

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X Plaintiff

v

TSITSO LEPELI Defendant

J U D G M E N T

Delivered by the Hon. Chief Justice Mr. Justice
T.S. Cotran on the 21st day of December 1984

The accused before me Tsitso Lepeli, who is a member of the Lesotho Mounted Police attached to the Traffic Branch, is indicted upon a charge of murdering Nteboheleng Tsita on or about 1st October 1983 at or near Stadium area in Maseru town.

The accused pleaded not guilty.

It is common cause that Saturday 1st October 1983 was a busy day in the Kingdom's calendar. It was firstly "Graduation Day" at the National University of Lesotho at Roma starting from 9 a.m. and it was secondly the semi finals between national soccer teams starting from 2 p.m. at Maseru. His Majesty the King, the Rt. Hon. the Prime Minister and other V.I.P.'s were expected to attend both functions. No doubt the personnel of the traffic department were somewhat over stretched.

The accused was given the task of standing with a colleague at the robot road intersection along Leabua Jonathan Highway that leads to the stadium (a T junction) to stop motorists using the road His Majesty and the Prime Minister were expected to pass and diverting them to another. The accused was given a "commando" type gun (specimen Exhibit A produced) and two bullets. Lieutenant Malephane issued him with this weapon without any

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specific instructions as when to use it. The officer testified he expected other ranks to have "common sense".

Motorists converging on the stadium were unaware of these traffic arrangements. Many of them coming from central Maseru drove right up to the robot (it was not in fact in working order that day) only to discover that they could not take their left into stadium road. Those motorists intending to attend the match coming from the opposite direction, i.e. from TY direction, were told at the junction where the accused and his colleague stood to drive straight ahead to Kentucky Fried Chicken corner and turn right to get to the stadium through Motsamai road. Those reaching the T junction from the Maseru side were told by the accused and his colleague that they could do a U turn and drive back to the Kentucky Fried Chicken corner to get to the stadium as aforesaid. It was common cause there was noise and confusion.

Justice Bambatha Tsita (P.W.1), a former police officer and public prosecutor, was the President of Lioli Football Club one of the teams that reached the semi finals. The kick off time was scheduled for 2 p.m. He had been with the team preparing for the event until shortly before 1 p.m. and went home to fetch his family. It is customary for the Presidents of the clubs to lead their teams into the football arena in a sort of a parade shortly before the kick off. Mr. Tsita, accompanied by his wife, who was next to him in his car, and four children in the back, discovered, soon after passing Kentucky Fried Chicken corner that traffic was not smooth and there was congestion at the T junction. Mr. Tsita felt he was getting pressed for time. It was past 1 p.m. He did not queue behind the vehicle in front of him but swerved to his left in such a way that two of its wheels were on the dirt verge and the other

two on the tarmac. He was hooting and squeezing between cars appealing to other motorists to give him priority as he careered to the T junction.

What happened at the T junction was not common cause except for the fact that the accused fired one bullet from the "commando" gun issued to him in the direction of Tsita's car after the latter drove up stadium road for a distance of between 22 and 30 feet (estimated) which bullet hit Tsita's nine year old daughter Nteboheleng in the face as she (with other children) was kneeling on the seat looking out through the rear windscreen, hopelessly damaging the brain, from which injury the child died an hour or so after her admission to Queen Elizabeth II Hospital.

The versions I heard of the incident vary. The full details of the divergence of the testimonies need not be recounted in this Judgment for it is available in the record and it would suffice if I briefly outline the evidence of each eye witness:-

Mr. Justice Tsita (P.W.1):-

He says he knew the accused well and vice versa. The accused knew he was the President of Lioli F.C. He thought that accused noticed his manoeuvres to get to the front when he was by-passing other vehicles. From a distance of 15 feet (pointed) he stopped and told accused "Brother allow me to pass to get to the stadium". Tsita says the accused heard him and replied "Yah". Tsita understood this to mean "okay" and started driving up the uneven (though tarmaced) road to the stadium, when he heard a bang, looked back, and saw that his rear windscreen was shattered to smithereens. After a few seconds he realised his daughter was in a pool of blood shot through the head.

Mrs. 'Makhosi Tsita (P.W.4):-

Her evidence is almost the same as Mr. Tsita's but she is
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not as emphatic as her husband that the accused did say "Yah" or indicate unequivocally that they can proceed. She thought and believed that accused did give permission. She protested that even if she and her husband misunderstood the traffic officer "what right has he got to shoot?"

Mr. Tsubane James Phothane (P.W.2):-

He says he was driving his car to the stadium coming from the direction of Sebaboleng and TY. At the T junction there was some traffic congestion. There was one vehicle in front of him. He wanted to turn to the right to go up the road leading to the stadium to watch the match. He saw the accused preventing traffic from taking this road and the witness says he indicated to the policeman that he will not go up but intended to park anywhere in the vicinity and walk up to the stadium. He says that at that moment he saw a vehicle driven by a person, whom he discovered a few moments later to be Tsita (P.W.1), trying to communicate with the accused who was directing a heavy stream of traffic away from entering the stadium road. He did not hear what words were exchanged between Tsita and accused because there was much noise, but he did see the accused gesticulate. He could not say whether the movements meant he had given him permission to go up or to make a U turn. He saw Tsita drive up. He then saw the accused pull up his gun, point it at Tsita's car, and shoot.

Tseliso Kuenane (P.W.3):-

He testifies that he was coming from the direction of TY and saw Tsita driving a car at the junction from the opposite side and two policemen. He stopped and he heard Tsita ask accused's permission to proceed up the road to enable him to lead his team into the stadium and heard accused says clearly "Ee", yes in Sesotho which meant Tsita could go. The

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witness himself apparently was told, or it was indicated to him, that he should proceed to Kentucky Fried Chicken corner. Accused and Tsita spoke to each other from close range and this witness says emphatically that after permission was granted, the accused pulled his gun and shot at Tsita's car from the rear.

Thabiso Makhooa (P.W.5):-

He says he was driving from TY road towards town. He was not on his way to attend the match. At the T junction he saw the van of Tsubane James Phothane (P.W.2) and Tsita. The traffic officer, the accused, was next to Phothane's car, which was stationary. Tsita's car drove right up to the accused and came to a dead halt. He saw accused and Tsita talking. The witness observed no gestures. He saw Tsita drive up stadium road. The accused turned, lifted his gun, and fired.

The accused testifies that his instructions were to stop any vehicle except His Majesty's and the Prime Minister's from going up stadium road from 11.30 a.m. onwards and he and a colleague were instructing drivers of all traffic coming from either direction to proceed to the stadium via Motsamai Road at the Kentucky Fried Chicken corner. He saw a car coming fast from the town side and stop at the intersection. This was driven by Tsita. Tsita wanted to go up stadium road and he went up to him and told him that his instructions were to prevent anyone from going up except His Majesty and the Prime Minister. Having said this accused says he turned round to attend to the heavy traffic. He heard Tsita say: "Foestek" (an Afrikaans word for dog) "I am the President of Lioli Football Club". Accused says he knew Tsita by sight but did not know that he was a former police officer or a public prosecutor or the President of Lioli Football Club and that in any event his orders were to

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make no exceptions. Tsita drove up without permission. He had to stop him. He lifted his "commando" gun and fired one bullet aiming for the tyres. That vehicle stopped and Tsita came out in a fighting mood and said he killed his child. He did not see the child and he did not believe Tsita but learned of the death later. He continued controlling traffic. He did not intend to kill anyone but he shot at the wheels in an attempt to stop Tsita as he was ordered to do by his superior officer.

Mapesela Rantiti (D.W.1):-

He is accused's colleague and was on duty with him at the time. He says he was 5 - 8 feet (pointed) from accused who held a gun. Tsita drove up to accused. Accused said "The road is closed". Tsita replied "I am the President of Lioli". Accused did not respond to this and walked away and continued with his job. Tsita then drove his car towards accused compelling him to retreat backwards and drove up the road. The witness then heard a shot and later realised a child in Tsita's car was hurt.

Tsiame Letsie (D.W.2):-

He is a Warrant Officer in the Lesotho Paramilitary Force but was off duty on the day in question and not in uniform. He was on his way to the stadium travelling in a friend's car. They were coming from Maseru. His friend's vehicle was the first at the T junction from this direction and before he had time to ask the accused what was wrong he saw Tsita dash past him from behind. He halted his vehicle just before reaching accused. The witness heard the accused ordering Tsita not to proceed. He heard Tsita reply "Man, you are wasting my time, I am in a hurry to get my team on the football ground". The witness adds that accused repeated "The road is closed" and gesticulated accordingly with his arm. Tsita however did not

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heed and drove up almost colliding with accused who had to jump. Accused pulled his gun and shot from a distance of 22 paces (pointed).

We can divide the witnesses' evidence into four categories:-

1. Tsita (and to some extent his wife) and Tseliso Kuenane who say accused gave permission to Tsita to proceed, and after having done so, he aimed the gun and shot at the vehicle.
2. Tsubane James Phothane who says he saw Tsita and accused speaking to each other (but did not hear the conversation) and the accused gesticulate but could not say if this meant Tsita could go ahead up stadium road or turn back to Motsamai road.
3. Thabiso Makhooa who says he saw Tsita talking to accused but did not hear the conversation. He saw no gestures by accused giving an indication one way or the other.
4. The accused, Mapesela Rantiti and Tsiame Letsie who testify that Tsita was definitely forbidden from proceeding up the stadium road and he disobeyed the order.

We find it difficult to believe that the accused first gave permission to Tsita to go and then immediately changed his mind, aimed his gun and shot. We have no evidence of any motive on the part of the accused to harm Tsita and/or his family. The accused who was on duty since 11.30 a.m. at the T junction, had no idea about the identity of the motorists that were going to come to the junction and could not have had any idea that Tsita and his family would have been one of those motorists. We do not accept the proposition that in a split second the accused changed his colour from a law enforcement officer (somewhat harassed by people in a hurry) to a callous murderer.

The only reasonable inference that we can draw is either that Tsita misunderstood what the accused said (Ee for yes and e-e for no have similar sounds in Sesotho) or alternatively

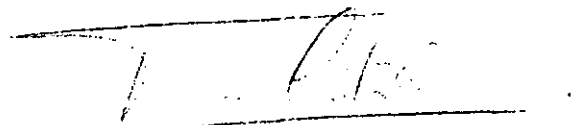
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that Tsita understood him perfectly, but nonetheless, with all the confusion and the noise, he decided to take a chance and slip up the road. Whether it was one or the other the killing cannot be justifiable either in terms of s.42 of the Criminal Procedure and Evidence Act 1981 or s.7 of the Police Order 1971 (Vol. XVI Laws of Lesotho p.97) or on the ground of obedience to lawful orders, or on the ground of necessity (for which see Burchell and Hunt S.A. Criminal Law Vol.I 1970 Ed. p.296) for the officer was not in any personal danger and the King and the Prime Minister were no where near the scene for accused to legitimately apprehend any threat to their safety or security in Tsita's act of disobedience.

I do not think that the accused intended to kill the child. It may well be he really thought he could hit at the lower part and deflate a tyre but the fact of the matter is that his act in shooting, taking all the circumstances into consideration, was grossly negligent and reckless and amounts to culpable homicide.

We find him guilty accordingly.

My assessors agree.



CHIEF JUSTICE

21st December 1984

For Defendant : Mr. Addy

For Crown : Mr. Peete

Sentence : 5yrs imp. 3 of which are suspended for 3yrs on condition that A be not convicted of an offence involving violence to the person during period of suspension.