

IN THE HIGH COURT OF LESOTHO

In the matter of :

R I X

v

SELLO RANKHOLO

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 22nd day of February, 1984.

The accused pleaded not guilty to a charge of murder on the following allegations :

"In that upon or about the 8th February, 1983 and at or near Qoaling in the district of Maseru the said accused did unlawfully and intentionally kill one Ts'eliso Lesenyeho."

At the commencement of the trial, Mr. Peete, counsel for the crown, accepted the admissions, tendered on behalf of the accused by Mr. Molapo, counsel for the defence, of the depositions made by Dr. Moji, Thabo Nkolanyane and Tpr. Makhakhe who were respectively P.W.1,4 and 5 at the Preparatory Examination proceedings. As their depositions were, in terms of the provisions of section 273 of the Criminal Procedure and Evidence Act, 1981, admitted in evidence, it became unnecessary, therefore, to call as witnesses Dr. Moji, Thabo Nkolanyane and Tpr. Makhakhe. The crown then called three (3) witnesses to testify in support of its case after which the defence, as it was perfectly entitled to do, closed its case without adducing any evidence.

The court had, therefore, only the crown evidence to consider for determining whether the commission of the offence by the accused had been established beyond a

2/ reasonable doubt.

reasonable doubt.

Briefly, the evidence of P.W.1, Tpr. Nthonyane, was that at about 4.30 p.m. on 8th February, 1983, he was visiting his grandmother at a place called Goaling in the district of Maseru. He was in the company of P.W.2 Tpr. Liau.

When the two police officers came to the home of P.W.1's grandmother, they noticed a white ford car outside the yard. It had neither registration numbers nor temporary permit papers. Its bonnet was open and a person appeared to be fiddling with something in its engine. They went to the car and found that the accused was the person fiddling with something in its engine. P.W.2 also noticed that the car had no insurance and clearance discs.

They greeted and introduced themselves to the accused as police officers. He reluctantly responded to the greetings, closed the bonnet and got into the car from which he came out carrying a ladies' handbag. Asked whose car that was, the accused replied that it belonged to two men with whom he was going. They had left him with the car and would come for it at about 10.00 p.m.

As it displayed no registration number plates, no temporary permit papers, no insurance and clearance discs and the accused claimed that it belonged to people who would only come for it at 10.00 p.m., the police officers became suspicious that the car had been stolen. In the circumstances, the police's suspicion that the car had been stolen was reasonable.

According to P.W.2, they then informed the accused that they were arresting him for the theft of that car. As officers empowered by law to execute criminal warrants, the police were, in terms of section 24(b) of the Criminal Procedure and Evidence Act, supra, entitled to arrest the accused. The section reads, in part:

"24. Every peace officer and every other officer empowered by law to execute criminal warrants may arrest without warrant -

(a)

(b) every person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in Part II of the First Schedule;"

Theft is one of the offences mentioned in Part II of the First Schedule. When the police officers informed him that he was being arrested, the accused explained that he could take them to a place called Borokhoaneng where he would show them the owners of the car. As he said so, the accused was moving backwards before he suddenly turned round and took to his heels. The two police officers chased him.

After running for some distance, the accused turned round, produced a revolver with which he fired two shots at the police officers. He, however, missed them and the chase continued. The police officers raised an alarm to which many people in the village responded by joining in the chase. One of those villagers was the deceased, Ts'eliso Lesenyeho. He was running ahead of the two police officers. As they ran after him, accused's pursuers were throwing stones at him. In the course of the chase, accused again turned round and for the second time fired a shot in the direction of the police officers. He again missed and the chase continued. After he had run for some distance, the accused again turned round and for the third time fired two shots. The deceased was hit by one of the bullets.

According to the evidence, at the time he fired the shot that hit the deceased a hail of stones was being thrown at the accused and many of the stones were actually hitting him. He could not have the opportunity to aim at any person in particular and he just fired aimlessly. After the deceased was hit, the accused managed to escape and continued running away.

P.W.3, Mojaki Thebe, testified that on the day in question, he was in the village when he heard the alarm and the report of a firearm. He then noticed that many people were running after the accused. Among the people who were chasing the accused, P.W.3 recognised P.W.1 whom

4/ he knew to be

he knew to be a police officer. He noticed the deceased whom he also knew very well fallen behind a toilet belonging to a certain woman by the name of Mary P.W.3 got the impression that the accused had committed an offence of some kind and the reason for his chase was to assist the police officer, P.W.1, to arrest him. He immediately ran to intercept the accused.

When he appeared where the accused was, P.W.3 noticed that he was aiming a firearm at the people who were following him. He fired a shot at them and tried to run away. When he noticed P.W.3, accused fired at him but missed. P.W.3 was holding a knife with which he threatened the accused. Accused fired another shot at P.W.3 but missed. When the accused tried to fire a third shot, P.W.3 heard only a click after which the accused dropped the firearm to the ground. P.W.3 picked it up and at the same time caught hold of the accused. He told him that they should go back so that he might see his victim (the deceased). The accused who by that time had already sustain a bleeding head injury complied.

When they came to the deceased, P.W.3 found him lying on his back. He had sustained a bleeding wound on the right side of the collar bone and was clearly dead. P.W.3 was, on this point, confirmed by P.W.2.

With the help of one Sempe, the deceased and the accused were carried in a vehicle to the hospital and the police charge office, respectively. The body of the deceased sustained no additional injuries whilst it was being conveyed to the hospital.

The evidence of P.W.1 was slightly different in that when they returned with the accused to the deceased, the latter was still alive. It was only when they arrived at the hospital that he noticed that the deceased was already dead.

Whether the deceased died at the scene of crime or was dead on arrival at the hospital is immaterial. What is important is that after he had been shot by a bullet, fired by the accused, the deceased died before any treatment could be given to him. There could be no suggestion, therefore, of novus actus interveniens perceptuating his death.

5/ The evidence of

The evidence of Dr. Moji was that on 11th February, 1983, he performed a post mortem examination on the deceased's body which was identified before him by Thabo Nkolanyane. He found that the body had a gun wound on the right clavical region. The bullet had obliquely entered the body of the deceased thus injuring his left lung, the diaphragm and the stomach before it finally settled between the 10th and the 11th ribs. He removed the bullet which he handed to Tpr. Makhakhe. He formed the opinion that death was due to haemothorax as a result of the gun wound..

There can be no doubt, on the evidence, that the deceased died of the injury inflicted on him by the accused. The only question for determination by the court is whether or not at the time he fired the fatal shot, the accused had the requisite subjective intention to kill - be it direct or legal.

The evidence adduced by the crown itself is that at the time he fired the shot that fatally injured the deceased, a hail of stones thrown by his pursuers was falling on the accused. He could not, therefore, have the opportunity to aim the shot at any particular person and he just fired at random, presumably to scare away the people who were trying to forcibly arrest him.

Perhaps a pertinent question here is whether the action of accused's pursuers was lawful. I have already decided that in the circumstances of this case, the two police officers were, in terms of the provisions of S.24 (b) of the Criminal Procedure and Evidence Act, 1981, empowered to arrest the accused. On the evidence, the deceased and other villagers joined in the chase against the accused as a result of the alarm raised by the two police officers who were actually seen running after him.

They believed, therefore, that the accused had committed an offence of some sort and was escaping from a lawful arrest by the police officers who ordinarily had the authority to arrest criminal offenders.

Now, section 27(2) of the Criminal Procedure and Evidence Act, supra, provides:

"Every person may arrest without warrant

6/ any other

any other person whom he believes on reasonable grounds to have committed an offence and to be escaping therefrom, and to be freshly pursued by one whom the private person believes on reasonable grounds to have authority to arrest the escaping person for that offence."

There can be no doubt, therefore, that the deceased and other villagers were, in the circumstances of the present case, empowered by the above cited section to come to the assistance of the police officers and arrest the accused - even by force if need be. It follows, therefore, that in my opinion their action was likewise lawful. The question whether or not the action of accused's pursuers was lawful must, therefore, be answered in the affirmative.

Granted that the deceased and other pursuers were effecting a lawful arrest of the accused, there can be no question of accused acting in self-defence for that defence avails only a person who acts to repel an unlawful attack on him. However if, on the evidence, the accused was, at the time he fired the fatal shot, not aiming at the deceased or any person in particular for that matter, it would seem to me illogical to infer that he had the intention to kill. It follows, therefore, that, in my view, the question whether the accused had the requisite subjective intention to kill must be answered in the negative.

It does not, however, necessarily follow that the accused must now go scot free. Even if it were accepted that at the time he fired the fatal shot, the accused did not aim at the deceased or any other person in particular there can be no doubt, on the evidence, that he was fully aware of the presence of a large number of people around ^{him}. He nevertheless used a firearm aimlessly and for no lawfully justifiable reason. That he could not be allowed to do. He had a duty of care not to injure the people who were around him carrying out a lawful duty. His failure to do so constituted, in my view, negligence which has resulted in the unfortunate death of the deceased.

I take the view that the accused is guilty of culpable homicide and accordingly convict him.

My assessors agree.

7/ Sentence.

SENTENCE

In mitigation, Mr. Molapo, on behalf of the accused, invited the court to take into consideration the fact that, following his conviction of assault with intent to do grievous bodily harm, the accused was already serving a prison term. Whatever sentence the court might impose on him should, therefore, run concurrently with the sentence the accused was already serving in gaol. I certainly take that into account.

I am also aware that the accused is about 3/4 years old. He probably has dependants to look after. In trying to punish the accused, it is unfortunately his innocent dependants who will suffer mostly.

Nonetheless, I shall not turn a blind eye on the seriousness of the offence with which the accused has been convicted. He has unlawfully deprived another human being of his life. In a number of decisions this court has repeatedly warned that the courts of law take a rather dim view of people who unlawfully deprive their fellow humans of the right to live. The warning seems to be going unheeded. It is about time the courts of law demonstrate their determination to deal effectively with those who like the accused commit this horrible crime.

The incident of car stealing has, of late, become a real nuisance. Consequently the law of the land empowers the police and all responsible persons to arrest the perpetrators of this and other related crimes. It was in the course of discharging his lawful duty as a responsible citizen that the deceased was unlawfully killed by the accused. This, in my view, is an aggravating factor calling for appropriate punishment if only the accused and those of his mind were to be deterred from a repetition of this kind of behaviour.

8/ In the premises,

In the premises, I come to the conclusion that the circumstances of this case warrant a sentence of seven (7) years imprisonment and the accused is accordingly sentenced. The sentence will, however, run concurrently with whatever term of imprisonment the accused may presently be serving in gaol.

B.K. MOLAI,
JUDGE

22nd February, 1984.

For the Crown : Mr. Poete,
For the Defendant: Mr. Molapo.