

IN THE HIGH COURT OF LESOTHO

In the matter of .

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V

MAKARA AZAEL SEKAUTU

J U D G M E N T

Delivered by the Hon. Acting Judge J.L. Kheole
on the 29th day of May, 1984.

The accused, Makara Azael Sekautu is charged with the murder of Chabasemaketse Lebeoana (hereinafter called the deceased.) It is alleged that on or about the 1st May, 1983 and at or near Setleketseng in the district of Moseru, the accused did unlawfully and intentionally kill the deceased.

The accused pleaded not guilty.

At the commencement of this trial Mr. Maqutu, counsel for the defence, formally admitted that the accused shot the deceased with a revolver. By agreement the depositions at the preparatory examination of the following witnesses were admitted as evidence before this Court: P.W.5 Dr. Abdulla, P.W.8 Sgt. Thoahlane and P.W.9 Sgt. Mothokho.

Dr. Abdulla performed a post-mortem examination on

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the dead body of the deceased and found that death was due to severe injury to vital organs especially collection of blood in the pericardium; there was a $\frac{1}{2}$ cm. entry wound on the right upper chest with injury through the right lung passing through the heart and disappearing somewhere near the left lung. He found no exit wound.

D/Sgt. Thoahlane's evidence is that on the 2nd May, 1983 he found the dead body of the deceased at Setleketseng and examined it. He found that it had a wound above the right breast. The body was brought to Maseru mortuary and it sustained no further injuries on the way.

Sgt. Mothokho's evidence is that on the 1st May, 1983 the accused came to his office and gave him a gun, four bullets and one empty shell. After the accused had made an explanation the sergeant cautioned and charged him. At the trial the crown counsel reported that the gun, the four bullets and the empty shell were missing.

The events leading up to and surrounding the shooting of the deceased by the accused were testified to by two eye witnesses called on behalf of the Crown. P.W.1 'Mamolise Sello said that after she had collected the building materials she approached the accused and asked him to find for her a person or persons who would build her a house. She then entered into a written contract with the accused. The terms of the

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contract were that the accused would build the wall of the house and that on the completion of the wall she would pay the accused M300. The contract was signed by the contracting parties and some witnesses. The accused brought to the site of two men, namely; Papa alias Katiso and the deceased. He introduced them to her as the people who were going to do the actual building of the wall. The two men acted as brick-layers while Sanku mixed the concrete used in the building. The fourth man, Tsiu Manamela, was removing concrete from the bricks because they had previously been used in the building of the first wall which was found to be defective and had to be demolished.

'Mamolise further said that the accused did not personally take any part in the actual building of the wall. For that reason he was not entitled to any money, not even a cent of the M300. She alone provided breakfast and supper for the people who built her house. She did not know whose tools they were using but one of the wheelbarrows was hers. She heard for the first time when they were at the chief's place that the hammer that was used by Papa and the deceased belonged to the accused. It took the brick-layers only one week to finish building the wall of her house and they immediately asked her to pay them. As she did not have the money at that time due to the fact that her son who works in the Republic of South Africa failed to turn up for the weekend, she decided to go and borrow the money from the accused. She told the bricklayers that she would pay

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them in the presence of the accused. She eventually went to the accused and asked him to lend her the sum of M300. The accused promised to lend her the money. He told her that on the previous day Papa, the deceased and Sanku had attacked him with knives when they found him at Moramang's area. They were claiming that she had paid him (accused) and that he had run away without paying them and that he was hiding himself at Moramang's. The accused said that he would give her the money in the presence of the chief. They agreed that they would meet at the chief's place on the following day.

When they arrived at the chief's place there were about ten or more people before the chief. She took out the letter of contract and gave it to one 'Matselane Sello to read. After the reading of the contract the accused gave the money to her ('Mamolise). She, in turn gave it to 'Matselane so that she could count it. She then gave the money to the accused as payment for the building of the wall of her house in terms of their contract. The accused accepted the money and gave M170 to the builders, i.e. Papa, deceased and Sanku; he kept M130 for himself. The builders refused to take the money saying that it was not enough and that they wanted the whole amount of M300. The deceased asked the accused what work he had done in the building of the wall. The accused pointed out that he was the contractor and that they were his employees. Papa told the accused that he had done
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nothing in the building of the house. At this stage the builders left the chief's place but when they were some distance away 'Matselane Sello called them back. They returned.

On their arrival they insisted that they were entitled to the whole amount as accused had done nothing. The accused ordered them to give him his hammer. Papa told him that they had not stolen his hanner and that their property was still at his (accused's) place. 'Mamolise said that at this stage the accused rose from where he had been sitting and came forward and threw M130 on the ground. M170 was still lying on the ground. The accused was swearing at them in the Sesotho Language by calling their mothers' vaginas. The deceased bent down and started to pick up the money that was strewn on the ground. She suddenly heard the report of a gun and saw that the accused was holding a black thing. The deceased ran away and fell down when he came behind the house of one 'Miri. They all ran away. She later went to where the deceased had fallen and found 'Miri trying to help the deceased. He was bleeding through the nose and he died on the spot. She said that during the whole of this episode the accused, Papa, the deceased and Sanku appeared to be normal and spoke gently. They were at no stage in a fighting mood.

Under cross-examination 'Mamolise said that she picked up the money after the deceased had been shot and kept it till the police took it from her. She denied

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that at any stage during this episode Papa and the deceased drew their knives and attacked the accused. She denied that they threatened to kill him if he did not give them their money. She admitted that she did not know the terms of contract between the accused and Papa. She saw no knife where the deceased was lying.

The second Crown witness is 'Maabel Sofi Matete. She described how the shooting took place in the same terms as 'Mamolise has. She said that on the day preceeding the shooting the accused came to her accompanied by a man she did not know. He reported that the people who were working at 'Mamolise's house had attacked him when they found him at Moramang's area. He indicated that he had decided to come on the following day and pay them before her as the chieftainess of the village. The deceased and his brother, Papa were not armed with any knives when they appeared before her. They were not angry. The accused appeared to be normal and did not show any anger during the proceedings before her.

Under cross-examination she conceded that the accused, Papa, the deceased and Sanku were angry and were shouting at each other. She denied that the deceased and Papa produced any knives with which they attacked the accused.

The accused gave a sworn statement in which he said that after he had entered into a contract with 'Mamolise Sello he employed Tsiu Manamela and Nyefolo to build the wall. That wall was later found to be

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faulty and had to be demolished. He then employed Papa and Tsiu Manamela to build the new wall. The deceased and Sanku were not his employees but were invited by Papa to assist him. At one time he even objected to their presence at the site but Papa asked him not to worry about them as they were his (Papa's) employees. After the completion of the wall he demanded M300 from 'Memolise in terms of their agreement. She told him that her son would come home on the 30th April, 1983 and that the money would be available on that day. He accordingly informed Papa to come on the 30th April and get his pay. He had promised to pay him M170. On the 30th April, 1983 'Mamolise came to his place at 7.00 a.m. and informed him that her son had not come home for the weekend and that she did not have the money. They agreed that they would meet in the afternoon and make some arrangements about paying the employees.

They parted. He went to Ha Moremang, a distance of about 30 miles from his home where he was doing some ploughing with his tractor. While he was there Papa, the deceased and Sanku came to him and they accused him of having run away from Setleketseng without paying them and yet 'Mamolise had told them that she had paid him M300. One of them attacked him with a knife, he ran away and locked himself into Makhobalo's cafe. Makhobalo expelled them from his cafe. They went to his tractor and waited for him there. He decided to leave the tractor there and went home on foot. When he was at Tlali's he noticed that Papa and his companions were

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following him. They were running. He sought refuge from a stranger he met there. The strange man remonstrated with Papa and his companions and warned them not to attack him. They heeded the warning because they apparently feared him. The stranger accompanied him till they came to the chieftainess who immediately called 'Mamolise. He suggested to lend her the money so that these people could be paid.

The accused said that after the contract had been read and money given to him by 'Mamolise, he gave M170 to Papa. He kept M130 for himself because he still had to pay Tsiu Manamela and Nyefolo; he also had to pay for the five pockets of cement he bought when the first wall was demolished. Papa threw the money (M170) on the ground. He started to insult him saying that he had cheated them. Papa called the deceased and Sanku. They all left threatening that they would kill him. They were called back by P.W.2 'Maabel Matete, not by 'Matselane as the two Crown witnesses alleged.

The accused's version of how the shooting took place differs from that of the Crown witnesses. He said that these men were very aggressive when they came back. They were insulting him. They suddenly drew their knives saying that he should take all the money but they would kill him. He threw M130 on the ground. He asked the chieftainess to take all the money and keep it so that they could resort to legal action in the Courts of law. Papa said that no person would take the money. During the commotion the chieftainess and her people ran away.

/Papa

Papa came to him ready to stab him with his knife. He (accused) pulled out his revolver. He and Papa were facing each other. He suddenly turned and looked in the direction of where the money was lying on the ground. He fired one shot in that direction. He said that he would not have fired at the deceased if he saw him take the money. The deceased ran away and fell down behind 'Miri's house. He (deceased) was still holding the money and his knife when he fell down. His death was accidental.

Under cross-examination the accused said that he went to the chief's place armed with a revolver because he was carrying a lot of money. He used the revolver because he was being robbed of his money. The money was being taken by the person he did not want. The money was falling into the wrong hands. The chieftainess hated him because he had paid all the burial expenses of her late husband but her people did not like that, 'Mamolise started hating him when he started building her house.

D.W.1 Manamela Tsiu described how the shooting took place in terms similar to those of the accused. He said that the deceased was on the side of the accused about 4 paces away when accused suddenly looked in that direction and fired a shot. He said the accused did not see the deceased but was unable to explain how and why he could not have seen the deceased when he turned and looked in that direction before he fired his revolver.

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There is no doubt in my mind that the Crown witnesses were not telling the truth when they said that the accused, Papa and his companions were very peaceful and spoke to each other in a normal manner when they were before the chieftainess. 'Maabel Matete conceded under cross-examination that these people shouted at each other because they were very angry. Mr. Maqutu submitted that their evidence is worthless because they lied about the circumstances leading to the shooting. He asked the Court to reject their evidence in toto. He referred me to the case of Harebatho Lehloenya v. Rex 1980(1) LL.R. 30, in which it was held that "where there is a great conflict between the Crown's version of the events that took place on the one hand and that of the defence on the other hand and there is no finding whatever on credibility adverse to the appellants by the Court a quo, then the Appellate Court is at large to form its own view of the defence evidence." This was a case in which the trial Court made no finding on credibility adverse to the appellants, that is to say, they were not found to be untruthful witnesses. But this case is not authority for the proposition that if a witness is found to have been lying on one point that would per se destroy her credibility in toto. The unreliability and illogicality of the maxim falsum in uno falsum in omnibus was pointed out in Rex v Gumede, 1949(3) S.A. 749 (A.D.) at p. 756. But the point which causes me some concern is that 'Mamolise Sello (P.W.1) honestly believed that the accused was cheating the people who

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had built her house by paying them only M170 out of M300. She said in no uncertain terms that the accused was not entitled to anything, not even a cent of M300 because he had not done any work. I tend to believe the suggestion made to her that she encouraged or incited the employees of the accused to revolt against their master. I have come to the conclusion that there is a possible bias in her evidence against the accused. Her evidence shall be relied upon only on those points where it is corroborated by some other evidence.

The evidence of P.W.2 'Maabel Matete is approached from an entirely different angle. She is the chieftainess of the village. She was not involved in any way in the building of 'Mamolise's house. The matter was first reported to her by the accused after he was attacked by Papa and his companions. Her version of how the shooting took place is that the accused rose and came forward near where the M170 was lying. He threw M130 on the ground and said "Take it, your mothers' vaginas." The deceased came forward and started to pick up the money. The accused turned round his blanket and shot him. She categorically denied that Papa and his two companions had drawn their knives and were on the verge of attacking the accused. Although she had initially lied that the people were all peaceful she later conceded that they were angry and speaking loudly. I formed the opinion that she was a truthful witness.

In his defence the accused said that chieftainess

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'Maabel hated him because when her late husband died he (accused) paid for all the burial expenses. I find it very unreasonable and illogical that the chieftainess would hate a person who rendered valuable assistance to her during her distress. This point was not even put to 'Maabel in cross-examination because it was obviously an afterthought on the part of the accused. I see no reason why the defence counsel would not have canvassed this very important point to show the witness that she was fabricating evidence against the accused because there was this hatred of long standing between them. I come to the conclusion that the accused was lying on this point.

The accused said that 'Mamolise (P.W.1) started hating him when he started to build her house. This is completely untrue. Up to the time when she came to him and reported that her son had not come home for the weekend their relations were very cordial. That was the reason why he suggested to her that they should again meet in the afternoon in order to make some arrangements about paying the employees. At this stage they had not crossed swords. According to the evidence the trouble started when the employees attacked the accused at Moramang's. They told the accused that 'Mamolise had informed them that she had given him M300. The accused was not telling the truth that 'Mamolise began to hate him when he started to build her house.

I have earlier in this judgment given the version of the accused how the shooting took place. He said the

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shooting of the deceased was an accident because he would not have shot him if he saw him take the money. It is altogether not true that he did not see the deceased. There is evidence by the defence that the deceased was on the left side of the accused about 4 paces away from him. He was picking up the money that was strewn on the ground by the accused. As he was picking up the money the accused suddenly turned and looked in that direction. He fired a shot which hit the deceased on the chest. How can the accused be heard to say that he did not see the man who was so close to him. In any case, if the accused blindly fired a shot in that direction he was reckless. He knew that there were people around him; even after the chieftainess and her people had run away he knew that the deceased, Sanku and Papa were still present. But the Crown evidence, which I have believed, is that the people scattered and fled when the shot was fired. In the case of S. v. Sigwahla, 1967(4) S.A. 566 (A.D.) at p. 570, the Appellate Division held the following:

- "1. The expression 'intention to kill' does not, in our law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if he subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as dolus eventualis, as distinct from dolus directus.
2. The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone

on in the mind of a bonus paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The factum probandum is dolus, not culpa. These two different concepts never coincide.

3. Subjective foresight, like any factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so."

In the present case the accused did not only know that there were many people around him but he turned and looked at the deceased before he shot him. To my mind this is not a case of dolus eventualis but that of dolus directus. I entirely reject his story that he did not see the deceased.

Under cross-examination the accused changed his version of why he shot the deceased. He said he shot him because his money was falling into the wrong hands. He also said he was being robbed of his money. In other words, he abandoned accidental shooting. Mr. Maqutu referred me to South African Criminal Law and Procedure, Vol. 1 by Burchell and Hunt at page 281, where the learned authors rely on the case of S. v. Van Wyk, 1967(1) S.A. 488 in which it was held that depending on the circumstances, it is permissible to kill or injure another by way of self-defence in the defence of property. The onus rests upon the State to rebut that form of self-defence also. The decision in that case turned

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upon its special facts. In the case now under consideration there are no special facts. The accused threw the money (M130) on the ground and invited the deceased and Papa to take it. When the deceased tried to pick up the money he shot him. The question which arises is, if the accused intended that the money should be given to the chieftainess while they took their dispute to the Courts of law, why did he not give the money (M130) to the chieftainess? If this were true he would have given M130 to the chieftainess. He would then have picked up M170 and handed it over to the chieftainess. He did not do that but threw the money on the ground as a bait. He then invited them to take it so that he could shoot them with a revolver. There are no special facts in this case because these people were well known to the accused. They were taking the money in the presence of the chieftainess and many other witnesses. The taking of the money amounted to nothing other than overpayment of one's employees. The accused had other remedies by which he could recover his money but he chose to kill a fellow human being for M130. Even if the accused was under the impression that he was justified to resort to violence to protect his property, he grossly exceeded the legitimate bounds of private defence.

The other point raised by Mr. Maqutu was that of provocation. He referred me to Criminal Law (Homicide Amendment) Proclamation 42 of 1959. He submitted that provocation reduces the killing which would normally be

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murder to culpable homicide. This depends on the nature and gravity of the provocation, whether the accused was so extremely provoked that he was incapable to form the specific intent required in murder. In Rex v. 'Makhethang Setai 1980(2) LL.R. 359 at 378, Cotran, C.J. said:

"The law, at any rate since R. v. Krull 1959(3) S.A. 392, seems to be clear, viz, that provocation does not reduce an intentional killing to culpable homicide. Upon a charge of murder where there is evidence of provocation only one inquiry need be made, viz. did the accused subjectively intend to kill? If the answer is in the affirmative it will be murder, possibly with extenuating circumstances. If the intention to kill was negatived by the provocation, it may be culpable homicide."

The learned Chief Justice did not specifically refer to Proclamation No. 42 of 1959 but in R. v. Buthelezi, 1925 A.D. 160 it was held that section 141 of the Transkeian Penal Code-Act No. 24 of 1886 (C) (Which is similar to our section 3 of Proclamation 42 of 1959) correctly expressed the common law of South Africa. I shall assume that in 'Makhethang Setai's case (supra) the learned Chief Justice had in mind not only our Proclamation but the case of Rex v. Lebohang Nathane 1974-1975 LL.R. 64 at p. 69 where referring to Krull's case the late Mpetla, C.J. said:

"As the learned Judge of Appeal pointed out later in his judgment, the language of the Transkeian Penal Code was not, unlike that of our Proclamation in our case, binding on the Courts in its ipsissima verba. In the present case one is dealing with a statutory provision and the question then is one of interpretation of the meaning of this provision. In construing this provision I can find no justification

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for drawing any distinction between the loss of the power of self-control and inducement to commit an assault on the one hand and the inability to form an intention to kill on the other. The use of the expression "means and includes" in the definition suggests that it was not the intention to exclude the common law concept of provocation."
(My underlining).

I entirely agree. There is no doubt that on the previous day the deceased and his companions wrongfully attacked the accused. But on the 1st May, 1983 when they were before the chief they did not attack him with knives as he alleges. They merely demanded what they regarded as due to them. There is no doubt in my mind that they were very angry and disgusted. They had shown their dissatisfaction throughout the proceedings before the chief. In my view, they did not do any act which amounted to sudden provocation entitling the accused to shoot the deceased. According to the accused he was defending his property which was about to fall into wrong hands. He did not raise the defence of provocation because the deceased did not commit an act which can be described as sudden provocation. That the accused was angry when the people he rightly regarded as his employees challenged his authority is a fact which cannot be ignored. But the accused was well aware of their attitude long before they came before the chief. I am of the opinion that there was no provocation.

I have approached this case on the basic that the accused had entered into a contract with Papa in which he promised to pay him M170; that the deceased had not been employed by the accused. Nevertheless, the accused

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was informed by Papa that he should not worry about the deceased and Sanku as they were his (Papa's) employees. The accused agreed to this arrangement. For that reason they had an interest in the matter and re just .fic to back up Papa in his demand. I do not mean that Papa was entitled to the whole amount but M170 was rather insufficient as he had to employ his own supporting staff.

Lastly, I would like to say a few words about D.W.1 Manamela Tsiu. He struck me as being an unreliable witness who, because of his dependance on the accused he was not prepared to say anything that would displease his master. For instance, he said the accused turned and looked in the direction of the deceased who was about four paces from him and fired a shot. On the same breath he said the accused did not see the deceased. Why does he say the accused did not see the man who was so close to him? He was unable to give any reason. His intelligence appears to me to be a matter of concern. He said the accused had promised to pay him M350 for his part in the building of the house of P.W.1. This is untrue and every person with some common sense can see that the accused could never promise him more than what was going to be paid to him. But this witness was not in a position to see that what he said was absurd.

For the reasons I have attempted to summarise above I formed the opinion that the Crown had proved its

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case beyond a reasonable doubt. The accused is found guilty of murder. My assessors agree.

SENTENCE.

Extenuating circumstances are apparent from the text of this judgment and I need say no more about the subject. The accused is sentenced to nine (9) years' imprisonment.

G. H. M. M. M.
ACTING JUDGE

29th May, 1984.

For the Crown : Miss Nku

For the Accused : Mr. Maqutu.