CRI/T/38/83

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

MOSALA NKUE

JUDGMENT

Delivered by the Hon. Mr. Justice B.K. Molai
on the 5th day of December, 1984.

The accused is before me on charges of murder and attempted murder on the following allegations :

Count I : "upon or about the 23rd day of March, 1983 and at or near Ha Lapisi in the District of Berea, the accused did unlawfully and intentionally shoot and kill Nkopane Sephaphathi."

Count II : "upon or about the 23rd day of March, 1983 and at or near Ha Lapisi in the District of Berea, the accused, acting unlawfully and with intent to kill, did shoot at and injure Kemiso Sephaphathi."

It may be mentioned from the word go that during the course of this trial, the Court was informed that the defence would not dispute the depositions made by D/Tpr. Ntlaloe, Sgt. Liphoto and Lt.II 'Mabathoana, who were respectively PW.1, PW.2 and PW.3 at the Preparatory Examination proceedings. Their depositions were, therefore, admitted, on behalf of the accused, by the defence counsel and counsel for the Crown accepted the admissions. It became unnecessary, therefore, to call the deponents as witnesses and their depositions were admitted in evidence

2/ in terms of the .....

in terms of the provisions of S.273 of the Criminal Procedure and Evidence Act, 1981.

The evidence of PW.2, Kemiso Sephaphathi, and PW.3. Paulosi Nkutle, was that they lived in neighbouring villages with the accused. On the day in question they were herding cattle on a fallow land next to another field on which was cultivated ts'aane grass. They told the court that they did not know to whom the two fields belonged and that the area on which the fields were was reserved from grazing. However, the accused testified that the field on which ts'aane grass was cultivated belonged to him and the area on which the two fields were was, in fact, a reserved grazing area. On the day in question, the accused noticed that cattle herded by PW.2 and 3 were trespassing on his field. He reported to and asked assistance from his chieftainess to go and impound the cattle. He could not get any help from his chieftainess and so the accused went alone to impound the cattle.

According to the accused, he was a member of the Police Volunteer Reservists (P.V.R.), an organization which was not very popular among some people in his area. Because of the unpopularity of the members of the P.V.R. in his area, the accused carried a firearm when he went to impound the cattle. It was a shot gun allocated to him in his capacity as a member of the P.V.R.

It is common cause that when he came to PW.2 and 3, the accused asked them what they wanted to see. They did not reply and the accused had to repeat the question for the second time. According to PW.2 and 3, it was clear from his tone that the accused was in an angry mood. After he had repeated the question for the second time, the accused removed the shot gun from his shoulders. The two boys then took to their heels. As they ran away, PW.2 and 3 could not see what the accused was doing behind them. They merely heard a gun report.

It is clear from their evidence that PW.2 and 3 cannot positively say whether or not as he fired the shot

the accused was aiming at them or in the air. However, PW.2 told the court that at the time he heard the gun report, he felt something hitting him. He at first said he was hit on the palm below the third finger but later changed and said it was on the finger itself. He did not, however, sustain any bleeding injury but later his finger got swollen.

The accused's version was slightly different. According to him, when they saw him coming to them, PW.2, 3 and a third boy who did not testify before this court left the cattle and came running to him. They were blowing their whistles and clearly in a fighting mood. He then removed the shot gun from his shoulder. It was only then that they turned back and ran away. He denied to have fired any shot at all.

Taking into account that the cattle had either been grazing next to the field on which the accused had cultivated ts'aane grass or trespassing in that field. I find it natural that the accused was angry when he came to the herdboys. The stubbornness manifested by their refusal to answer accused's question was likely to create in his mind the impression that the herdboys intended to frustrate any attempt on his part to impound the cattle. The probabilities are high, therefore, that the accused did fire a shot to expel the herdboys and forestall any attempt on their part to prevent him from impounding the cattle. Indeed, as it will be shown in this judgment, D/Tpr. Ntlaloe who later came to the scene picked up an empty shell of a shot gun next to accused's field thus suggesting that a shot had in fact been fired in the vicinity.

Returning to their evidence, PW.2 and 3 testified that after they had run away from him, they noticed the accused driving away their cattle towards his home village. They then went to the top of certain cliffs from where they called at the deceased in Count I and reported what had happened. The deceased who was the father of PW.2 immediately left the village and followed the direction in which the accused had driven the cattle. He was

4/ armed with a .....

armed with a timber stick (the heavy type which is normally bought from the shops). According to PW.3 it was at the time they were on top of the cliffs that PW.2 showed him his 4th finger. On examining it, PW.3 noticed a blackish spot on the tip of PW.2's 4th finger. He did not see any injury.

I do not understand why PW.2 had to show him his finger if there was no injury at all. What PW.3 probably meant was that there was no bleeding injury or an open wound.

Be that as it may, PW.2 and 3 went on to say after he had left the village to follow the accused, they also followed the deceased. When they came within the view of the deceased and accused, PW.2 and 3 heard several shots being fired. They were, however, some distance away and could not hear any conversation (if any) between the deceased and the accused. They then decided to return right there and did not dare approach the place where the accused and the deceased were.

I am inclined to believe that these boys were frightened by the sound of the shots and decided not to go there. However, according to PW.2, after many people had gathered at that place, he decided to go there when he found the deceased already dead.

On the following day, 24th March, 1983, PW.2 was at the Police Charge Office in T.Y. where he reported, among other things, that he had been shot by the accused on his third finger. The police did not, however, refer him to a medical doctor for treatment. This suggests that the injury (if any at all) was very insignificant. Only after 3 weeks was PW.2 called from his home by the police who sent him to a medical doctor for treatment but at that time the injury on his finger had completely healed. This was confirmed by PW.4, Dr. Letele, who testified that PW.2 was referred to him by the police for treatment of the alleged injury on his third finger on 13th May, 1983 (more than a month after the event).

5/ He could only .....

He could only see an old scar and it was not medically possible to say whether or not it was the scar of an injury inflicted by a bullet shot.

The evidence of PW.1 Sekoati Moqasa was that on the day in question he was herding his sheep in the veld when he noticed the accused driving certain cattle towards his home village. He was about 100 yards (indicated) away from the accused. He then noticed the deceased who was going along with two dogs following the accused. The deceased was carrying a stick while the accused was carring a gun. As he followed the accused, the deceased was calling at the accused and asking him to stop so that they could have a talk. When the deceased was about 7 paces (indicated) away from the accused, the latter stopped and fired a shot at the deceased. PW.1 noticed a lot of dust going up from the feet of the deceased. The deceased then moved aside but the accused fired a second shot and said : "I am killing you!". The deceased tried to run away but the accused fired a third shot at him when he fell to the ground. The accused then left him and continued driving away the cattle. Later on many people came to the spot where the deceased had fallen.

According to PW.1, he had often seen the accused wearing a uniform of people commonly referred to as members of the Police Volunteer Reservists in his area. He did not know the work of those people and would not know if their work was to assist the police and the chief in maintaining law and order in his area.

I must say PW.1 did not impress me as a truthfull witness from the witness box. He was evasive in his replies to many of the questions that were put to him, and of ten took such a long time to give a reply to questions that even the Defence counsel at one stage had to remark to this rather inordinate delay in answering questions. I consider it unsafe to rely on his evidence standing alone and I shall have to approach it with care.

6/ The accused conceded .....

The accused conceded that after he had impounded the cattle and while driving them home, the deceased came following him. As he approached, the deceased, who was the owner of those cattle, was insulting him by his mother. The accused then moved some distance away from the cattle and told the deceased he could take his cattle but should not come to him. Instead of taking his cattle, the deceased came straight to him. He was raising his stick and setting dogs at the accused who then fired a short in the air to scare away the dogs. He avoided shooting at the dogs for fear that he might injure the deceased in the eyes.

I do not believe that the accused could have fired the shot in the air to scare away dogs that were attacking him. His suggestion that if he fired at the dogs some of the pellets from the shotgun would have injured the deceased in the eyes is simply ridiculous. The deceased did not have eyes on his legs and it was unlikely that he could be injured in the eyes by the pellets of a shotgun bullet fired at the dogs which were running on the ground and, therefore, at the level of the deceased's feet.

Be that as it may, the accused went on to testify that when he fired that first shot, the dogs ran away. He also ran away and the deceased was chasing him. While running away the accused re-loaded his shotgun and when he came next to a field belonging to one Mokeka, he fired a second shot on the side of the field so that the deceased who was saying the gun was not in working condition could realise that the gun was in fact working. After firing the second shot, the accused removed the empty shell which he put into his pocket before re-loading the gun. He then noticed the herdboys who had run away coming towards him. He fired a third shot at the feet of the deceased who was running on his side trying to prevent him (accused)from running towards his home. After firing the third shot, the deceased stopped the chase and the accused heard him saying: "Are you shooting me!" The accused again emptied the gun of the

7/ shell which he ....

shell which he put into his pocket. He continued driving the cattle to the pound.

According to the accused, he fired at the deceased in self-defence. He at first said when going to impound the cattle, he had 6 rounds of ammunition but later changed and said he had only three and took the other three from his house after impounding the cattle. He then went to report what had happened to his chieftainess and the police in T.Y. I see no reason why the accused should have gone for the 3 rounds of ammunition after he had impounded the cattle and was on his way to the chief's place and the police station. It will be shown in a moment when he came to the police station the accused had only two rounds of ammunition. If it were borne in mind that the accused fired one bullet when he came to the herdboys and three more while he was with the deceased, there can be no doubt that the truth is that he had 6 rounds of ammunition when going to impound the cattle.

D/Tpr. Ntlaloe confirmed that he received information following which he proceeded to the scene of crime where he found the dead body of the deceased. On examining it he noticed that the body had multiple injuries on the right side of the legs, ribs, arm and face. Next to the body he found a timber stick which was identified as belonging to the deceased. A shot distance away from the body he also found a shell of a shotgun. He took possession of the stick and the empty shell of a shot gun. He kept them in the police custody until they were handed in as exhibits at the Preparatory Examination. After examining the injuries, he conveyed the body of the deceased to the mortuary at T.Y. The body did not sustain any additional injuries whilst it was being transported to the mortuary.

On 25th March, 1983, the accused took him to his field on which he said the deceased's cattle had been trespassing. Because of the draught, the police officer could not notice any damage on the ts'aane grass which was cultivated on the field. He could only see the foot prints

8/ of cattle. .....

of cattle.

The evidence of Sgt. Lephoto was to the effect that on the day in question he was on duty at T.Y. police station when the accused who was carrying a shotgun came and made a certain report following which he cautioned and charged him. The accused handed over the shot gun, 2 bullets and 2 shells of a shot gun. He took possession of and subsequently handed them as exhibits at the Preparatory Examination.

According to Lt. II 'Mabathoana he was responsible for training members of P.V.R. and allocating police firearms to them. The accused was one of the members of the P.V.R. to whom he allocated the "greener gun" or "12 boar" before Court on 10th March, 1983, after training and testing him on the use of the firearm.

The testimony of PW.4, the medical doctor who performed the post mortem examination on the body of the deceased, was that he conducted the post mortem examination on 25th May, 1983 and the body was identified before him as that of the deceased by Setomela Mifi and Moeti Mosala. He found that the body was bleeding from the nostrils and the mouth. It had multiple wounds on the right side of the abdomen, upper arm, chest and face. There was, however, no injuries on the legs. He found many pellets inside the body and some of them had penetrated the pericardio and the chest. He formed the opinion that the injuries had been inflicted by a gun which shot multiple pellets and death was due to haemorhage into the right chest cavity.

There can be no doubt on the evidence that the deceased died as a result of gun wounds inflicted on him at the time the accused shot at him. The only question is whether or not the accused was justified in shooting at the deceased. In this regard we have on one hand the evidence of PW.1 according to whom the deceased only wanted to talk to the accused and had done nothing to warrant the shooting. On the other hand accused's version is that the deceased was unlawfully attacking him and he

shot at him in self-defence. PW.1 himself said he was about 100 yards away from where the deceased and the accused met. I am not convinced that from that distance he clearly heard the conversation that transpired between the two men. He could, however, have clearly noticed their movements.

It is to be remembered that the accused was in the process of impounding the deceased's cattle. It is not uncommon in this country that the owners try to retrieve by force their animals from people who are impounding them or even assault the rangers for lawfully impounding the animals. It is not improbable that the accused was telling the truth when he said the deceased was trying to do exactly that. However, the story of the accused that while he was running away he was able to empty the gun of the shells, put them into his pocket and re-load the gun before firing the shots sounds rather incredible. It seems to me that the truth is in the evidence of PW.1 who said when he was fired at, the accused stopped advancing towards the deceased and moved aside. The accused then fired two more shots before the deceased fell to the ground. I do not, however, believe that after the accused had fired the first shot, the deceased stupidly kept on coming towards him. However, it should be borne in mind that the two men were fighting and in the circumstances they cannot be expected to have been in a position to make clear cut judgments. The accused may well have believed that when he moved aside, the deceased was trying to intercept him. He, therefore, fired the two shots to scare him away. But, in my view, the accused could have directed the firearm at a less vulnerable part of the body of the deceased as he apparently did with the first shot, instead of directing it at the upper portion of the body as it is clear he did from the injuries found on the deceased by D/Tpr Ntlaloe and the medical doctor who performed the post mortem examination. In my view, the accused was, to say the least, negligent and therefore, committed the offence of culpable homicide on count I.

10/ As regards .....

As regards count II, I have pointed out that at the time the accused fired the shot, PW.2 and 3 were already running away. They are not, therefore, in a position to tell us whether or not the accused was aiming the firearm at them. He may well have directed his firearm in the air merely to scare away the herdboys in which case the accused cannot be said to have had the subjective intention to kill which is one of the essential elements of the crime of attempted murder.

The question that now arises is whether or not in terms of the provisions of S.188(3) of the Criminal Procedure and Evidence Act, 1981, the accused can be found guilty of contravening S.25(1) of the Internal Security (Arms and Ammunition) Act No. 17 of 1966. S.188(3) reads:

> "(3) If at the trial of any person on a charge alleging that he killed or attempted to kill or assault any other person, it has not been proved that he committed the offence charged, but has been proved that he pointed at the person against whom the offence is alleged to have been committed, a firearm, airgun or air pistol, in contravention of any law, the accused may be convicted of having contravened that law."
> (My underlining).

As has been pointed out earlier, there is no conclusive evidence that the accused pointed the firearm at the complainant in Count II. He may well have fired in the air merely to scare away the herdboys who were attempting to prevent him from lawfully impounding animals that were damaging his crops. That being so, it cannot be said the accused committed a contravention of S.25 (1) of the Internal Security (Arms and Ammunition) Act No. 17 of 1966.

he answer to the question whether or not in terms of the provisions of S. 188(3) of the Criminal Procedure and Evidence Act 1981, the accused can be found guilty of contravening S.25 (1) of the Internal Security (Arms and Ammunition) Act No. 17 of 1966 must, in my view, be in in the negative. The accused is accordingly found not

11/ guilty .....

guilty and discharged on Count II. I however, find him guilty of culpable homicide on Count 1.

I must point out that my two Assessors take the view that on Count I the accused is guilty of murder with extenuating circumstances. The decision that the proper vedict is that of culpable homicide is mine alone. We are, however, agreed on the verdict returned on Count II.

B.K. MOLAI
JUDGE

5th December, 1984.

For Crown : Mr. Peete,
For Defence: Mr. Matlhare.

S E N T E N C E

The accused has already been convicted of culpable homicide. Coming to the question of sentence, the accused and people of his mind must be reminded that the life of a human being is a special gift from God and for that reason sacred. No man has a right to take it away unlawfully. This is so much true that a man is not allowed even to commit suicide.

The accused does not have to be reminded by this Court that he has done a wrong thing. His own conscience tells him that and the thought that he had killed another human being is going to trouble his conscience for the rest of his life and that is in itself enough punishment.

However, for the benefit of the accused, the Court takes into account the fact that he is an old man of 66 years and has no previous convictions. If in all the 66 years of his life the accused has led an unblemished life in the eyes of the law,that must certainly go to his credit.

We also take into consideration that at the time he clashed with the deceased, the accused was lawfully impounding animals which has trespassed in his crops. Unlike our neighbours across the boarder, we do not, in this country, fence our fields and reserved grazing lands. We fence our fields and reserved grazing lands by declaring the areas in which they are situated reserved areas. The acknowledged practice in this country is that when animals are impounded after they had trespassed in the fields or reserved grazing lands, the owner must go to the pound master and negotiate their release. He should not, as the deceased in the present case seems to have done, try to retrieve them forcibly from the person who is impounding them.

The sentence which we are about to pass on the accused in this case should not, therefore, be interpreted as an encouragement to interfer with impunity in the rights

of the rangers and the owners of the crop fields. It should rather be viewed as a demonstration of our displeasure at the acts of people who, like the deceased, think they can use violence to retrieve their animals when they are impounded for trespassing in other people's crops or reserved grazing lands.

The sentence that we consider appropriate for the accused, in the circumstances of this case, is 2 years imprisonment suspended for 3 years on condition that he is not convicted of any offence involving violence on another person and for which he is sentenced to serve a term of imprisonment without an option of a fine, during the period of suspension.

B.K. Molai
Judge

For Crown : Mr. Peete,
For Defence : Mr. Matlhare.