

IN THE LESOTHO COURT OF APPEAL

In the matter between :

M. MOKHALI Appellant

v

R E X Respondent

Held at Maseru

Coram:

MAHOMED J.A.

TRENGOVE J.A.

ACKERMANN J.A.

J U D G M E N T

Mahomed J.A.

The appellant was charged in the Court a quo with the crime of MURDERING one Napo Mejaro ("the deceased") on the 5th of JULY.

MR PHEKO who appeared on behalf of the appellant correctly conceded that the appellant had used a rifle to fire the fatal shots which lead to the death of the deceased on the 5th of JULY. He relied upon the provocation which the appellant had received from the deceased, to make two main submissions -

Firstly he submitted that the effect of this provocation on the mind of the appellant was such as to negate any intention on his part to kill the deceased.

Alternatively he contended that even if the conduct of the appellant constituted the crime of murder at common-law, the provocation under which the appellant was acting at the relevant time, justified a finding of culpable homicide, because of the provisions of section 3 of the Criminal Law (Homicide Amendment) Proclamation of 1959 ("the proclamation")

Both the appellant and the deceased were privates in the Royal Lesotho Defence Force. A quarrel had broken out between the two on the first of January, 1988. The deceased had complained that the appellant had referred to him as a child. The deceased hit the appellant with a blow on his face. The appellant returned the blow and swore at the deceased. The fighting was then stopped by others, but the deceased continued to nurse a grievance. On the 2nd of July 1988 another quarrel broke out between the two, arising from the type of food which was being served from the mess. The deceased again reminded the appellant of the earlier quarrel and he threatened to beat up the appellant.

Matters between the two came to a head on the 5th of July near a public bar called Lehafing. The deceased asked the appellant to leave the bar in order to have a discussion outside. Anticipating a possible reconciliation of some kind, the appellant agreed. The deceased then took a belligerent attitude and challenged the appellant to a fight. He grabbed the appellant and others again intervened to separate the two men.

Both the appellant and the deceased then returned to the bar, to continue their drinking. The deceased continued to

pester the appellant who then decided to leave the Bar, after P.W.8 Seargent Lebona suggested that he did so.

The appellant decided to leave Maseru and go to his home in TY. He put his rifle in a bag which he left with a friend at a filling station next to the main bus stop, so that on his return from home the following morning he could collect the rifle and go straight to his duty station. The appellant returned to the Bar to inform P.W.1 Private Nathane of his plans. He was thereafter proceeding to the bus stop when he was confronted by the deceased who hit the appellant with a fist. Others again intervened and P.W.3 Private Maja Tsolo, lead the appellant away towards the Bar. The appellant, then sprinted away towards the bus stop, and returned shortly thereafter with his rifle which he had recovered from his friend at the filling station. He proceeded to chase the deceased, in a state of great anger. The deceased was eventually shot by him several times, but only after the appellant had ordered other persons to move away from the appellant in order to avoid being injured themselves. The appellant reported the matter soon thereafter to the Police at the Pitso Ground Police Station. The deceased died from his injuries on the same day.

In my view, these facts would ordinarily establish beyond any reasonable doubt that the appellant in fact killed the deceased and that when he fired the shot which lead to the death of the deceased, he intended to kill the deceased or appreciated at least that he was performing acts which could lead to the death of the deceased.

This inference can only be escaped, if the evidence left open the reasonable possibility that the provocation under which appellant was operating, had induced an emotional condition of such intensity that he

could not and did not formulate an intention to kill, or that he did not appreciate that he was performing acts which could lead to the death of deceased.

The evidence does not justify any such reasonable possibility. The appellant did not react unthinkingly to a sudden emergency, by instinctively using a weapon in his immediate possession. After the last act of belligerence, from the deceased he proceeded especially to go and recover his firearm from the filling station some 40 paces away. He then returned to the Bar which was some 55 paces away and sought out the deceased. Angry as he was, he retained sufficient control and judgement to appreciate that he should not endanger other persons. He therefore ensured that other persons moved away from the deceased. Having shot the deceased, he appreciated what he had done and immediately proceeded to report the matter to the police. This is not the conduct of a man so enraged that he did not appreciate that he was killing the deceased or at least that he was performing acts which might lead to the death of the deceased.

Mr. Pheko, contended that even if this conclusion was justified, a conviction for murder did not follow because of the provisions of Proclamation 42 of 1959.

Section 3 of the Proclamation reads as follows:

" 3(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.

- 5 -
- 3(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".

"Provocation" is defined in Section 4 of the Proclamation as follows:-

"4(a) 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.

(b) For the purposes of this section the expression "an ordinary person" means an ordinary person of the class of the community to which the accused belongs."

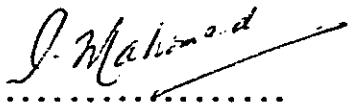
Mr. Pheko contended that the Crown had to establish that the appellant had not perpetrated his act in killing the deceased, in the heat of passion caused by sudden provocation (as defined) and before there was time for his passion to cool.


I shall assume (without deciding) that there is indeed such an onus on the part of the Crown, but in my judgment that onus is discharged by the evidence.


The circumstances of the "provocation" proved by the facts in this matter were not such as to make it likely that an "ordinary person" in the position of the appellant would so lose his self-control as to be and be induced to kill the deceased or to perform acts of so serious a nature as to carry with it an appreciated

risk of death ensuing. Such "an ordinary person" would on the facts, have had enough time for his "passion to cool" sufficiently before he attempted an act as serious enough as the killing of the deceased. Moreover the act of killing the deceased, in these circumstances does not "bear a reasonable relationship to the provocation" within the meaning of Section 3.

In the result I would order that the appeal be dismissed.

Signed : 
.....
I. MAHOMED
JUDGE OF APPEAL

I agree Signed: 
.....
J.J. TRENGOVE
JUDGE OF APPEAL

I agree Signed: 
.....
L.W.H. ACKERMANN
JUDGE OF APPEAL

Delivered at Maseru this 27th day of July, 1990.

For Appellant : Mr. Pheko
For Respondent : Mr. Mdhluli.