

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

TSIETSI THAHANE  
MOETI THAHANE

J U D G M E N T

Delivered by the Acting Mr. Justice J.L. Kheola  
on the 18th day of December, 1984.

The accused are charged with the murder of 'Molotsi Lesekele (hereinafter called the deceased) on 4th September, 1982 and at or near Mokone's in the district of Mafeteng. The accused pleaded not guilty to the charge.

It is not in dispute that on the 4th September, 1982 the deceased was returning from Sarielle's village and going towards Mokone's village. He was accompanied by a lady named 'Mamoeletsi Ntipe who was his concubine and Monaheng Thahane (PW.1) who is the elder brother of the two accused. 'Mamoeletsi is their sister. The deceased was merely taking them half-way. On the way they met with the two accused. 'Mamoeletsi suddenly ran away and accused 1 chased her. Deceased followed them. Accused 2 followed the others after a short while. When he came to them accused 1 had caught 'Mamoeletsi and was holding her. At that juncture the deceased struck accused 2 with a stick on the head and hit him again above the left eye. When accused 1 noticed that his brother (accused 2) was being attacked by the deceased he let 'Mamoeletsi free and struck the deceased with a stick on the head. After wiping away blood from his face, accused 2 struck the deceased with a stick. He fell down and the

2/two accused .....

two accused repeatedly hit him with sticks and finally accused 1 took a big stone (Exhibit I) and crushed the head of the deceased with it. Before the deceased fell to the ground, there was a fierce stick fight between the accused on the one hand and the deceased on the other hand. Monaheng tried to intervene but was unable to stop the fight because the combatants refused to discontinue the fight. He went to the village in order to raise alarm but when he returned to the scene of the fight the deceased had been killed.

Dr. A. Vanderlugt performed a post mortem examination on the body of the deceased and found that the cause of death was 'trauma of the head'. The head was crushed; the skull was deformed and burst open, brain tissue was coming out of the skull. The injuries were caused with a stone.

After the Crown had closed its case, Mr. Mofolo for the defence closed the defence case without calling any of the accused to give evidence. It seems to me that the reason why Mr. Mofolo did this was because the defence of the accused appears in the confessions which were formally admitted by the defence when the deposition of the magistrate, Mr. Lentsoe was admitted as evidence in this Court. The confessions are consistent with the facts stated above which are common cause.

Mr. Mofolo submitted that the attack on accused 2 was unlawful as was the attack on accused 1 who in trying to separate the two was also attacked. Moreover, if accused 1 thought accused 2 was in danger, he was entitled to protect him. I agree that the attack on accused 2 by the deceased was unlawful and that accused 1 had the right to defend accused 2 as his life was undoubtedly in danger when the deceased struck him with a stick on the head and on the forehead. In Gardiner and Lansdown: South African Law and Procedure, Vol.2, (6th edition) at page 1549, the learned authors expound the law regarding killing in defence of others in these words :

3/ "A person has .....

"A person has the same right to use force in the defence of another from a threatened danger, as he would have to defend himself, if he were the person threatened - Moorman, 2.3.5; van der Linden, 2.5.9; Matthaeus, 4.8.5.12, von Quistorp, S.245; ....."

In the case before me, the deceased's attack upon accused 2 was not only unprovoked but was also unlawful and accused 1 was entitled to defend his brother (accused 2). When accused 1 intervened in the fight between accused 2 and the deceased, the latter left accused 2 and attacked accused 1 and a stick fight ensued. At that time accused 2 was wiping away blood from his face and he then realized that his brother was being attacked by the deceased. At this stage I think the life of accused 1 was in imminent danger and accused 2 had the right to defend his brother. He struck the deceased with a stick on the head. The deceased fell on the ground. The two accused then belaboured the deceased with their sticks while he was lying prostrate. And finally accused 1 took a big stone and crushed the head of the deceased. P.W.2, George Maela who is the headman of Maela's village told the Court that when he arrived the deceased had already fallen to the ground and was not moving while the accused were hitting him with their sticks. He tried to protect the deceased from the beating by standing over him and raising his arms over him. The accused chased him away.

Now the question to be decided by the Court is whether after the deceased had fallen down and the two accused were belabouring him with their sticks their lives were still in such imminent danger that they were in law entitled to defend themselves and kill the deceased. I do not think that at that stage their lives were in any danger. In fact when P.W.2 arrived, the deceased was already lying prostrate and was incapable of causing any harm to the accused. Mrs. Bosiu for the Crown has submitted that as the deceased had ceased to attack the accused their subsequent attack upon the deceased was sheer retaliation. She referred me to Buschell and Hunt:

4/ South African .....

South African Criminal Law and Procedure, Vol.I at page 276 where the learned authors say :

"Any measures taken by the accused after the complainants' attack has ceased would be retaliatory rather than defensive and, therefore, unjustified."

I entirely agree with the learned authors, See R. v. Kantolo, 1912 E.D.L. 154, R. v. Hope, 1917 N.P.D. 145 at p. 146, R. v. West, 1925 E.D.L. 80 at p. 88). The general principles mentioned by Watermeyer, C.J., in R. v. Attwood, 1946 A.D. 331 at p. 340 are that an accused is entitled to an acquittal on the ground that he was acting in self-defence if it appears as a reasonable possibility on the evidence -

- (a) that he had been unlawfully attacked and had reasonable ground for thinking that he was in danger of death or serious injury. (Though there may be cases of lawful self-defence where the accused was originally the aggressor R. v. Ndara, 1955(4) S.A. 182 (A.D.) at 182 E.);
- (b) that the means of self-defence which he used were not excessive in relation to the danger;
- (c) that the means he used were the only or least dangerous means whereby he could have avoided the danger."

I have already held that the attack on both accused 1 and 2 by the deceased was unlawful and that the accused were entitled to defend themselves. The next question is whether in defending themselves the accused did not exceed the bounds of reasonable self-defence. After the deceased had fallen down, the accused belaboured him with their sticks till he could not move. They continued to hit him even after P.W.2 had tried to stop them. Accused 1 then crushed his head with a big stone. In my opinion, the accused immoderately exceeded the bounds of reasonable self-defence. Mr. Mofolo has submitted that although witnesses tended to depose that after the deceased fell he was beaten up, this was not borne by the

5/ medical evidence .....

medical evidence and that even D/Tpr. Peete testified that there were no visible injuries on the other parts of the body. In their own confessions accused admit that after the deceased had fallen, they belaboured him with their sticks. So Mr. Mofolo cannot be heard to suggest that the witnesses who say the deceased was belaboured with sticks should be disbelieved. The accused confirm such evidence. Mrs. Bosiu has asked the Court to take judicial notice of the fact that when Basotho men fight with sticks they usually aim their blows at the head and suggests that when the accused belaboured the deceased after he had fallen they hit him on the head. I do not think the fact is sufficiently notorious to be capable of judicial notice. Be that as it may, I think it is possible that the accused were hitting the deceased on the head but the fact that the head was subsequently crushed with a big stone making it impossible for the doctor to say whether there were any injuries prior to the crushing of the head, one may only speculate.

With regard to specific intent required in murder, there can be no doubt that when accused 1 took that big stone he foresaw the death of the deceased as a possible consequence but was reckless as to whether it occurred or not (See R. v. Valachia and Another, 1945 A.D. 826 at p. 831; R. v. Thibani, 1949 (4) S.A. 720 (A.D.) at p. 729).

I now turn to the question of common purpose and wish to quote from the case of R. v. Mkize, 1946 A.D. 197 at 206 where Greenberg, J.A., said :

"The only question is whether in picking up and using the stirrup Julius can be said to have been acting in execution of their common purpose. In this case, as in the majority decision in Rex v. Duma (supra, at p. 420), it is unnecessary to decide whether if person are acting in the execution of a common purpose to assault with weapons which might reasonably be expected to cause death in the circumstances, they are, therefore, responsible for the act of one of them who unexpectedly and without prior consultation with the others uses a differend kind of

6/ weapon and ....

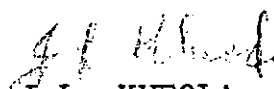
weapon and causes death... That question might have arisen if Jesselina's evidence had been that the appellant desisted from his attack immediately he became aware of the fact that Julius was using the stirrup."

(My underlining)

In the present case, the evidence is that both accused were armed with sticks and intended to assault the deceased with them. There is no evidence that the accused agreed or contemplated using stones to assault the deceased. They were still hitting him with sticks when suddenly accused 1 took a big stone and crushed his head. Immediately after the head was crushed with the big stone, accused 2 desisted from his attack. If the deceased had died from the injuries he sustained from the beating with sticks, the two accused would have been guilty of murder. But according to medical evidence, the injury on the head was caused with the big stone. Accused 2 cannot be found guilty of murder under common purpose because the means used by accused 1 could not have been contemplated as likely to have been employed in the carrying out of the common purpose (see R. v. Duma and Another, 1945 A.D. 410).

For the reasons stated above I find accused 1 guilty of murder and accused 2 guilty of assault with intent to do grievous bodily harm.

My assessors agree.

  
J.L. KHEOLA

JUDGE (Acting)

18th December, 1984.

For Crown : Mrs. Bosiu  
For Defendants : Mr. Mofolo.

