

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

MOHLAKOLA MATSOAI
TSABELLO MATSOAI
MALEFANE MATSOAI

1st Accused
2nd Accused
3rd Accused

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 17th day of October, 1990.

The accused are charged with the crime of murder; it being alleged that on the 15th day of November, 1987 and at or near ha Matsoai in the district of Berea, they each or other or all of them unlawfully and intentionally killed Matsoai Matsoai. They pleaded not guilty to the charge.

The defence admitted the depositions made at the preparatory examination by the following witnesses. 'Makatiso Ntisa (P.W.1) who raised an alarm when the wife of the deceased reported

to her that her husband had been killed; Mochesela Ntisa (P.W.2) whose evidence is to the effect that when he heard the alarm he went down to the fields. He saw A2 leaving the dead body and he was holding a black piece of timber stick (He identified the piece of stick before Court as the one A2 was holding). He examined the dead body and saw a wound on the head from which bones were protruding, a wound on the back of the head and a fractured arm. The field in question belonged to the father of the deceased; but after his death it was used by the father of the accused. At the time of this incident it had been ploughed by the deceased and he had planted wheat which was being grazed by the cattle of the accused; Trooper Lelala (P.W.6) who examined the dead body at the scene of the crime and found several wounds on the head from one of which brain matter was appearing, he found a piece of stick at the scene of the crime. It was marked Exhibit "1"; Detective Trooper Ramone (P.W.7) testified that the accused 1 came to Mapoteng Police Station and gave him a sword and said that he had used it in the fighting. It was marked Exhibit "2"; Kheola Matsoai (P.W.8) identified the body of the deceased to the doctor; Litaba Lekanyane (P.W.10) conveyed A2 to the police station in his vehicle and Dr. Gotink (P.W.11) is the medical practitioner who carried out a post-mortem examination of the body of the deceased. He formed the opinion that death was due to severe head trauma with skull fracture and extensive brain damage. There was a huge laceration on the forehead with clearly visible skull fracture and brain damage; open scalp wound on the left side and above the left eyelid and a fractured lower arm with a laceration.

The first witness called by the Crown in this Court is Tau Matsoai. He is the son of the deceased and he is eighteen years old. The accused are his paternal uncles and they are brothers. On the morning of the 15th November, 1987 he was at his home when he saw cattle grazing on his father's field on which there was wheat which had been planted by his father. A1 was herding the cattle. The deceased went to the father of the accused in order to report to him that his son was deliberately grazing cattle on his field. On his return he reported that the father of the accused had said that those cattle were being looked after by men like himself. He and the deceased went to the field. On their arrival there the deceased greeted A1 and immediately after that A2 and A3 arrived. The deceased asked A1 what those cattle wanted there. A1 said there were weeds (theepe) on the field and he wanted that the cattle should graze the weeds so that he can plough the field. A3 said that A1 should leave the deceased alone so that he could do what he wanted to do. The deceased said he was satisfied but A1 shouted "Attack!"

The accused attacked the deceased and hit him with their weapons. A1 struck him with a sword, A2 struck him with a stick and A3 hit him with a sword. (Tau identified Exhibit "1" as part of A2's stick and Exhibit "2" as A1's sword). He ran away because A2 hit him with a stick on the waist.

Under cross-examination Tau deposed that at the time they saw the cattle grazing on his father's field his father was ready to leave for Kimberley where he worked. They did not take any weapons when they went to the field because the intention of the deceased was to impound those cattle. The deceased was wearing a blanket and he (Tau) was sure that he was not hiding any sword under his blanket because he saw him when he was putting it on. He denied that Exhibit "2" belonged to the deceased. When he ran away the deceased had been hit three times. The stick of A2 broke when he hit the deceased on the head with it. He denied that A1 had Exhibit "1" and that the deceased was in a bad mood when he arrived at the field. He denied that Exhibit "1" broke when A1 warded off a blow delivered by the deceased with Exhibit "2".

Tau estimated that the village is about 700 to 800 yards from the field.

Matau Matsoai (P.W.2) was at her home at about 8.30 a.m. on the 15th November, 1987. She was in the company of her husband (deceased) and their son Tau. They saw the cattle of Mojalefa and Nako grazing on the field of the deceased on which wheat was grown and they were being herded by A1. The deceased went to the father of the accused and to Nako to report to them what A1 was doing to his field. When he came back he went down to the field with Tau. She remained at home but she could see the field from her home. When deceased and Tau arrived at the field, A2 and A3 also arrived. She then saw them fighting but she did not see how the fight started.

The deceased fell down and she then tried to go down to the field. She did not reach the field because on the way she met A3 holding a sword and he chased her.

The field in question is about 1 kilometre from her home. She and the deceased saw and recognized A1 who was 1 kilometre from them and that is why the deceased went to A1's father in order to make a report.

P.W.3 'Makhotso Seotsanyana testified that she lives in the same village with the accused. On the day in question she was at her home when she saw the cattle of the father of A1 grazing wheat on the field of the deceased. A1 was looking after them. She saw the deceased and his son (P.W.1) going to the field. At the same time she saw A2 and A3 go to the same field. As she was far from the field she did not clearly see what was happening but she saw that they were fighting. One person fell down and she saw that things were being raised up in a manner indicating that they were hitting the person who had fallen down.

Motjotjo Patsi (P.W.4) is the younger brother of the father of the accused. The deceased is the son of his late brother Mohlakola who was the owner of the field in question. After his (Mohlakola's) death his fields (there are three of them) were allocated to the deceased by the family and the local chief confirmed the family decision and formally allocated the fields to the deceased.

On the day the deceased was killed he received a report as a result of which he took his stick and proceeded to the fields. He saw cattle and people on the field which is the subject matter of these proceedings. A1 and A3 were holding shiny objects and were going in the direction of Letsoela's village. When he arrived at the field the deceased was already dead and A2 was still looking after the cattle. He was holding one stick and a piece of a broken stick similar to Exhibit "1". He testified that the accused were killers and killed the deceased because he saw them leave the deceased. He was about two hundred or three hundred yards away when he saw them.

He admitted that during the lifetime of Mohlakola the field in question used to be ploughed by the father of the accused. However he did so under the system of sharing with Mohlakola who was the owner of the field.

A1 testified that on the 15th November, 1987 he was herding his cattle on the field in question on which there was no wheat but wild weeds. The deceased and his son (P.W.1) arrived. The former was very angry and asked him what he (accused) intended to do. Even before he could answer that question the deceased struck at him with a sword he was holding (he identified Exhibit 2 as that sword). He warded off that blow with his stick and immediately struck the deceased on the arm with his stick. As a result of that blow the sword fell on the ground. He (accused) took the sword and struck the deceased on the head with it till he fell down. After he had fallen down he never assaulted him again. A2 and A3 were not there at all and he alone fought with the deceased.

Regarding the field A1 says that it was being ploughed by his father since his (accused's) childhood. It never belonged to the father of the deceased.

A2's version is that he remained at home when A1 took out the cattle to graze. A long time after that he went down to the fields and met A1 near the river. A1 was carrying a black sword and a piece of a stick. A2 says that he drove the cattle left by A1 and never reached the field where they had been grazing. He denies that he chased P.W.1.

A3 testified that on the morning in question he was on his way to work in the Republic of South Africa when he met A1 near the river. The latter was holding a sword and a broken piece of stick; he (A1) reported to him that he had clashed with the deceased at their father's field. A3 denies that he ever participated in the fight between A1 and the deceased.

The accused are implicated in the murder of the deceased by four Crown witnesses. P.W.1 was at the field with the deceased and saw what happened. According to him all the accused hit the deceased on the head with their respective weapons. He is corroborated by his mother, P.W.2 who, though she was about one kilometre away, saw that there was a fight leading to her husband falling down. She rushed down to the field but failed to reach it because on the way she met A3 who chased her away with a sword in his hand. I agree with the criticism of her evidence on the ground that she was a little bit too far to see exactly what happened at the field. She confessed that she did not see how the fight started but saw that there was a fight after A2 and A3 had arrived.

It is also correct that the evidence of P.W.1 and P.W.2 should be approached with caution because they are closely related to the deceased and have been directly affected by his death. The impression I had of the two witnesses was that they were honest and truthful witnesses. P.W.1 admitted that as soon as the fight started he ran away and does not claim to have seen all that happened. In the same way P.W.2 does not claim to have seen what each of the accused did to her husband. She could not have seen clearly what happened because she was a little bit too far. In any case the evidence of P.W.1 and P.W.2 is corroborated by P.W.3 and P.W.4 who saw what happened. P.W.3 saw A2 and A3 leave the village. They joined their brother who was herding cattle on deceased's field. From her home she could not see what was happening except that those people on the field were fighting and one of them fell down; the others beat him up. All she could see was that they were raising up their arms and hitting the one who had fallen down. P.W.3 impressed me as being an honest witness because she made no attempt to claim to have seen more than she did.

P.W.4 is the paternal uncle of the accused and, like all the other Crown witnesses, has never had any quarrel with the accused. They have been on very good and cordial terms with him. In other words no reason was suggested why he could falsely implicate the accused in this serious crime. He did not see the fight but when he appeared at the scene he saw A1 and A3 leaving the deceased who had fallen down. They were holding shiny objects

and going in the direction of Letsoela's village. The question one may ask is: if the A3 was not involved in the fight why was he holding a shiny object and accompanying A1? The only reasonable inference to be drawn from his conduct is that he was running away from the scene of the crime because he had participated in the murder of the deceased. A3 boarded a vehicle with A1 and never returned to the scene of the crime. He alleges that he did not go to the scene of the crime because he was afraid as A1 had told him that the deceased had died. It seems to me that was the very reason why he had to go to the field to see and help his cousin who had been killed by his own elder brother. He is a man of about twenty-five years of age and must have seen dead bodies many times and there was no reason why he was allegedly afraid of seeing the corpse of his own cousin. The real reason was that he was running away.

A2 is also implicated by his own uncle who, when arriving at the scene of the crime, found him holding a full stick and a piece of a broken stick similar to Exhibit 1. P.W.4 says that because A2 was holding those weapons he regarded him as a killer. His evidence is to some extent corroborated by P.W.1, P.W.2 and P.W.3 that he participated in the murder of the deceased.

A1 has raised the defence of self-defence by admitting that he alone caused all the injuries which caused the death of the deceased in the manner described above in the summary of his evidence.

The law governing self-defence has been stated in a number of cases as follows:-

In R. v. Attwood, 1946 (1) A.D. 331 at p. 340

Watermeyer, C.J. said:-

"The accused would not have been entitled to an acquittal on the ground that he was acting in self-defence unless it appeared as a reasonable possibility on the evidence that accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury, that the means of self-defence which he used were not excessive in relation to the danger and that the means he used were only or least dangerous means whereby he could have avoided the danger."

In Union Government (Minister of Railways & Harbours v.

Buur, 1914 A.D. 273 at p. 286, Innes, J.A. (as he then was)

said:-

"Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstances of their position."

Although this was a civil case dealing with negligence, the principles stated above were said to be applicable in criminal case by Holmes, A.J.A., in R.v.. Patel, 1959 (3) S.A. 121 (A.D.) at p. 123.

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It is trite law that where the accused exceeded the bounds of reasonable self-defence and killed his assailant he may be found guilty of culpable homicide despite the fact that the killing was intentional (See R.v. Koming, 1953 (3) S.A. 220 (T) at pp. 232-3). However, if the excess is immoderate a verdict of murder will be returned (See R. v. Krull, 1959 (3) S.A. 393 (A.D.) at p. 399).

In the present case even if the evidence of the A1 were to be believed he would still be found guilty of murder because he immoderately exceeded the bounds of reasonable self-defence. In his own words he says that when the encounter started the deceased delivered a blow with a sword. He (A1) warded off that blow with his stick and immediately struck back at the deceased hitting him on the right arm and causing the sword to fall from the deceased's hand. He (A1) took the sword and struck the deceased on the head until he fell down. He does not remember how many times he struck him.

According to medical evidence the deceased had three wounds on the head and a fracture of the lower arm. The injuries clearly indicate that after disarming the deceased and taking his sword the accused viciously attacked him causing very serious injuries. At the time he did so his life was no longer in any danger because the deceased was disarmed. However, A1's story has been rejected by this Court. It is a lie. He was seen by several Crown witnesses when he attacked the deceased with his own brothers. There is overwhelming evidence that there was

wheat growing on that field. His belligerent conduct of destroying that wheat by grazing it with his cattle is a clear indication that he was determined to cause trouble. The fact that as soon as the deceased and his son arrived at the field, A2 and A3 also arrived is a clear proof that the whole thing was planned in advance.

The evidence of the Crown, which I have believed, is that the first blow delivered by the A1 was so severe that it caused the deceased to fall down. The rest of the injuries were inflicted after he had fallen down and were inflicted by the three accused. I have said that although three of the Crown witnesses were about one kilometre away they could and did see that there was a fight because they saw when one person fell down and the others hit him with certain objects.

Mr. Snyman, attorney for the accused, submitted that on fateful day in question the deceased became aware that A1 was in his field where the cattle were grazing. The deceased was on his way to work and did not have much time. He first visited two other people and then went down to A1 with the specific intention of fighting or killing him because of the fact that he was allegedly grazing in his field. I do not agree that the deceased went there with one thing in his mind, i.e. to fight or kill the accused. There is overwhelming evidence that there was wheat growing on that field. It had been planted by the deceased. It was only a normal and natural reaction by the deceased to go to the field to investigate and to find out why the A1 was deliberately and maliciously

destroying the wheat crop. As I pointed out during arguments the deceased was entitled to go to the field and to impound those cattle. It was the accused who was bent on causing trouble by maliciously and openly grazing the deceased's wheat crop. When the deceased asked him what the cattle were doing there, he said they were grazing weeds because he wanted to plough the field. Thereafter he ordered his brothers to attack the deceased.

The evidence of Kholoang Letsoela (D.W.4) was to the effect that some weeks before the present incident he had some encounters with the deceased and that on the last of such encounters the deceased was armed with a panga. He went on to say the deceased was an aggressive person. The deceased may have been an aggressive person but in the present case A1 was the aggressor. He deliberately provoked the deceased by grazing his wheat crop with animals. However, the evidence which I have believed is that the accused were the aggressors and that the deceased did not own any panga; he was not holding any panga when he went to the field.

I come to the conclusion that the accused viciously attacked the deceased and hit him on the head and arm with dangerous weapons and were reckless as to whether death resulted from their acts or not.

I accordingly find the accused guilty of murder.

J.L. KHEOLA

JUDGE

17th October, 1990.

EXTENUATING CIRCUMSTANCES:

I have found that the accused had the intention commonly known as dolus eventualis. In S.v. Sigwahla 1967 (4) S.A. 566 (A.D.) the Appellate Division held that

"(a) Trial courts in their conspectus of possible extenuating circumstances, should not overlook the fact (if it be such) that it is a case of dolus eventualis. (b) While it cannot be said that this factor must necessarily be an extenuating circumstances, in many cases it may well be so, either alone or together with other factors, depending on the particular facts of the case."

I have also found that there was a dispute about the field in question and that the accused persons were not happy that their father had been using the field for a long time it should suddenly be allocated to the deceased.

I find that there are extenuating circumstances.

In passing sentence I took into account the personal circumstances of the accused and the fact that they are first offenders. I also took into account that the accused took the law into their own hands and completely ignored lawful means to resolve the dispute. They decided to kill the deceased in cold blood.

SENTENCE: Fourteen (14) years' imprisonment each.

Order: Exhibits are forfeited to the Crown and are to be destroyed by the police.

J.L. KHEOLA

JUDGE

17th October, 1990.

For Crown ; Mr. Mokhobo
For Accused ; Mr. Snyman