

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

TSOKOLO TUMANE

V

R E X

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla  
on the 26th day of May, 1989.

The appellant was charged before the Subordinate Court in Mohale's Hoek with the offence of Culpable Homicide.

The deceased Lazarus Phangoa succumbed to injuries inflicted on him by the appellant on 11th May 1987. Deceased died while being conveyed to the Mohale's Hoek Government Hospital after he had sustained those injuries on the same day.

Appellant was convicted by the court below and has appealed against conviction only.

The only eye witness Matsepang Tumane who testified before the trial court as to the events told that court that deceased came to the field where this witness was in the company of 'Malitsoanelo Tumane the accused's wife peeling beans.

P.W.1 'Matsepang Tumane heard a cracking sound and on turning her head saw that the appellant Tsokolo was hitting the deceased with a stick. She testified that appellant hit deceased many times.

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The appellant did not reply when P.W.1 asked why he was assaulting the deceased thus.

However under cross-examination P.W.1 shifted from the version which she had portrayed in her evidence in chief.

Under cross-examination she conceded that the assault was preceded by an exchange of words between deceased and the appellant.

It was elicited from her that appellant in an exchange of words with deceased asked if he the appellant should not ask deceased about appellant's wife.

It appears that appellant had earlier disapproved of the apparent love affair existing between his wife and the deceased. He had warned deceased never to be seen in his wife's company.

In cross-examination then a different story emerged from that in P.W.1's examination in chief. She testified that after hearing the words referred to above she had seen deceased approaching the appellant and that deceased had adopted a crouching position when doing so. She mentioned that appellant was holding a stick at the time and she and appellant's wife ran away and did not see what happened save that when she ran away deceased had rushed at the appellant.

The magistrate described P.W.1 as a liar and an unreliable witness.

Her version to the extent that it departs from her evidence in chief supports that of the appellant who testified and was corroborated by his wife that, deceased rushed at him when appellant asked him why he was with his wife despite the previous warning.

When deceased rushed at appellant it is said he was in an angry mood and had dipped his hand in his pocket such that appellant feared deceased might be

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having a knife with which to stab him.

There is no evidence to substantiate presence of the knife.

Appellant then put thus in fear for his safety hit deceased with the stick first on the forehead. Deceased rushed at him again and appellant hit him on the jaw whereupon deceased fell down, got up on his knees and sat down. Appellant testified that he did not hit deceased when the latter was on the ground.

Indeed an accused's story need not be true as long as it is possibly reasonably true. In other words an accused need not convince the court of the veracity of his tale.

I have observed that the medical evidence has not been made part of the record in these proceedings.

I have no option but to accept appellant's story in the circumstances.

It thus becomes difficult to take the view that when he acted as he says he did the appellant ought as a reasonable man in the circumstances to have foreseen that death would ensue. Consequently it seems to me that appellant has used more force in his apprehended fear that deceased was bent on injuring him with a knife than was justified by the circumstances regard being had to the fact that deceased was fifty years old while appellant was only twenty five. Mr. Mda in argument pointed out with his tongue in the cheek that the crown did not lead evidence to exclude the possibility that deceased suffered further injury while being conveyed to the hospital. My reaction to this is that the Crown is not obliged to close every avenue of escape that an accused may avail himself of from criminal liability.

Moreover if the crown case was not so bedevilled by the inconsistency of its star witness, the learned magistrate's findings would hold on the grounds that

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"..... if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it."

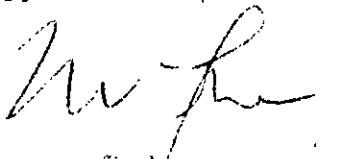
See Rex vs. Dhlumayo & Another 1948(2) SA. 677 et seq.  
But section 238 of our C.P. & E. here has relevance  
i.e

(1) "..... any Court may convict ..... on the single evidence of any competent and credible witness."

The only star witness was discredited by the learned magistrate. The record shows he was right to discredit her.

It becomes difficult to decide how far to go along with P.W.1's evidence in an endeavour to determine where the truth ends and the lies begin in view of her complete about face once she was under cross-examination. See CRI/T/80/91 Rex vs Moroka Mapefane (unreported). See also Rex vs Sabilone Nalana & 25 Others CRI/T/51/69 (unreported) by Jacobs C.J. as he then was.

Appellant is accordingly acquitted of Culpable Homicide and convicted of assault with intent to do grievous bodily harm. Even though there is substantial success in this appeal the sentence imposed in the Court below was nevertheless so light that I am disinclined to disturb it.



J U D G E.

26th May, 1989.

For Appellant : Mr. Z. Mda  
For Crown : Mr. Qhomane.