

IN THE HIGH COURT OF LESOTHO

In the matter of:

REX

v

SAMPUTI TSUMANE

J U D G M E N T

Delivered by the Honourable Acting Judge, Mr. Justice M.L. Lehohla,  
on the 15th day of August, 1986.

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This is a judgment to be read in conjunction with the ruling I made on 6th August, 1986. The ruling is attached.

The accused is charged with the murder of one Malefetsane Nkhekhe. The killing is alleged to have occurred on 22nd August, 1985.

P.W.1 Sebatli Nkhekhe gave sworn testimony in which he said he is the son of the deceased. On 21st August, 1986, he had penned up his father's (deceased's) cattle in a kraal next to the latter's household. At around dawn on 22nd August, 1985, P.W.1 was awakened by his father, the deceased, who informed him that not one of the cattle which P.W.1 had penned up on the evening of 21st August was in the kraal. The witness maintained that prior to this occasion there had never been any history of these cattle either bolting out or breaking out of the kraal. He and deceased went looking for them and finally traced them to accused's place where they were penned in a kraal fenced in by barbed wire. Accused's house is also in this

fence.

When the two approached accused's house, accused also appeared from inside his house. Another matter worth noting is that on receiving the report that cattle were missing from the Kraal, P.W.1 did not bother going to check at the kraal to see what clues he could gather as possible means through which the cattle effected their escape from the kraal.

D On coming to accused's place the two saw their cattle in accused's kraal, actually mingling among them and constantly being disturbed by a bull which was tugging a heifer which was on heat.

P.W.1 was about 15 paces away from accused and deceased when the latter were engaged in a low-pitched conversation which he did not hear or follow but at the end of which his father commanded him to "strike out the cattle and let's drive them home". To all intents and purposes in this witness's view the conversation had been friendly and the command he received from his father was its coping stone. In P.W.1's words "they seemed to have clinched the matter amicably."

D A sudden turn of events occurred even as the witness was beginning to enforce his father's command. As he was driving the cattle out and chasing after the bull, whose natural instincts dictated against separation from accused's heifer which was on heat, P.W.1 heard a gun report. In response to that he saw his father fallen about seven paces from where the accused was standing.

Under cross examination by Mr. Sooknanan for the defence, P.W.1 was adamant that the discussion between accused and deceased was friendly. He insisted that after the friendly conversation between deceased and accused, he saw accused go to his house and come back with a gun and shoot the deceased. P.W.1 denied that he or his father had put their cattle to graze on accused's land on purpose.

To the question "You did that (let your stock to destroy accused's crops) a number of occasions .....?" P.W.1 replied "He (accused) has been implicating me thus always. He even took me before the chief and threatened to kill my father."

P.W.1 admitted that at the Preparatory Examination he was properly recorded as having said "when I heard the first gun report, I ran away" but he qualified this by saying he also saw his father fall immediately after that gun report.

Defence counsel tried to bring to P.W.1's attention the fact that as he was pre-occupied with carrying out his father's instruction to drive out the cattle he could not have seen what had preceded the gun report nor heard what had been said between accused and deceased. However, P.W.1 insisted that nothing untoward had been said or done between those two.

P.W.1 was hard put to it to give a satisfactory

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explanation how he could be telling the truth by saying his father, immediately prior to the gun report which detracted his (P.W.1's) attention from the cattle to the place of encounter between deceased and accused, had done nothing.

P.W.1 denied that he and deceased attacked accused with sticks and stones.

A new complexion to the incident was <sup>given</sup> / by P.W.2 Mamockande Tsumane who is accused's daughter-in-law. She testified that in the early hours of 22-8-85 accused came and knocked at her door demanding a key to a house which is not in regular use. She complied. Accused left. P.W.2 immediately thereafter she heard accused say that he required a rope for tying cattle as he had seized some<sup>cattle</sup>?. She went to the well to draw water a little while later. On coming back she heard accused say to deceased "leave the cattle alone and go to the chief to report and come back with the chief's messengers so that you can have the cattle." In reply to that heard deceased say

"These cattle will come out of the kraal or else someone will die." "Strike those cattle and let's drive them out."

She saw accused moving towards his house. She also saw a stick being thrown towards him. Immediately thereafter she saw accused and deceased face each other in a close encounter. A gun report followed. In close succession to that gun report, two others followed and she saw deceased fall.

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She had earlier heard accused say "leave those cattle for I have impounded them already." She said she did not see accused being cornered at the fence nor did she see or hear stones being thrown at him.

P.W.3 Chieftainess 'Maseoehla Matsoete testified that all the participants mentioned above are her subjects. She knew of bad blood between accused and deceased. Accused had previously been complaining to her about cattle which destroy his crops at night in the fields, yet he was not able to find those responsible for letting their cattle graze on his land.

She at one time mounted an investigation which led her to believe that deceased and his boys often grazed their stock on accused's field at night.

She further testified that P.W.1 on the morning after P.W.1's father had died, her investigations had revealed that his father's cattle usually and on that day had grazed on accused's land, and that on the night in question his father had told him that the cattle were missing and he could not find them on accused's land where he knew them to be because by then accused had driven them away and had impounded them in his kraal.

The Preparatory Examination record to which she was referred shows that P.W.2 heard the words uttered by accused in the following form "Do not throw the stick at me man." Under cross examination P.W.2 admitted that these

words conveyed to her that someone was being attacked.

Camping on the trail of that is the following text:-

"You didn't see with what he was being attacked  
.....? No, I couldn't see with what because  
it was dark.

You saw a stick being raised .....? I took it  
it a stick was thrown at him because with aid  
of morning light we saw that stick lying there.

What words relating to the stick that you didn't  
see were uttered by the accused .....? How  
come you throw the stick at me."

P.W.2 said she could not deny accused's contention  
that stones were being thrown at him. Her reason is that  
she could not see any such stones as it was dark nor could  
she hear their thuds as they drop on the ground or sounds  
as they struck against objects lying on the ground. But  
she was adamant that accused fired into the air twice with  
his gun and it was when the stick was being thrown at him  
that she heard a third gun report consequent upon which  
deceased fell down and remained slumped on the ground.  
She was unable to say whether/was <sup>accused</sup> firing at random. From  
her narration of the firing incident it was common cause  
that the firing was effected at rapid succession and very,  
very short intervals. As rendered by this witness, it appears  
that the duration of the firing of the three shots lent  
itself to the description: Before you could say Jack Robinson.

P.W. 4 Detective Sergeant Sekhibane corroborated  
the evidence already elicited by Defence Counsel from P.W.2

and P.W.3 that accused said he was attacked by deceased.

The application for the discharge of the accused at the close of Crown case was based on the ground that accused was defending himself when the shooting occurred. He was under attack as the evidence revealed.

The Court found it significant that the story relating to the right of private defence came from Crown witnesses. According to law the duty of the Crown where a right of private defence is raised, is to negative such evidence. It can only negative it if it comes from the defence side. In this case the opposite has occurred. Crown witnesses showed existence of private defence. Where such is the case the Court cannot ignore evidence possibly showing existence of private defence.

It appears to me that P.W.1 as was rightly pointed out by Learned Counsel for Defence that he had problems. Deceased was his father. He and his father were involved in this reprehensible and irresponsible exercise of letting their stock graze on accused's land at night. He spoke of one gun shot that was fired consequent upon which his father fell and died, followed by one more fire shot the purpose of which he was at pains to explain. P.W.2 heard three gun reports. P.W.4 found two spent shells in the vicinity. The ground had been disturbed already. While P.W.1 deserves some sympathy for the stance he adopted of a hen with one chicken as demonstrated by his reference to the fact that his father used to beg for fodder from

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the accused and was each time obliged with same, in an attempt to show absence of bad blood between the two and also give credence to his testimony that the discussion prior to the fatal shooting was amicable he was in a cleft stick to explain how it could lie in his own mouth to deny knowledge of bad blood between them in the face of his own evidence that accused had threatened to kill his father over a dog which had worried the accused.

Contrasted and compared with P.W.4's testimony which was given freely and convincingly without any attempt to favour either side, (the same applies for P.W.2's), P.W.1's reticence and evasiveness on the issue of bad blood between accused and deceased plainly account for the milk in the coconut; namely that he himself was a party to letting cattle graze on accused's land and destroy his crops. He cannot be truthful in his story that the discussion between accused and deceased was friendly on that fateful day. His story that accused had no right to impound the cattle in his own kraal is demolished by the Chieftainess's story that as the communal pound had been out of use due to delapidation and consequent insecurity, accused's kraal was regarded and known by all her subjects as the lawful pound. The fact that he and his father set out for accused's place to retrieve the cattle on the ground that the latter had wrongly penned them there instead of at the communal pound is frowned upon. If anything, it indicates that inspired by this feeling that the cattle were wrongly penned his father and he were bent on taking the cattle out by force. It also accounts for the fact that deceased ignored accused's

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word in season; that he go to the chief's place where he would be given messengers who would in turn come and have the dispute resolved. There is no onus on the accused to prove self-defence. Rex vs. THEKO KUMI CRI/T/7/81 by EVANS J. (unreported) at Page 4.

Consequently there doesn't seem to be any need to put the accused under the necessity to answer. The Crown has established existence of private defence. The Court cannot ignore that. Mr. Seholoholo for the Crown very properly concedes.

Accused is acquitted and discharged. My assessors agree.

M.L. LEHOHLA  
A C T I N G   J U D G E

18.8.86.

For the Crown : Mr. Seholoholo

For Defence : Mr. Sooknanan