

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

MICHAEL MPOBOLE

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molei  
On the 11th day of August, 1988.

The accused is before me on a charge of murdering one Tankiso Tanka, it being alleged that on or about 11th January, 1985 and at or near Ha Tsosane in the district of Maseru he unlawfully and intentionally killed the deceased. He has pleaded not guilty to the charge.

It may be mentioned from the word go that at the commencement of this trial Mr. Khaobe, who represents the accused in this matter, informed the court that the depositions of Dr. Khalil Anwary, Mofosi Tanka, D/Tpr Nolutshungu and Tpr. Chedane who were, respectively, P.W.1, P.W.4, P.W.5 and P.W.6 at the proceedings of Preparatory Examination were admitted by the defence. Miss Nku, counsel for the crown accepted the admissions

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made by the defence counsel and the depositions of Dr. Khalil Anwary, Mofosi Tanku, D/Tpr. Noluntshungu and Tpr. Cheoane became evidence in terms of the provisions of S. 273 of the Criminal Procedure and Evidence Act, 1981. It was unnecessary, therefore, to call the deponents as witnesses in this trial.

It is also worth mentioning that after the crown had closed its case the defence applied for the discharge of the accused on the ground that no prima facie case had been established for the accused to answer. The application was opposed by the crown in whose contention there was a prima facie case established by the evidence and the accused could not, therefore, be discharged at that juncture.

There was evidence that on the night in question the accused came to the home of the deceased, pulled him outside the house telling him that they should have a talk. Subsequently the deceased was found to have been fatally stabbed. Without going into the question of credibility there was, in my opinion a prima facie case that the accused was the person who had inflicted the fatal stab wound on the deceased. That being so, the application for the discharge of the accused was refused.

As they were perfectly entitled to do, the defence told the court that in that event they were closing their case. The court is now bound to consider

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the only available evidence adduced by the crown, and deal with the question of credibility to determine whether or not it has been established beyond a reasonable doubt that the accused has committed the offence against which he stands charged.

In as far as it is relevant, the evidence before the court is that on the night of 11th November, 1985 D/Tpr Noluntshungu received a certain report as a result of which he proceeded to the casualty department of Queen Elizabeth II hospital in Maseru where he found the dead body of the deceased. On examining it for injuries the police officer found that the body had a single stab wound on the chest. The deceased's body was thereafter carried to the mortuary. He then conveyed the deceased's wife and a certain Peter Khahlala to their home at Ha Tsosane. He was in the company of another police officer, Tpr. Cheoane. The two police officer then looked for the accused but could not find him. They returned to their police station from where they knocked off duty and went to their respective homes.

On the following day D/Tpr. Noluntshungu met Tpr. Cheoane who handed to him the accused together with a knife which was handed in as exhibit "1" at the Preparatory Examination proceedings. The evidence of Tpr. Cheoane was that after he had been to Ha Tsosane he continued with the investigations during the course of which he found and arrested the accused. After making a certain explanation the accused

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over to him the knife - exhibit "1". Tpr. Cheoane cautioned and charged the accused with the murder of the deceased. He then brought the accused together with the knife, exhibit "1" to the police station where he apparently handed him to the D/Tpr. Noluntshugu.

According to Dr. Khalil Anwary, he was the medical doctor who, on 21st January, 1985, performed an autopsy on the dead body of a male African adult. The body was identified to him as that of the deceased, Tankiso Tanka, by Mofosi Tanka and Moeketsi Matobako. This was confirmed by Mofosi Tanka who testified as P.W.4 at the proceedings of Preparatory Examination and told the court that the deceased was his own son.

The findings of the medical doctor were that the deceased had a single stab wound on the right side of the chest. The stab wound had penetrated through the 3rd and 2nd intercostal space into the heart atrium and the upper lobe of the lung resulting in the death of the deceased.

I can think of no good reason why the evidence of the medical doctor that the deceased had died as a result of the stab wound inflicted on the right side of his chest should be doubted. The important question for the determination of the court is therefore whether or not the accused is the person who stabbed the deceased and brought about his death.

In this regard the court heard the evidence of P.W.1, 'Masentle Metsape who testified that the deceased was married to her elder sister. He was, therefore, her brother-in-law. On 11th January, 1985 she was staying with her elder sister at the home of the deceased at Sebaboleng, alias, Ha Tsosane. On the evening of the day in question her elder sister sent her to a shop where she found the accused who offered to buy her some beer. She declined the offer telling the accused that she did not drink beer. After the accused had insisted on buying her the beer P.W.1 decided to return home by a different route for fear that he might follow her.

Shortly after P.W.1 had returned home, the deceased arrived from his place of work, in the mines of the Republic of South Africa. He was in the company of Peter Khahlala. They had brought with them cans of beer which were placed on the table. P.W.1 was sent to the butchery to buy some meat. On her return home she found the deceased in the company of his wife, Peter Khahlala and one Mafefoane.

The deceased's wife was cooking the meat while P.W.1 was washing dishes when the accused suddenly pushed the door open, entered into the house without even knocking at the door and sat in a chair. Asked by the deceased what he wanted the accused gave no reply. When the deceased asked him for the second time

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what it was that he wanted in the house the accused merely nodded his head in the direction of P.W.1.

The deceased then got up from his chair, went to the accused and hit him a blow with an open hand. However, Peter intervened and separated the two men. According to her, P.W.1 recognised the accused as the person who had been insisting to buy her beer at the shop. She explained that to the people who were in the house. The deceased then wanted to beat up the accused saying he did not understand what it was that he (accused) wanted from a girl as young as P.W.1. Again, Peter intervened and accompanied the accused out of the house. Shortly thereafter Peter returned into the house and collected accused's hat which had dropped on the floor at the time he was hit by the deceased with an open hand. He took the hat outside and then returned into the house.

The deceased then demanded a full explanation as to who the accused was and what business he had at the house. P.W.1 was again explaining what had happened between her and the accused at the shop, earlier in the evening, when the latter suddenly kicked the door open and entered into the house. He went straight to the deceased, caught hold of, and pulled, him towards the door saying : "come with me for a talk."

When Peter rushed to the two men, presumably to intervene by separating them, P.W.1 immediately went into another room in the house to get a sjambok which she

intended handing over to the deceased so that he could defend himself from the accused. On her return from the room P.W.1 found that the accused, the deceased and Peter were already outside the house

P.W.1 followed them outside where she noticed one Nonki and three other strange people who were, however, outside the fence. She handed the sjambok to the deceased who was just standing on the stoep next to the door. The deceased took the sjambok but could not use it. He just remained standing with it where he was next to the door. When the accused tried to rush at the deceased, Peter kicked him. The accused then tried to stab Peter with a knife but P.W.1 caught hold of him and grabbed the knife in an attempt to disarm him. The knife cut her in the hand and she had to let go of it. Peter then kicked the accused who fell next to the fence. When he got up the accused ran away.

Although the deceased denied that he had been stabbed, in the course of the scuffle when his shirt was unbuttoned blood splashed out from his chest. P.W.1 immediately went to look for a vehicle with which the deceased was rushed to Queen Elizabeth II hospital in Maseru. She herself did not accompany the deceased to the hospital. Peter and the deceased's wife did. On their return from the hospital on the same night P.W.1 learned that the deceased had passed away.

B/ P.W.2, .....

P.W.2, Nonki Tsosane, gave evidence to the effect that on the night of 11th January, 1985 he was drinking at a beer house commonly called "village gate" at Ha Tsosane when the accused requested him to accompany him to P.W.1's house. According to him the accused was to collect his eye glasses from P.W.1's house. On their arrival at P.W.1's place P.W.2 waited outside whilst the accused entered into the house leaving the door open behind him. P.W.2 could see the accused standing in the house which was, however, poorly illuminated with a candle light.

Shortly after the accused had entered into the house P.W.2 noticed the deceased pushing him out. They were immediately followed out by another man who was armed with a sjambok. Whilst the deceased and the accused were boxing each other on the forecourt of the house the man who had come out armed with a sjambok kicked the accused. P.W.2 intervened by telling the accused to leave the place and the latter obliged. He confirmed the evidence of P.W.1 that the deceased was subsequently found to have been stabbed on the chest and rushed to the hospital in a vehicle. On the following morning P.W.2 learned that the deceased had passed away.

It will be observed that there are some discrepancies in the evidence of P.W.1 and P.W.2. While P.W.1 said the accused had pulled the deceased out of the house P.W.2 said it was the deceased who pushed  
9/ the accused .....



the accused out of the house. P.W.2 himself told the court that he came to P.W.1's house from a beer drinking house. He was naturally under the influence of intoxication. In his own words P.W.2 told the court that the house from which the accused and the deceased came out was poorly illuminated with a candle light. Naturally he could not clearly see what was happening. I am not prepared therefore to accept his story unless it can be corroborated by a more reliable witness. I am inclined to accept as the truth the evidence of P.W.1, the person who was actually inside the house and not under the influence of intoxicating drinks at the time of the incident.

Again while P.W.1 told the court that she was the one who went into one of the rooms in the house and brought a sjambok which she handed to the deceased outside the house, P.W.2 said the sjambok was brought outside the house by a third man, presumably Peter, who followed the accused and the deceased out of the house. If it were true that the sjambok was brought out not by P.W.1 but by Peter who, according to P.W.2, even kicked the accused, it seems to me that Peter would not have only kicked the accused, but would have also whipped him with the sjambok. In my view it is sensible to accept as the truth P.W.1's evidence that she was the person who took the sjambok to the deceased outside the house and reject as false P.W.2's version that Peter came out of the house armed with the sjambok.

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Be that as it may, there can be no doubt that considering the evidence in its totality the deceased, who was in the course of the scuffle outside the house, was stabbed by the accused with the knife which he later handed to Tpr. Cheane - EXH"1" at the proceedings of preparatory examination. The question I had earlier posted viz. whether or not the accused was the person who had fatally stabbed the deceased must therefore be answered in the affirmative. The salient point is however under what circumstances did the accused stab the deceased. It seems to me the person who would have enlightened the court in this regard was Peter Kahlala. He was, however, not called as a witness in this trial.

It may perhaps be mentioned at this stage that the manner in which the office of the Director of Public Prosecutions handled this trial was most dissatisfactory. After the evidence of the two crown witnesses had been adduced the crown wanted the deposition of Peter Kahlala at the proceedings of the preparatory examination to be accepted as evidence in this trial on the ground that he could not be traced after a diligent search. However, the widow of the deceased who had not testified at the proceedings of the preparatory examination and was, therefore, sitting in the Court room pointed out that it was not true that Peter could not be traced. She said she could take the police to the actual house in which Peter lived at Wolkom - the Republic of South Africa. Miss Nku who initially prosecuted this case then became ill and the case had to be handled by several other

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crown counsels who were either absent in court when the case was to continue or reluctant to proceed even when Peter was in attendance from his place of work in the Republic of South Africa.

Finally the crown case was closed without the evidence of Peter Khahlala. As it has been stated earlier Peter was a material witness who could have enlightened the court on how the deceased was fatally stabbed by the accused. In the absence of such evidence the possibility that the accused could have fatally stabbed the deceased in self-defence cannot be totally excluded. That being so, a court of law properly advising itself must have a doubt on this point, the benefit of which doubt is always given to the accused person, in our law.

There is also evidence that following his fatal injury the deceased was still alive when he was rushed to the hospital. The people who accompanied him viz. Peter and deceased's wife have not testified in this trial. We do not therefore, know whether or not on his arrival at the hospital the deceased was still alive and what treatment (if any) was administered to him. The possibility that he was given treatment which could have precipitated his death cannot, therefore, be excluded. In the result I come to the conclusion that it is impossible to find the accused guilty of murder or culpable homicide.

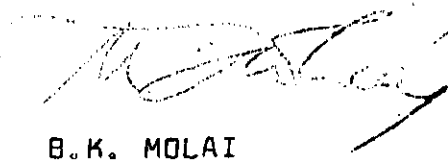
There is however, evidence which I accept,

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namely, that when he came to P.W.1's house on the second occasion the accused went straight to the deceased, caught hold of, and pulled him outside saying he should come with him for a talk. By so doing the accused was in my view, assaulting the deceased. I am unable to find any justification for that assault, particularly so because on an earlier occasion the deceased had clearly demonstrated to the accused that he was unwanted in the house.

In the circumstances I have no alternative but to come to the conclusion that the accused is guilty of assault common. He is accordingly convicted.

My assessor agrees with this finding.



B.K. MOLAI

JUDGE

11th August, 1988.

For the Crown : Mr. Thetsane

For the Defence : Mr. Khauee.

CRI/T/24/85

SENTENCE

Coming now to the question of sentence I take into account the fact that the crown counsel has informed the court that the accused has no previous conviction. He is, therefore, a first offender.

I also take into account all the facts which were raised in mitigation by the defence counsel, especially the fact that the accused is a married man and has a wife and four minor children who are his dependants. There is no evidence that accused's dependants are not law abiding citizens of this country. They do not, therefore, deserve punishment by the Court. However, in punishing the accused it is unfortunately his innocent dependants who will suffer most.

I also take into account that before he assaulted the deceased in the manner described in the course of my judgment the accused had been assaulted by the deceased. That was no doubt provocation on the part of the deceased. Provocation is, however, not a defence, in our law. If the deceased thought the accused was wrong in coming to his house uninvited and refusing to answer questions he should have sued him before a court of law rather than take the law into his own hands by hitting him with an open hand.

By the same token if he thought the deceased had wronged him by assaulting him, as he did, the accused

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should have taken him before a court of law rather than take the law into his own hands by returning to deceased's house and violently pulling him out in the manner he did.

Although he was charged with murder the accused is convicted of assault common which is a lesser offence than murder, culpable homicide or, for that matter, assault with intent to do grievous bodily harm. Appropriate sentence in the circumstances of this case is, in my opinion, that the accused should pay a fine of M90 or in default of payment thereof, serve a term of 9 months' imprisonment.

I accordingly sentence him.



B.K. MOLAI

JUDGE.

11th August, 1988.

For the Crown : Mr. Thetsane

For the Defence: Mr. Khaue.