

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

SEHLABAKA MATASANE

Accused

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 11th day of April, 1989.

The accused is charged with the murder of Michael Maqebo on the 3rd March 1986 at Semonkong in the district of Maseru. He pleaded not guilty.

After the plea was taken Mr. Maqutu, counsel for defence, admitted the entire preparatory examination record as evidence before this Court. Miss Moruthoane, Crown counsel, read the depositions of all the witnesses in the court below into the record. Then the Crown closed its case. The defence then called the accused to give evidence. In his evidence he denied some of the things testified to by the Crown witnesses. The question is whether he was

entitled to do that after making a formal admission of all the depositions of the Crown witnesses. I shall deal with that matter later in this judgment.

Accused and the deceased used to work for Lesotho Airways Corporation at Semonkong. They both stayed in the same house belonging to their employer. The deceased occupied one bedroom while accused occupied another. The kitchen and the lounge were used by both of them jointly. On the 3rd March, 1986 one lady by the name of 'Maseapehi Ramokhabi (P.W.5) had come to Semonkong to consult a doctor. From the doctor's surgery she went to cafe. Before she entered into the cafe she saw a man standing near the closet. That man called her. As she did not know him, she refused to go to him. It was about 7.00 p.m. The man followed her into the cafe and caught hold of her. That man is the deceased. He held her by the hand and dragged her out of the cafe saying that he wanted to talk to her outside.

When they were outside the cafe the deceased asked her her name. She told him her name. He then asked her to visit him at his place. She refused. He dragged her away. She struggled to free herself but in vain. When they came near the airport fence she sat down but the deceased twisted her arm and forced her to stand up. At this juncture the accused came into the picture. He was coming from the airport when he saw that the deceased was dragging a woman toward their house. The woman was struggling and it was obvious that she did not want to go there. The accused called the deceased but the latter refused to go to the former saying that he was in a hurry.

The deceased continued to drag the woman till they came to the airport gate. She managed to grab the gate and held on to it till the accused came to them. The accused asked the deceased to leave the woman so that they could have a short talk. He refused and continued to drag her towards the house. The accused passed them on the way and entered into the house. When they came to the door she clung to it till she slipped and the accused managed to drag her into the house.

Again the accused pleaded with the deceased not to bring that person into the house because he always stopped the deceased from doing such things. He said that he always respected the deceased's wife when she was there and he never brought women into the house. He also expected the deceased to respect his (accused's) wife. It is common cause that at that time the accused was staying with his wife. In answer to accused's plea, the deceased said "Fortsek man, you can fight."

At this juncture the accused came between the deceased and the woman. The deceased then hit the accused with a fist. He (deceased) retreated and the woman got free. She ran away when the two men started fighting. It is common cause that the accused was sober while the deceased was drunk.

'Mamotau Koepe (P.W.4) says that while she was in the cafe she heard someone cry. She came out and found that it was the accused's wife. She saw accused hitting the deceased with a plank (a leg of a chair). They were in the kitchen and she saw well they were both still on their feet when the accused hit the deceased. The

latter fell down and the accused continued to hit him. He then dragged him by the leg out of the house. When they were outside the accused kicked the deceased on the belly and on the head. He threw away the plank and left. After a while he came back and searched the pockets of the deceased. He went away and came back in a vehicle and carried the deceased to the hospital. Mamotau says that during the assault she heard the accused saying, "I have told you that you do not respect me. I will show you that I am not a boy."

According to the Crown evidence the deceased never tried to ward off the blows after he fell down. He appeared to be motionless while the accused repeatedly hit her with the plank whose weight was estimated to be about two pounds.

The medical evidence is to the effect that the cause of death was haemothorax and contusion of the lung. There was linear abrasion posterior to the right mandible; injury right upper eyelid and bleeding right nostril. Internally there was a subdural haemorrhage left, parietal area, bilateral pulmonary oedema. The other injuries were haematoma subcutaneous and intramuscular right anterior neck; subcutaneous haematoma lower sternal area.

After the close of the Crown case the accused went into the witness box and denied that he hit the deceased repeatedly with the plank before Court. His version is that he hit him several times. He again says that the deceased retreated after hitting him (accused) with a fist and bumped against the kitchen unit and fell down. But the Crown evidence is that he fell down after he was struck with a plank.

The defence is bound by the admissions made at the commencement of this trial. They have accepted as true the evidence of the Crown as it appears in the depositions made in the court below. If the defence had indicated that some of the allegations made in the depositions were not correct, the Crown would have called the deponents for cross-examination to enable the court to decide for itself which version was true. The admission was made in terms of section 273 (1) of the Criminal Procedure and Evidence Act 1981. Be that as it may in substance the evidence of the accused is the same with that of the Crown witnesses.

Mr. Maqutu submitted that on the facts of this case there is no doubt that the accused was provoked by the deceased who assaulted him when trying to stop him (deceased) from bringing a woman he intended to have sexual intercourse with in a house in which accused's wife was present. The second provocation according to Mr. Maqutu was that the deceased was virtually dragging the woman into the house although the woman was unwilling, when the accused came to the rescue of the woman deceased hit him with a fist.

Provocation is defined in the Criminal Law (Homicide Amendment) Proclamation No.42 of 1959 in section 4 (a) as follows:

"The word "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered."

I agree with the submission that there was an element of provocation in what the deceased was doing. He wanted to bring an unwilling woman into the common house and to rape her in his bedroom while the wife of the accused was in the next bedroom or in the kitchen or lounge. That would be a very indecent act to be done in the neighbourhood of the accused's wife. If the woman was willing and quietly went into the deceased's bedroom, the accused would have had no cause to quarrel about that. The only option open to him would be to vacate the house and get a house where his wife would be safe from the corrupt influences of the deceased. But in the present circumstances the deceased was dragging a woman against her will and she was struggling to free herself but in vain. It was obvious that the accused intended to rape that poor woman. When the accused tried to stop him by coming between them the deceased hit him with a fist. I agree that the two facts coupled together made the accused see red.

He then repeatedly hit the deceased with a plank until he was dead. He later dragged him out of the house and kicked him on the belly and on the head. It is correct that there was excessive use of violence but we are not dealing here with self-defence, we are dealing with provocation which is governed by section 3 (1) and (2) which read as follows:

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- "(1) A person who-
- (a) unlawfully kills another under circumstances which but for the provisions of this section would constitute murder; and
 - (b) does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool,
- is guilty of culpable homicide only.
- (2) The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation."

It seems to me that there was sudden provocation when the deceased persisted in dragging the woman despite accused's protest. There was sudden provocation when the deceased hit the accused with a fist. The accused reacted quickly in the heat of passion. He hit the deceased with a plank until he was dead. This is a case which falls squarely within the Criminal Law (Homicide Amendment) Proclamation No. 42 of 1959. The accused must be found guilty of culpable homicide.

Mr. Maqutu submitted that since the proclamation of the Criminal Law (Homicide Amendment) Proclamation No. 42 of 1959 the law of homicide in Lesotho in respect to provocation was amended and made similar to English Law. On this aspect it now differs from the South African Law. The rest of Lesotho Law on culpable homicide remains like that of South Africa. He further submitted that on the 11th June, 1959 Schreiner, J.A. in R. v. Krull, 1959 (3) 392 at p. 399 expounded the South African law in terms which made the Transkeian Penal Code no more part of the South African Law and said:

"Under our system it does not follow from the fact that the law treats intentional killing in self-defence, where there has been moderate excess, as culpable homicide, that it should also treat as culpable homicide a killing which though provoked was yet intentional. Since a merely provoked killing is never justified there seems to be no good reason for holding it to be less than murder when it is intended."

He submitted further that the Legislature in Lesotho did feel that R. v. Krull (supra) should not apply in Lesotho and on the 1st September, 1959 passed the Criminal Law (Homicide Amendment) Proclamation No. 42 of 1959.

I entirely agree with Mr. Maqutu that since the enactment of the Criminal Law (Homicide Amendment) Proclamation 42 of 1959 our law on provocation in homicide cases became different from that of South Africa. It seems to me that under our law once sudden provocation has been proved and that the accused acted in the heat of passion, he is guilty of culpable homicide. It is immaterial that during his rage the accused inflicted many wounds.

In Rex v. 'Makhethang Setai, 1980 (2) L.L.R. 359 at p. 378 Cotran, C.J. accepted that there had been great provocation towards the accused but overlooked the Criminal Law (Homicide Amendment) Proclamation 42 of 1959. He followed R. v. Krull (supra). I am of the opinion that the Court was bound by the statute of Lesotho and ought not to have followed a South African case.

In Rex. v. Lebohang Nathane, 1974-75 L.L.R 64 at p. 69 Mapetla, C.J. had this to say about the Criminal Law (Homicide Amendment) Proclamation 42 of 1959:

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"As the learned judge of Appeal pointed out later in his judgment, the language of the Transkeian Penal Code was not, unlike that of the Proclamation in our case, binding on the court 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 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."

The learned Judge came to the conclusion that it was not the intention of the Legislature to exclude the common law concept of provocation. With respect, it seems to me that the sole purpose was to change the common law of provocation in homicide cases. If this had not ^{been} the intention I do not see what the Legislature intended to remedy in the common law. According to common law as applied in South Africa provocation is not a complete defence to a charge of murder. If there is proof that although the accused was provoked he had the intention to kill, then he is guilty of murder. But under our law even if the killing was intentional the accused would be found guilty of culpable homicide only if he caused the death in the heat of passion caused by sudden provocation and before there is time for his passion to cool.

For the reasons stated above I find the accused guilty of culpable homicide.

My assessors agree.

J.L. KHEOLA
JUDGE

11th April, 1989.

SENTENCE:

In passing sentence I took into account that the accused is a first offender and that he had been provoked. However, the crime with which he is charged is a very serious one.

Taking into account all the circumstances of the case I came to the conclusion that a sentence of five (5) years' imprisonment of which two (2) years is suspended on condition that the accused is not convicted of any offence involving violence to another person committed during the period of suspension, is appropriate and the accused is so sentenced.

My assessors agree.

J.L. Kheola
JUDGE

11th April, 1989.

For the Crown - Miss Moruthoane
For the Defence - Mr. Maqutu.