

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

*MAKARABO PHOOKO

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 29th day of August, 1990

The accused is charged with the murder of one 'Mathapelo Ntsasa (hereinafter called the deceased) on the 1st day of September, 1988, at or near Thibella in the district of Maseru. She has pleaded not guilty.

Detective Lance Sergeant Noluchunku (P.W.1) testified that on the night of the 1st September, 1988 he was in a house at Thibella. He heard a woman's voice saying, "Phooko, I told you that I would catch you." He stood up and looked through the

window. He saw two women and a man. One of those women was wearing a white jersey. He later identified the two women as the accused and the deceased and the man as Phooko.

He was about twenty paces from them and it was already dark; they were under the shade of a tree. However, there was a pole of electric light not far from where they were. When he first saw them the accused got hold of the deceased and pulled her towards the corner of the house and under the big tree and then hit her with her hand on the side of the neck. He did not see what the accused was holding in her hand as she hit the deceased. From there the accused pulled the deceased for some distance and the latter fell and belched. P.W.1 says that all the time the deceased was not warding off the blows. After she had fallen down he (P.W.1) came out and found that the deceased had been fatally wounded. He did not wait until a crime was committed because he was not aware that they were fighting. The man who was with them did not intervene in any way.

'Matsepiiso Mohlouoa (P.W.2) was working at a bottle-store at Thibella in September, 1988. At about 8.00 p.m. on the 1st September, 1988 the deceased and Phooko came to her place and bought a case of beers in bottles. A short while after they had left Papi Tlali (P.W.3) and Aupa Phalatsi (P.W.5) arrived and bought some tobacco. Just as they were about to leave they looked through the window and reported to her that the people who had just bought beer from her were fighting outside. She looked through the window and noticed that the accused was striking at the deceased.

with her hand and Phooko was trying to separate them by standing between them. When they came out of the house the accused was still striking the deceased who was trying to use Phooko as a human shield by hiding herself behind him. Phooko said: "You have got us into trouble by stabbing a person with a knife." The accused replied and said: "I have long been rebuking you for this woman." P.W.2 says that after those ^{words} were uttered she left the place and raised an alarm. She admitted that she did not see the start of the fight.

The evidence of P.W.3 and P.W.5 is that after buying tobacco from P.W.2 they heard the cracking of bottles outside. They looked through the window with P.W.2. They saw a scuffle by three people. A woman was striking at the deceased in a stabbing manner but they did not count how many times she struck her. The man who was with them was trying to get hold of the woman who was striking the deceased while the latter was trying to hide herself behind the man. The deceased was also warding off the blows with her arms and protecting her head with them. She was also appealing to the accused not to stab her with a knife. When they got out of the store the fight was almost over because the man said: "You have got us into trouble by stabbing a person."

The version of the accused is entirely different from that of the Crown witnesses. She deposed that on the night in question she left her home at Sea-Point and went to Thibella to fetch her husband Phooko who died in September last year. When she came to a place called Big House she heard the voice of her husband saying:

"You know that earlier my wife found us under compromising circumstances and you want that to happen again." One day she had gone to deceased's home and found her husband having sexual intercourse with the deceased. She got very upset but did nothing to them and quietly returned to her house. She talked to her husband when he came home that evening.

After uttering those words Phooko tried to hit the deceased but at that time she was very close to them. She grabbed her husband by the hand and dragged him. The case of beers he was carrying with the deceased fell down. The deceased asked who she (accused) was. She said she was 'Makarabo in the name of Phooko. When asked what she meant by that, she said she meant that she was Phooko's wife. The deceased said that she had long been looking for her and had at last found her. She (deceased) took a bottle full of beer and threw it at her and hit her on the back of her head. She fell down on her knees and hands. When she tried^{to} rise 'she saw a knife coming towards her' as the deceased directed a blow at her. She warded off the blow with her left arm and she was stabbed above the left wrist (The witness showed the Court a scar above the left wrist). As a result of that blow the knife fell down. She (accused) took it and rose. The deceased held her at the neck and hit her on the face with a fist. She (accused) stabbed her with the knife five times. After that the deceased managed to wrest the knife from her and it cut her (accused) on the right thumb. She says that while she was stabbing her, the deceased was still fighting and hitting her with a bottle on the shoulders. She left after the deceased had taken her knife.

It is common cause that all the Crown witnesses did not see how the fight started. However, when they first saw the fight the accused was the aggressor and the deceased was fleeing from her or warding off the blows with her arms and shielding behind Phooko but without much success because the accused was able to come close to her and to stab her several times. It is trite law that in cases of self-defence the accused may be found guilty of culpable homicide if he exceeds the bounds of self-defence in a moderate way; however, if the excess is immoderate, he may be found guilty of murder (R.v. Molefe, 1940 A.D. 202).

In the present case the evidence of the Crown witnesses is very clear that even if the deceased was the initial aggressor, when they first saw the fight it was the accused who was the aggressor. The knife was already in her possession and she was actually chasing the deceased and stabbing her. I believe the evidence of all the Crown witnesses except Detective Lance Sergeant Noluchunku. I had the feeling that he did not see clearly what was happening. It is not correct that the deceased was folding her hands like a child when she was being stabbed. It is also not correct that Phooko was just standing besides the two women and not trying to intervene in any way. The evidence of P.W.2, P.W.3 and P.W.5, which I have believed, is that the deceased was warding off the blows with her arms/hands and trying to cover her head/face. Phooko was trying to get hold of the accused and to separate them.


The story of the accused is not only improbable but it is so improbable that it cannot reasonably possibly be true. The Crown has proved that it is false beyond any reasonable doubt. The accused says that when the deceased threatened to assault her and said she had found her, she did not look back to see what she was doing until she was hit on the back of her head. She did not even see whether the deceased threw the bottle at her or was still holding it in her hand when she struck her. I do not think that she could be so brave as not to look back when the threats were made.

She contradicts herself by first saying that the deceased was holding her by her clothes at the neck and hitting her on the face with a fist. She later changes and says the deceased was hitting her on the shoulders with a bottle. It seems to me that the accused is contradicting herself because she is not telling the truth that the deceased ever held her in the manner described. It is most unlikely that the deceased could be in a position to cling to the accused even after she had been mortally wounded. One of such injuries was a complete cut through the trachea. To suggest that the deceased was fighting until the last minutes when she allegedly wrenched the knife from the accused is absurd and untenable. After sustaining the injuries described in the evidence of Dr. Karamazi, which was admitted by the defence, the deceased could not be in a position to offer any resistance. The Crown witnesses prove that she was helpless.

The story of the accused that she once found her husband and the deceased in the latter's house having sexual intercourse is untrue. It is most improbable that a married woman who finds her husband ^{under} such compromising circumstances would just look at them and leave the house without saying a word and allow them to finish what they were doing in peace.

I am convinced that the accused told the Court a pack of lies. She was not prepared to explain to the Court the circumstances under which she sustained the injury on her left wrist. I come to the conclusion that even if the accused can be said to have been defending herself she exceeded the bounds of self-defence in an immoderate way and is therefore guilty of murder. She had the requisite intent for murder in the form of dolus eventualis. The accused is found guilty of murder.

My assessor agrees.


J.L. KHEOLA
JUDGE

29th August, 1990.


EXTENUATING CIRCUMSTANCES

The Court took into account that there was no premeditation; the intention was that commonly known as dolus eventualis; and that there was an element of "provocation" when the accused found the deceased with her husband at night.

SENTENCE:

In passing sentence we took into consideration that the accused is a first offender; that she has already been in gaol for two years. On the other hand we took into account the fact that she used a knife which is a very lethal weapon used in almost ninety per cent of the murder cases that are tried in this Court. The injuries she inflicted were very grievous and one such injury was that deceased's trachea was cut through. We accordingly sentence the accused to seven (7) years' imprisonment.

My assessor agrees.


J.L. KHEOLA
JUDGE

29th August, 1990.

For Crown - Mr. Qhomane
For Defence - My. Putsoane.