournment and then a postponement to call Mantsela, who

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was in hospital in the tuberculosis ward. According to the appellant's counsel her evidence was of importance as she would depose to what had happened at Maletsatsi's home. Eventually the doctor under whose care the witness was was called. He expressed the view that her condition at that time was such that she could not give evidence. He was uncertain whether she might recover sufficiently to be able to give evidence at a later stage. Defence counsel then asked for a lengthy postponement in order to see whether the witness would recover sufficiently. This application was refused, Mofokeng J stating "I think the Court has already extended its indulgence to the accused, and the matter cannot go on like that, there must be a finality to this matter". The evidence then ended. In his judgment the learned Judge stated that the Court would also have wished to have heard this witness, but that in the circumstances it was impossible.

In the result the Court accepted the evidence of Mamaipato, stating that she had given her evidence very well. The Court warned itself to treat her evidence with great caution as the deceased had been her lover and she thus had a motive for falsely implicating the appellant. The corroborative evidence of Maletsatsi, <sup>who was also found to be a truthful witness,</sup> as to what happened inside the house was also accepted. Corroboration of what happened outside, namely the absence of a commotion as deposed to by Mamaipato, was also found to exist. I have some difficulty with this finding because of the fact, already referred to, that Maletsatsi did not hear any shots, although according to Mamaipato they were fired not long after departure from Maletsatsi's house and not far from it. Corroboration of Mamaipato was also found in the evidence of Motoa in that she heard the footsteps of only one person running. I have a difficulty with this finding. There is no evidence that before the fatal shooting the accused and the deceased passed Motoa's house. It was agreed between the appellant and Mamaipato that after he had been shot the deceased did not run away. So there is no corroboration on any point of difference. Further support for Mamaipato's version was found in Motoa's description of more than five shots fired in quick succession. There is some substance in this finding as the appellant's version seems to imply some interval between fusillades. But on the other hand the witness was not questioned as to whether what she referred to as a quick succession of shots could accord with the intervals implicit in the appellant's version.

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Moreover, her description of more than five shots accords rather with the appellant's than with Mamaipato's version, contrary to what the learned Judge a quo said.

The Court a quo made a strong finding of credibility against the appellant. He was said to have been restless in the witness box, to have told one lie after another, and to have fabricated evidence to meet the changing exigencies of the case as it went along. I shall deal with these detailed criticisms of his evidence. The first point made is that although the appellant had said (only in cross-examination) that the question of the knives was discussed between the appellant and two policemen at the charge office, no question was put to the police witnesses on this aspect. I do not see why any question had to be put. According to the appellant the police told him that two knives had been found on the scene. This was in the appellant's favour, and accorded with the ultimate police evidence. The next criticism is that the appellant's version was also not put to the police witnesses on another point, namely, his evidence given in answer to questions put by the court near the end of his evidence, to the effect that he had asked the police to take him to the scene in order that he could point out his expended cartridge cases to them, but that the police had refused to take him. This was important evidence and I think that there is substance in the criticism, although the failure to put this version may have resulted from the appellant's legal representative's failure to ask him the obvious question as to where cartridge cases were found. Such a failure would be no more incomprehensible than the failure of the police to give any evidence about the finding of cartridge cases. The next criticism relates to the failure of witnesses to describe more than one burst of shots. There is substance in this point, although it may be explained in the manner I have already described. The next criticism is that the version of Mantsela Mara (the witness in hospital) was not put to either of the direct witnesses. Again there is substance in the criticism, but the real sting of the criticism appears to me to be, and this appears from a question put by the learned Judge during argument and from the judgment, that the appellant invented this witness at a late stage of the case. The counter to this suggestion has been provided by appellant's counsel who produced the subpoena for this witness during the appeal. It had been drawn the day

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before the trial, and was served on the first day of the trial. The fault therefore appears to have been that of the appellant's counsel at the trial (who was not the counsel in the appeal) and not that of the appellant. The final criticism is that, whereas defence counsel had put to Mamaipato in clear terms that the deceased had a knife in his hands when he attacked the appellant, appellant himself in his evidence referred only to an object in deceased's hands. The learned Judge concluded that the reason for this was that the appellant had lied to his counsel and then allowed his memory of his lie to let him down. That may well be, although I find it a little difficult to believe that the appellant would first have mentioned a thing so important as a knife to his counsel and then have tempered his evidence. The true explanation may well be that defence counsel, knowing that a knife had been found beside the deceased's body, placed a construction on his client's instructions.

From the above analysis it emerges that many at least of the trial court's criticisms of the appellant may properly belong to his counsel at the trial (I do not say that they do). But when at least one instance seems to have been shown to be the fault of counsel, I think that it would be dangerous to embark on the hip and thigh smiting of the appellant that the trial court embarked on. However, nothing that I have said should be taken to detract from what the trial Judge has said on the importance of counsel's putting the material parts of his case to witnesses who may be able to comment thereon.

Based on what I have said so far there are criticisms both of the trial court's findings as to corroboration of Mamaipato, and as to the degree of untruthfulness of the appellant. It is therefore necessary to weigh their respective testimonies afresh, bearing in mind the advantages enjoyed by a trial court. Many criticisms have been levelled in this Court by appellant's counsel against the two principal Crown witnesses. I do not propose going through them in detail, because on the record I do not think that either of them have been done much serious damage in cross-examination. There is the point already mentioned about Crown counsel's opening conflicting with their evidence. Crown counsel explained this in this Court by saying that he had based himself on an inadequate preparatory record. That may be. I would add that there is also some extraordinary conflicting evidence given by Mamaipato under cross-examination concerning whether the

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deceased had a knife in his hand when he was shot. In the result I think that the conflicts resulted from misunderstanding. In favour of the evidence of Maletsatsi it has been contended that she had no motive to fabricate. This is a valid contention, although the answer may be that she was concerned for the honour of her "house".

The one real difficulty that there is in Mamaipato's evidence is the lack of motive for the appellant's attack. It is true that it is not essential for the Crown to establish motive, but its failure to do so may cast doubt upon its case. It is possible that the appellant's attack originated from an earlier quarrel about which Mamaipato knew nothing, but I cannot help suspecting that the Court was not told the whole story as to how the quarrel originated. Nor am I impressed by the appellant's version, particularly his tale about running around firing many shots in the air.

In these circumstances it becomes necessary to consider the objective facts. The first that may be taken as a fact is that the deceased was drunk and in an aggressive mood. He had slapped Mamaipato hard and had opened his knife. Whereas ordinarily one might consider his attack on the appellant as deposed to by the appellant unlikely, it becomes less unlikely once his frame of mind is taken into account.

An important objective fact is the injuries already described which were found on the appellant. The learned Judge was rather dismissive of this fact, remarking that the appellant might have sustained the injuries elsewhere. It seems to me that there are four possibilities. The first is that the injuries were sustained on the night in question in the manner described by the appellant. The second is that they were accidentally sustained at about that time in some other way. The third is that the appellant was cunning enough to inflict them, including one at the back of his head, before his arrest the next morning. The fourth is that the injuries were sustained a considerable time before the fatal night. The second possibility can hardly be taken into account as the coincidence involved would be most considerable. The third is a possibility, but it is entirely speculative. The fourth seems to me most unlikely. If the police had not seen fresh wounds on the appellant after his arrest but had seen old wounds it is unlikely that they would not have given evidence to that effect, and it is also unlikely that they would not have ensured that the doctor made an appropriate note. In the result it seems to me that there

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is a probability that the appellant sustained the injuries when engaged with the deceased. Such a conclusion weighs substantially in the scales in favour of the appellant.

The next objective fact is that early the next morning an open knife was found lying close to the deceased's right hand. Added to this was the fact that Mamaipato had deposed that that knife was the deceased's and that he had opened it earlier. The Court a quo dealt with this difficulty by concluding that she must have been mistaken, taking this knife to be the one she had seen earlier. The Court may have been right, and such a conclusion is also supported by the police evidence and that of the defence witness Neo Leteba. The Court dealt with the problem of the knife rather inconclusively by stating that there was much in the Crown's argument that the knife Exhibit 2 had been "planted" by "somebody" who did not know that the deceased already had Exhibit 1 in his pocket. It is difficult to conceive of anybody doing this if it was not the appellant. Of course it is possible that the appellant (an intelligent man) did a second cunning thing - "planting"/<sup>Exhibit 2</sup> But I do not think that there is a sufficient basis for concluding that he did and ignoring <sup>(Exhibit 2 or 1)</sup> the knife lying next to the deceased. It was contended, and I think rightly, that there is some improbability in a man carrying two similar knives at the same time. But even that does not mean that the presence of the knife can be ignored. I would add that it was most improper for the knives not to be mentioned at the preparatory examination or in Mamaipato's evidence in chief in a case where the defence was self defence. It was for the Court and not the police to decide whether Exhibit 2 had been "planted". I also find it inexplicable that the police did not test the knife for fingerprints.

The decision of Mofokeng J not to grant a further postponement to see whether the witness in hospital would recover was also criticized. I am not prepared to say that, in the unusual circumstances, he was clearly wrong.

In the result, although I have doubts about the appellant's story, I do not think that it is capable of being stigmatized as one which may not reasonably be true, with the result that the Crown has not, in my view, proved its case beyond reasonable doubt.

I consider that the appeal should be allowed and the

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conviction and sentence be set aside.

W.P. SCHUTZ  
Judge of Appeal

I agree

L. de V. VAN WINSEN  
Judge of Appeal

I agree

B. GOLDIN  
Judge of Appeal

Delivered this 7th day of July 1983 at MASERU

For Appellant : Mr. Maqutu  
For Respondent: Mr. Peete