

IN THE HIGH COURT OF LESOTHO

In the matter of :

REX

v

BOTHATA CLEMENT JONKORO

J U D G M E N T

Delivered by the Hon. Acting Chief Justice Mr.
Justice M.P. Mofokeng on the 8th day of September
1983

The accused is charged with crime of murder. It is alleged that about the 29th November 1981 at or near the Likhutlong in the district of Mohale's Hoek, he unlawfully and intentionally killed one Charlotte Motseki (hereinafter referred to simply as the deceased). When the charge was put to him, he pleaded not guilty.

The depositions at the preparatory examination of the following witnesses were admitted as evidence at this trial:

- (a) The two identifying witnesses;
- (b) Dr. De Ronde who examined the deceased on admission to the hospital. He states that her condition was very bad; that she had a shot wound on the right frontal area of the skull. Her brains were bulging through the entrance hole made by the bullet; that the patient was already dying.
- (c) Dr. Heathcoate performed a postmortem on the body of the deceased. He found that she had been shot in the head and the bullet had entered the right side of the forehead. It went through the brain. He found it lodged in the skull, on the left side. The deceased was pregnant (about two months. He had found no other injuries.

/(d).....

(d) Sgt Letsie's evidence was admitted. He merely formally investigated the case and arrested the accused.

It was also admitted that the accused had shot the deceased with Exhibit 1 but the circumstances under which that had occurred differed from those deposed to by the only Crown witness Mahlape Molefi.

Concerning the shooting, she said that the accused came to the room for the second time. He was accompanied by Matia (he is a policeman). They wanted the owner of the Kombi which was parked outside to come out. He did. Accused gave instructions that nobody else should come out of that room. It is not revealed why. Now, one Lejone who had been dismantling the lock inside the room was asked by Mahlape to go and find out as to what was happening to Tefo (the owner of the Kombi). Soon thereafter, accused arrived and in anger wanted to know why Mahlape had disobeyed his order. There followed some talk between the two. The accused was pointing a firearm at her all the time. She asked him to point it elsewhere. Accused then called on to the deceased who sat at the table, a few paces away from the opened window, facing away from the accused. He called upon her three times and when she turned her head to look at him he fired at her. At that time Oupa (another man in the house) was still sleeping on a bed.

When accused was asked by Mahlape why he shot the deceased he threatened to do the same to her.

The accused's version is simply that Oupa tried to come out after another man had come out and run away. ^{the accused,} He, had cocked his small firearm. As Oupa tried to come out of the window he pushed him back and in the process the small firearm went off. The deceased was hit.

It was shown that there were certain pieces of evidence which Mahlape mentioned for the first time at the trial.

/However,

However, at the end of her evidence the accused changed his plea of not guilty to one of guilty to culpable homicide. Crown counsel, has consented. This consent is not to be in writing in terms of section 5(c) or 6(1) of the Criminal Procedure and Evidence Act 1981. Those sections refer specifically to the process of discontinuing a prosecution which is not the case here. In the case of Kutoane v Rex CRI/A/25/76 delivered by this Court on the 18th June 1976 the principle involved in the present situation was stated as follows :

"From the perusal of the record it does not appear that the learned magistrate either consented or refused the 'offer' of a change of plea by the accused. Now, when once the accused has pleaded, the Attorney-General has no power to accept, without the consent of the Court, a plea different from that already recorded. (R. v Komo, 1947(2) SA 508 at 511). The Court has a power to allow a change of plea. (R. v Sherwin-Wilder, 1916 CPD 614)".

See also Tsematsi Mosolo v Rex, 1979(2) LLR 482 (Court of our Appeal decision) which also quotes Rex v Komo(supra) as its authority. However, it should be made quite clear that in particular instance, the Court has the last say because it is now seized of the case. In this particular instance it was the accused who brought about the change in the plea when the litis contestatio had already begun.

Some Crown witnesses, even though not called to give evidence, had stated at the magistrate's court during the preparatory examination that the accused was drunk.

Taking the circumstances of this case as revealed to me and having informed myself from the preparatory examination, as I should where an accused pleads guilty. (Rex v Mekhoa Molulela and others, CRI/T/2/82 dated 11th November 1982). I find accused guilty of the crime of culpable homicide.

My assessors unanimously agree with me.

/I have

I have taken into consideration what defence counsel has said. But society must be protected from police officers who handle firearms while under the influence of liquor. The courts frown on this type of behaviour and it will visit it with particularly heavy punishment precisely because the police officers are the custodians of law and order. (See remarks on sentence in Phaloane v Rex, 1981(2) LLR 246 at pp 266-7 and Takalimane v Rex, CRI/A/35/83 dated 15th August 1983 to mention but a few cases). Going on duty or being on duty under the influence of liquor has resulted in fatal consequences in this particular case. There have been quite a few of such cases in this Court recently. The action of the accused was dreadful really.

He is sentenced to 8 years imprisonment.

William J. O'Keefe

ACTING CHIEF JUSTICE
8th September, 1983

For Crown : Adv. S. Peete
For Defence: Adv. Sooknanan