

IN THE HIGH COURT OF LESOTHO

In the matter of

R E X

Vs

KAIZER MAKATA
MPHASA LEPHEANA

J U D G M E N T.

Delivered by the Hon Mr. Justice B. K. Molai
on the 13th day of March, 1984

The two accused appeared before me charged with the murder of one Seabata Kou, in that upon or about the 7th November 1981 and at or near Thibella Location in the district of Maseru they each or both unlawfully and intentionally killed the deceased. They have both pleaded not guilty to the charge.

The depositions of D/Tpr Seboka, w/o Rikabi, Captain Maphathe D/Sgt Thoahlane, Moholo Kou and Captain Lebakeng who were respectively, PW 5, 6, 7, 8, 11 and 12 at the Preparatory Examination proceedings were admitted and accepted as evidence in terms of the provisions of Section 273 of the Criminal Procedure and Evidence Act, 1981. It was unnecessary, therefore, to call the deponents as witnesses in this trial.

It may be mentioned from the onset that at the close of the crown case Mr Kolisang, Counsel for the defence, applied for the discharged of the two accused on the basis that the prosecution evidence had failed to establish a case for the accused to answer. The application was, however, opposed by Miss Nku, the crown representative in this case.

This court has had the occasion to discuss in detail the principle governing an application of this nature in the recent case of Rex Vs Thoabala 1981 (2) L.L. R 363 at pp. 364 et seq. There is no need now to repeat what has been said in that decision, suffice it to say, in the present case there is evidence that on the day in question the two accused were going together when accused 2 handed to accused 1 a revolver with which the latter admittedly
fired/

fired the fatal shot at the deceased. Without going into the question of credibility I came to the conclusion that, on the face of it, the crown evidence had established a prima facie case against the accused and the accused and the application for their discharge was accordingly refused.

As it was perfectly entitled to do the defence decided to close its case without adducing any evidence and it now becomes mandatory for the court to deal with credibility of evidence and apply the more stringent test of proof beyond reasonable doubt to determine whether or not the accused have committed the offence against which they stand charged

The evidence of PW 4, Mathabiso Leballo, was that she and the deceased, Seabata Kou, were lovers. On the evening of 7th November, 1981 the deceased came to her house at Thibella location and asked her to quickly prepare a meal for him as he was in a hurry to go elsewhere. The deceased was going in a motor vehicle, so PW 4 requested him to take her children to a cinema while she was going to a nearby cafe to buy something with which to prepare his meal. The deceased complied and PW 4 left for the cafe.

When she got out of the house PW 4 noticed accused 1, whom she knew to be a police officer, seated outside the house. He had a pint of milk and a piece of bread next to him. He was smoking dagga which she had no difficulty in recognising by the peculiar smell of its smoke. She asked the accused how come he, a man of law, was smoking dagga and his reply was that he was just culming his nerves or making himself wiser or words to that effect. Accused 1 used to frequent her house but she had not been seeing him for some time, so she asked him whether he would still be there when she returned from the shop and the reply was in the affirmative. PW 4 then proceeded to the shop and bought what she intended to buy.

On her way back home PW 4 met a certain Mokuena who gave her a report as a result of which she had to rush to her house. On arrival she found a lot of commotion in the house. I shall return to her evidence later in this judgment

How that commotion had started was explained by PW 3, Tseetsana Ts'oana, who told the court that at the material time he had been drinking at home of One Marukla. Towards sun set he felt tired and decided to go and have a rest at his place on PW 4's stand. On arrival he noticed the two accused seated outside PW 4's house. The accused called and offered him a scale of hops beer to share.

While he was with them the accused questioned him about a certain person who had been found dead next to Seipobi's place. He denied knowledge about it after which he left the accused where they were seated and entered into the house in which he lived on PW 4's site. While he was sleeping in there the two accused came in, violently pulled him from where he was sleeping, kicked and hit him with fists. They dragged him out of the house telling him that he should go with them. When he asked where he was being taken to the accused told him that he was to show them the person he had killed. He managed to release himself from accused's grip and escaped into PW 4's house. The accused chased him into that house, caught hold of and continued assaulting him.

During the assault PW 3 fell under a table and was holding on to it when one 'Manthafa pleaded with the accused and asked what wrong he had done. Although he could not follow what accused reply, was PW 3 realised that his assailants had suddenly stopped beating him up. He got out from underneath the table and tried to leave the house. One Makhogane advised him not to go out of the house. He however, eventually got out and noticed many people crowding around the deceased who had fallen in the street and clearly injured.

PW 3 told the court that because of the confusion he was in on account of the assault on him he had not personally heard the report of a firearm. While the deceased was being assisted on to his vehicle which was parked on the street, he noticed two young men bringing accused 2 to the vehicle. They all got into the vehicle which was driven by one Seboka first to the charge office and then to Queen Elizabeth II hospital where the deceased was admitted. They then returned to the charge office where they found accused 1 already making a report. This was confirmed by W/O Rikabi according to whose evidence accused 1 handed a .38 revolver to him at the Maseru police charge office and reported that he had to use it in self-defence when he and accused 2 were being attacked by some people at the location. As he made the report to him accused did not appear drunk. He (W/O Rikabi) took the revolver and handed it to Captain Maphathe who in turn gave it to D/Sgt Thohlane. It was later handed to captain Lebakeng for safe keeping. According to captain Lebakeng he kept the revolver in one of the drawers in his office but as many police officers, including accused 2 himself, were working in his office it has since disappeared from the drawers and he could not find and produce it as exhibit in his evidence.

The importance of the safe keeping of articles to be used as exhibits in court cases cannot be overemphasised. They must

be properly

be properly labeled and kept in the exhibit room. If the revolver in the present case were a matter for dispute its absence could have clearly prejudiced the decision of this court

The evidence of PW 5, 'Manthafa Kholotsa', was that on 7th November 1981 she was living on PW 4's site. At about midday she was in her house when she heard a commotion. She went out and found that the two accused were assaulting PW 3 in the latter's house. She pleaded with the accused to stop beating up PW 3 and the fight stopped. Later in the evening of the same day there was a commotion and she found the two accused again assaulting PW 3 in PW 4's house

She once more pleaded with the accused to stop it. At that time PW 4 and the deceased also came and intervened. Accused 1 then demanded a firearm from accused 2 who complied.

According to PW 5 the deceased then sent her to go and call Seboka, a C.I.D police officer who lived in a nearby house in the location. She went but did not find Seboka. She returned and reported to deceased. Deceased then left saying he was going to report at the charge office

It was not clear from PW 5's evidence whether or not when the deceased left for the charge office the fight between PW 3 and the accused had stopped. However, when the deceased left PW 4's house accused 1 followed him out and started firing shots at him. Altogether four shots were fired but it was the last shot which hit the deceased who fell to the ground. After he had shot down the deceased accused 1 ran away. Seboka then came to the scene and was assisting to convey the deceased to hospital when someone said one of the soldiers was still in PW 4's house. Seboka went into the house and found accused 2. He arrested him. PW 5 confirmed PW 3's evidence that the deceased was carried in his vehicle first to the charge office and then to the hospital where he was admitted

I have observed the witnesses as they testified before me and I must say I found PW 5 not very impressive as a witness. She was often evasive and stubborn in her reply to the questions that were put to her. In fact I formed the opinion that she probably had taken some liquor before coming to testify before this court. I am not prepared therefore, to accept her evidence save where it is corroborated by the evidence of other more reliable witnesses.

Now, coming back to her evidence PW 4 testified that when she arrived at her house from the shop she found many people in her house. They were clearly trying to intervene in the fight between accused 1 and PW 3 who had fallen under the table. Accused 1 was

kicking and hitting PW 3 with fists. Accused 2 was just standing and doing nothing in particular at the time. She pleaded with accused 1 to stop assaulting PW 3 and asked what wrong the latter had done. Accused 1 explained that he was arresting PW 3 for having killed a person next to the Lesotho Evangelical Church. She told accused 1 that he should then arrest PW 3 and take him to the charge office instead of assaulting him at her place.

Immediately after PW 4 had entered into the house the deceased also arrived. He too joined with the people who were intervening in the fight between PW 3 and accused 1 by pleading that the fight should stop. Accused 1 then threatened that he would shoot and told accused 2 to hand a gun over to him. The latter complied. It was then that PW 4 realised that accused 2, who was a stranger to her, might also be a police officer.

When accused 2 produced the gun which he handed over to accused 1 the deceased remarked that the whole thing was getting out of hand and even if the two accused were police officers he was going to report the matter at the police charge office. He immediately went out of the house and was hurrying towards his vehicle which was parked across the road when accused 1, still holding the firearm which he had obtained from accused 2 also went out of the house and followed the deceased. As the deceased was approaching his vehicle accused 1 fired a shot. When he came to his vehicle the deceased turned back and called at PW 4 to hand over to him the ignition key which he had left in the house. PW 4 went for the keys and returned towards the deceased. She met him half way and gave him the keys. The deceased actually ran towards his vehicle but accused 1 fired three other shots in his direction. The last shot clearly hit the deceased for he immediately fell to the ground after it had been fired.

PW 4 said it was she and not the deceased who then sent PW 5 to go and report to a police officer by the name of Seboka who lived in a nearby house in the area. Seboka confirmed that he heard gun shots and received a report following which he proceeded to PW 4's place where he found the deceased fallen in the street. He was almost unconscious. On examining the deceased he noticed blood oozing from below the ribs at the back near the spinal cord where he found there was a wound. With the assistance of some other people he took the deceased into his vehicle but before he could drive away someone remarked that another soldier was still in the house. He went into PW 4's house and found accused 2, who appeared drunk. He arrested him and drove to the charge office to obtain a medical form with which he rushed the deceased to the hospital where he was admitted. The deceased did not sustain any additional injuries.

When.../

When he returned to the charge office Seboka found accused 1 already reporting to W/O Rikabi that he and accused 2 had been attacked by people and as a result he was bound to shoot. Accused 1 also handed a firearm to the warrant officer. It had four empty shells.

Dr. Siddique, a consultant surgeon at Queen Elizabeth II hospital, testified that he was the one who admitted the deceased on 8th November, 1981. He confirmed that on admission the deceased had a gun shot wound on his left lower chest, injuring the left lung and spinal cord with the resultant paraplegia. With treatment the deceased became better generally but developed bed sores on his buttocks. The bed sores gradually became worse. The deceased became depressed and his wife wished to take him home. It was outside his jurisdiction to refuse but he tried to persuade the wife against taking the deceased home where he could not receive as good treatment as in the hospital. The wife insisted and the deceased was eventually released to her on 8th December, 1981. He, however, re-admitted the deceased on 8th January, 1982. Deceased's bed sores had increased and become worse. He was anaemic and notwithstanding the best treatment afforded to him at the hospital the deceased's bed sores did not improve. He gradually went down and became toxic. He eventually expired on 27th January, 1982.

PW 4 told the court that she was the one who obtained the release of the deceased from the hospital. According to her the deceased was not receiving good treatment at the hospital. Every time she paid him a visit at the hospital she found that the deceased had soiled himself with excrement and there was no nurse to clean him. She had to clean him herself.

When she reported the matter to one of the nursing sisters PW 4 was told that the nurses did not know their work. She agreed with the deceased that he should be taken out of the hospital and sent to Baragwanath hospital in the Republic of South Africa.

PW 4 conceded, however, that after he had been released to her the deceased was never sent to Baragwanath hospital. It was Christmas season when there was a lot of traffic on the roads in the Republic of South Africa. Some nurses at the hospital used to give her certain medicines and bandages with which she herself treated the deceased at her house. She could not, however, tell the names of the nurses who gave her the medicines nor could she tell what medicines and dosages were given to her for the treatment of the deceased. She herself was not a trained nurse. She was not, therefore, in a position to tell us whether or not the treatment she gave to her patient (the deceased) did not deteriorate his condition with the resultant /

resultant death.

The evidence of Dr Moorosi was that he performed post mortem Examination on the body of the deceased on 2nd February, 1982. His findings were that the body had large ulcers or bed sores whose base was covered with pus there was a fracture of the pelvis on the left which fracture was consistent with shooting. The body was pale. He, therefore, formed the opinion that death was due to anaemia resulting from the ulcers.

There is simply overwhelming evidence that accused 1 was seen firing shots at the deceased and it was one of those shots that hit the deceased who ended up in hospital where he developed bed sores that eventually took his life. Indeed, accused 1 himself did not dispute the fact that he had shot the deceased.

Accused 1's suggestion to W/O Rikabi that he had to fire the shots in self-defence could not be supported by the only available direct evidence adduced by the crown in this case.

It was also stated under cross examination that accused 1 would testify in his defence that he and accused 2 were attacked by certain people when he had to use the firearm in self-defence. He has not in fact so testified before this court and the statement cannot advance the defence case any further.

In the premises, I have no alternative but to come to the conclusion that there is not an iota of evidence on which accused 1 is attacked on the actus reus of the offence with which the accused are charged.

The only question that remains for determination is whether or not when he unlawfully attacked the deceased, accused 1 had the subjective intention to kill. I have accepted the evidence that accused 1 obtained the firearm from accused 2 and subsequently followed the deceased out of P W 4's house when he fired the first shot. There can be no doubt that at least after he had fired the first shot, accused 1 was aware that the revolver was loaded. He nonetheless fired three other shots in the direction of the deceased as indicated by the evidence. That being so, no other reasonable inference can be drawn except that the accused

3/ intended to

intended to shoot and kill the deceased. The question whether or not accused 1 had the requisite subjective intention to kill must, therefore, be replied in the affirmative.

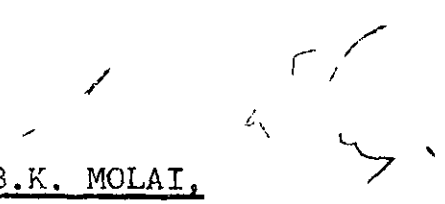
The only problem in this case as I see it, is the action of P.W 4 who removed the deceased from the hospital where he was receiving treatment in the hands of trained nurses and doctors. In her own evidence P W 4 testified that she had no nursing qualifications of any kind. She however, removed the deceased from the hospital where he was receiving treatment in the hands of trained nurses and doctors and she herself treated him with medicines she did not even know. She is not, therefore, in a position to tell as whether the medicines and dosages she administered on the deceased could or could not have resulted in the deterioration of the condition of her patient.

It must be remembered that the evidence of Dr Siddique was that on re-admission, the deceased's condition had become worse than when P.W 4 removed him from the hospital. In my view, the worsening condition of the deceased may or may not have been the result of improper treatment admittedly administered on him by P W 4. That granted, a court of law, properly advising itself, must have a doubt the benefit of which in our law, always given to the accused person. It is clear therefore, that I take the view that in removing the deceased from the hospital where he was receiving treatment P.W./ was negligent and the treatment she afforded the deceased may well have amounted to a novus actus interveniens for which accused 1 could not be held answerable.

As regard accused 2, it is clear from the evidence that at the time he handed the firearm to accused 1 it was for the purpose of arresting P.W 3. Although it may reasonably be said accused 2 was then acting in common purpose with accused 1, there was nothing positive he did to indicate that he associated himself with the action of accused 1 as regards the latter's attack on the deceased outside the house of P W 4. Indeed, as he had remained inside the house during the shooting accused 2 could not even see what accused 1 was doing outside.

In the light of all that has been said, it is clear that I take the view that accused 2 is entitled to an acquittal and he is accordingly found not guilty and discharged. I, however, convict accused 1 of attempted murder.

I must point out that although both my assessors agree with my decision as regards accused 1, they are of the opinion that accused 2 acted in common purpose with accused 1 and he should also be convicted of attempted murder. The decision to acquit accused 2 is, therefore, mine alone


B.K. MOLAI,
JUDGE

13th March, 1984.

For the Crown Miss Nku
For the Defence Mr. Kolisang.

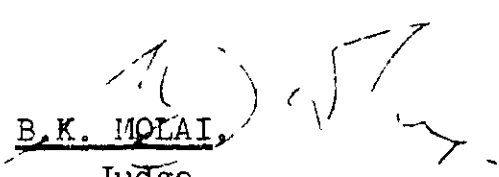
SENTENCE

The accused is the first offender. In mitigation, Mr. Kolisang, Counsel for the defence, addressed and invited the court to take into consideration a number of factors. We certainly take them into account in determining what sentence is appropriate for the accused in this case

However, there was evidence that the accused is a policeman. As such he is a law enforcing officer and entitled to possess a firearm which will assist him in the discharge of his duties but certainly not to harass or terrorise members of the public. We found nothing in the evidence to suggest that the deceased had committed any wrong that could have justified the accused to shoot him. All he did was to suggest to go and report at the charge office a brutal assault that the accused were perpetrating on P.W. 2. Was not that what any responsible citizen would be expected to do in the circumstances?

There was evidence that prior to his shooting of the deceased, the accused had been seen drinking liquor and smoking dagga. In a number of decisions, this court has pointed out that firearms are deadly weapons and warned that they should not be placed in the hands of irresponsible drunkards. The warnings seem to be passing unheeded with tragic results. It must, therefore, be brought home to the accused and people of his mind that the type of behaviour that has landed him before this court is unacceptable and the courts are determined to root it out

In the premises, we have come to the conclusion that, in the circumstances of this case, the appropriate sentence for the accused is 4 years imprisonment and he is accordingly sentenced.


B.K. MOLAI,
Judge

14th March, 1984.