

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

NEO BERENG

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola
on the 26th day of October, 1990

The accused is charged with the murder of Mohapi Tsietsi on the 7th day of January, 1987 at or near Ha Neo in the district of Maseru. He has pleaded not guilty to the charge.

It is common cause that the deceased died as a result of gunshot wounds on the chest which caused a complete bilateral lung collapse and bilateral haemothorax. There were two entry wounds - the first one was at the 1st - 2nd intercostal space and the second one was at the 3rd - 4th intercostal space. The two wounds were inflicted by the accused with his 6.35mm Astra Pistol for which he had a valid firearm certificate. The accused has claimed that he shot the deceased in self-defence.

P.W.1 Majoalane Makasane testified ^{that} in December, 1984 her six cattle and three donkeys went missing. She reported the disappearance of her stock to various police stations near her home as well as to the deceased who was the chairman of an organization ^{known} as the anti-stocktheft unit which is composed of some villagers whose aim is to combat stock theft. P.W.1 suspected that the accused had stolen her animals because a day before they went missing she saw the accused at the veld where her animals were grazing. He was checking them and writing on a piece of paper. She did not ask the accused what he was doing until the animals went missing.

P.W.2 Molahlehi Mothibeli was the assistant chairman of the anti-stock theft unit. He testified that on the 7th January, 1987 he and members of his organization went to office of the Principal Chief of Rothe (P.W.7). They went there to report the complaint by P.W.1 about the disappearance of her stock and that the accused was the suspect. P.W.7 wrote a letter to the accused instructing him to appear before him (P.W.7) on the following day. They took the letter and went to accused's place. When they left P.W.7's office the deceased called at his home and the rest of the members of the organization did not wait for him. On their arrival at the accused's place P.W.2 gave the letter to the accused and explained what it was all about. The deceased took the letter and read it to himself. It was at this juncture that the deceased arrived. Having read the letter the accused told them that it would not be possible for him to go to P.W.7's office on the following day because he was going to Rahlao's. He invited the deceased as the chairman of the organization to

come with him to his house (about 30 paces from where accused's court was) so that they could choose a suitable date.

The accused was inside his yard when he spoke to them and was about ten paces from them. Before he started talking to them the accused had invited two of his subjects namely Sekopo and Ratama (both of whom are late) to attend the discussions. P.W.2 testified that the deceased had not uttered a single word before the accused invited him to accompany him to his house. After that the accused and the deceased left for the house. The former was in front and the latter was following. On their arrival at the house the accused went into the house and closed the door behind him. The deceased stood at the forecourt for some time before the accused peeped through the window. P.W.2 did not hear what they were saying because he was about thirty paces from the house still in the company of his colleagues at the accused's court. The deceased ^{went towards} the window and as he approached it P.W.2 heard two gun reports and saw that the accused was holding a pistol and shooting the deceased who immediately fell down on his face near the window. Reacting to this unprovoked attack P.W.2 and his colleagues picked up stones and rushed to the house of the accused. They threw stones at the house and smashed the windows of the house.

During the stone throwing the accused came out of the house holding a rifle and the pistol. He fired at one Mokhalinyane (P.W.4) with the pistol but missed him and the bullet hit his (accused's) horse which was near the court. He (accused) ran away in the direction of Mokhalinyane Police Station. After he had

left they examined the deceased and found that he was already dead. They eventually went to Mokhalinyane Police Station and found the accused there. A policeman accompanied them to the scene of the crime where they found that the deceased had been removed from where he fell when he was shot and was in the stable.

In cross-examination P.W.2 admitted that the members of his organization were many when they went to the home of the accused but denied that they were fifty in number. P.W.2 said he knew nothing about Exhibit "A" and Exhibit "B". Exhibit "A" is a letter written by P.W.7 addressed to the deceased instructing him and members of the organization to come and report themselves at the office of P.W.7 so that the complaint of the accused against them could be discussed. Exhibit "B" is another letter written by P.W.7 addressed to the deceased instructing him and some members of their organization to report themselves at Morija Police Station on the 2nd September, 1986 in connection with the complaint of the accused.

P.W.2 said that when the deceased arrived they were still explaining the contents of the letter from P.W.7 to the accused. He said that the deceased never read the letter to the accused. When it was put to him that at the preparatory examination he said the deceased read the letter to the accused, his reply was that he might not have understood or heard well when the magistrate read back to him his deposition. He insisted that he gave a letter to the accused and denies that the accused even demanded that they should give him a letter or a warrant from P.W.7, P.W.2 denies

that he and his colleagues forcibly jumped over the fence following the instructions of the deceased and attacked the accused.

P.W.3 Ntupana Khorola testified that he is a member of the said anti-stock theft unit and was a member of the group that went to the home of the accused on the 7th January, 1987. He estimates that there were about eleven of them. When they arrived at the court of the accused who is a headman in the village, he (accused) was at his house. P.W.2 called him. He came and sat on a stone inside his yard and was about five paces from them. P.W.2 gave him a letter and explained that he had been sent by P.W.7. Accused read the letter and then left for his house without saying anything. P.W.2 asked him why he was leaving without saying anything. He explained that on the following day he would be going to ha Rahlao and invited the deceased to come to the house with him so that they could check the calendar and choose a suitable date. The deceased stood up and left his sjambok and fly-whisk on the ground. He followed the accused. When they came to the house the accused went into the house and closed the door leaving the deceased outside. Accused was later seen appearing at the window and the deceased went to him. As he approached the window two gun-reports were heard and the deceased fell down on his face.

P.W.3 says that they rushed to the house to defend him. They picked up stones, surrounded the house and threw stones at it smashing windows. The accused came out running and holding a pistol in his hand. He fired at P.W.4 but missed him. The

bullet hit a horse. They all ran away when the accused came out of the house and went to the police station.

In cross-examination P.W.3 said that only two people, i.e. P.W.2 and the deceased were sent by P.W.7 to deliver the letter to the accused. However, it is their practice that on such missions all the members of the organization should accompany the messengers of the chief. He denies that they went there in a group so that they could attack the accused. He says that before the arrival of the deceased they never discussed anything with the accused. It was P.W.2 who requested them to wait for the deceased. The letter was given to the accused by P.W.2 because the deceased had not yet arrived.

The version of P.W.4 Mokhalinyane Monyane as to what happened is the same with that of P.W.2 and P.W.3 on all material aspects of the case. He is also a member of the said organization. Because he is lame he did not go to the house of the accused after the shooting down of the deceased but remained at the court. When the accused came out of the house he asked him why he was killing the deceased. He aimed at him with the pistol and fired but missed him and hit the horse.

Detective Sergeant Monyane (P.W.5) was head of C.I.D. at Morija in 1987. He attended the scene of the crime. He was shown a pool of blood near the window of the house of the accused. There were blood stains on the window-sill. There were many stones in the house and the windows were shattered. He also remembers

that before this incident the accused had complained to them about the harrassment the members of the anti-stock theft were doing to him. The accused had complained to them about two or three times that they were chasing him and wanted to kill him.

P.W.6 Motale Mokheseng is a member of the aforesaid anti-stock unit. He corroborates the evidence of his coileagues.

Chief Mohlalefi Bereng (P.W.7) is the Principal Chief of Rothe. He admits that he wrote Exhibits "A" and "B" following a complaint to him by the accused. He testified that on the 7th January, 1987 he wrote a letter to the accused and gave it to the deceased and P.W.2 to deliver it. The deceased and the members of his organization were accusing the accused of being a suspect in a stock theft case. They asked him (P.W.7) to instruct the accused to appear before him so that the matter could be investigated. The invitation did not materialise because he received a report that the deceased had been killed. P.W.7 was unable to trace a copy of the letter he wrote to the accused. However he was quite sure that he wrote such letter.

The accused testified that on the 25th August, 1986 he went to the shop at Mokhalinyane. On his way back to his home he met the deceased and members of his organization. They insulted him and when he realized that they were about to attack him he ran away and they chased him for a distance of about three kilometres. When he came to his home he found some of the members of the organization waiting for him near his yard. He turned and raced his horse to Rothe where P.W.7 wrote Exhibit "A". The deceased

and his colleagues did not comply with the order of P.W.7 contained in Exhibit "A". Seeing that they were ignoring the orders of P.W.7 the accused reported his complaint to the officer commanding, Morija Police Station who wrote a letter to P.W.7 asking him to instruct the deceased, the accused and members of the aforesaid organization to come to Morija Police Station on the 2nd September, 1986. P.W.7 wrote Exhibit "B" but again the deceased and his group ignored the order of P.W.7.

On the 7th January, 1987 P.W.2 and members of his organization came to his place. They assembled at his (accused's) court and P.W.2 called him. He went to them and P.W.2 told him that the Principal Chief of Rothe was calling him and that they had come to fetch him. Accused says that he demanded a letter from P.W.7 but P.W.2 failed to give him one. He also remarked that P.W.7 never sent so many people to come and fetch him. He said P.W.2 must go back and bring a letter from P.W.7 and inform him that he was not prepared to be escorted by such a large group of people. The accused estimates that there were about fifty men. They seemed to be satisfied with his demands or explanation. As he was just about to go back to his house, the deceased arrived and dismounted his horse and asked his colleagues what the accused was saying. P.W.2 said: "This person is refusing." The deceased said: "you are playing with this boy; let's go." They jumped over the fence and went to him. Accused says that he asked them as to whether they looked down upon him so much that they even jump over his fence. The deceased said: "Let's go, this person will always defeat us, we are here to kill you."

He ran into the house and locked the door. The deceased and his colleagues surrounded the house and threw stones at it smashing windows. During the throwing of the stones he suddenly saw the deceased getting into the house through the window. At the time he saw him, half of the body of the deceased was already within the house. Accused says that he fired two bullets in quick succession at the deceased because he was defending himself. The rest of the group ran away when they heard the gun reports. He came out of the house and fled to the Mokhalinyane police station. He denies that he invited the deceased to come to his house so that they could fix suitable dates. He points out that he has calendars in his office which is outside his yard and that there was no need for him to invite the deceased to come to his house. He is in the habit of going about with a pistol in his pocket.

Miss Moruthoane, counsel for the Crown, submitted that the Crown witnesses were honest and credible and asked the Court to believe their story. She submitted that the accused and the deceased had cordial relations. I think that the relations between the accused and the members of the anti-stock-theft unit of the deceased were not cordial at all, at least since August, 1985. Exhibit "A" and Exhibit "B" are evidence of that. The accused tried all he could to organize a meeting between himself and the members of the organization but in vain. P.W.2 testified that he knew nothing about Exhibits "A" and "B" and never saw them. It is very strange that the deceased could have kept these letters to himself because they were addressed to him as the Chairman of the organization. I have serious doubts about the honesty of P.W.2

in saying that he never saw those two letters. I am of the view that both the deceased and P.W.2 decided to ignore them.

I have a doubt whether the Crown witnesses are honest people. I am referring in particular to P.W.2, P.W.3 P.W.4 and P.W.6. I formed the opinion that they are the type of witnesses who, everytime before they come to court to give evidence, they put heads together and manufacture evidence. During cross-examination Mr. Pitso, counsel for the defence, drew the attention of the above witnesses that at the preparatory examination they said when the deceased arrived at the court of the accused, he produced a letter, read it and gave it to the accused. But in this Court the abovementioned witnesses are now saying the letter was in fact produced by P.W.2 when the deceased arrived. P.W.2 gave the letter to the accused and the latter read it to himself. I think the discrepancy is too great and serious to be ignored by the Court. I fail to understand how four witnesses .. can say one thing at the preparatory examination and then make a complete turn about at the trial and say an entirely different thing. I am convinced that when these witnesses sat together to manufacture evidence for the purposes of the trial they did not have a preparatory examination record and forgot what they had already said. I totally rule out the possibility of a mistake because the handing over of the letter to the accused was a very important thing. A mistake cannot be common to all the four witnesses.

I shall quote the actual words of some of these witnesses at the preparatory examination (p.e.) and at the trial. At the p.e. P.W.2 said: "On arrival deceased informed accused that he was being summoned to the Principal Chief's court. Deceased in fact produced a letter which the latter read to Accused. He then explained that the summons was in connection with theft of 'Majoalane's cattle." P.W.4 Mokhalinyane Monyane said: "The deceased arrived, for he came after us. When he arrived he produced a letter, gave it to accused and the latter read it." The version of these witnesses at the trial is that the deceased never spoke to the accused when he arrived. I have formed the opinion that the Crown witnesses mentioned above are unreliable and very dishonest. They should not be believed by this Court.

The accused vehemently denied throughout the trial that the deceased and his colleagues brought any letter from the Principal Chief of Rothe. I suggested to the Crown before they closed their case to call Chief Mohlalefi Bereng, The Principal Chief of Rothe. He testified that he remembers well that he wrote a letter. He was given a chance to trace a copy of such letter but he could not find it. It is a very common practice amongst chiefs not to write a letter/summons when they call their subjects. They merely send a messenger or two to deliver the message to the subject. I had the impression that the Principal Chief may be making a mistake that he actually wrote a letter to the accused. I find it most unlikely that the letter was removed from the file; even if it was removed the serial numbers in the file would reveal that such a letter was written. I am referring to serial numbers because Exhibits "A" and "B" show how

well the records of the Principal Chief in question are kept. I think the doubt which I have about the existence of such a letter must be given to the accused because the Crown witnesses have shown that they are not the type of people one must readily believe.

I am inclined to believe the story of the accused that the deceased and his men invaded him and swore that they would take him to the Principal Chief's court through thick and thin because 'this boy should not always defeat them'. It is very unusual that when a chief sends two people to deliver a letter to his subject that between fifteen and fifty members of an organization should mount their horses and accompany their two colleagues just for the delivery of a letter. All the Crown witnesses failed to give the Court a sound reason why such a large group went to the home of the accused. The obvious reason is that they were ready to escort the accused by force if he attempted to resist. He actually refused to go with them because they had no letter from the Principal Chief. In their attempt to take him by force, the deceased was killed.

The accused says that when he shot the deceased the latter's half of the body was already within the house through the window and that he had no alternative but to shoot him in self-defence. His story is to some extent confirmed by the presence of the blood on the window-sill especially on the inside part of it. A suggestion was made that the blood spurted on the window sill when the deceased was shot. I do not agree with that suggestion because the deceased was shot on the 1st-2nd intercostal space

and 3rd-4th intercostal space. The heart remained intact and no main artery or vein was cut and there is no how blood could spurt as if the heart or main artery or vein had been cut. The deceased was wearing clothes and the bullet 6.35 mm must have made a very small opening on the clothes as well as on the body so that blood could not spurt directly at the window.

Stones were found in the house and the windows were shattered. I am of the opinion that under such onslaught the accused was entitled to defend himself with any weapon he had at his disposal.

In a criminal trial the burden of proof remains throughout on the Prosecution to prove its case beyond a reasonable doubt. If the accused gives a story that is reasonably possibly true he must be acquitted. In R. v. Difford, 1937 A.D. 370 at 373 Greenberg, J. described the criminal standard thus:

"..... no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is **not entitled** to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

Similarly in R. v. H., 1946 A.D. 1023 at p. 1027 Davis, A.J.A. said:

"..... the court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true."

I have formed the opinion that there is a reasonable possibility of the accused's explanation being true and he is therefore entitled to an acquittal. I accordingly find the accused not guilty.

My assessors disagree.

J.L. KHEOLA
JUDGE

26th October, 1990.

For Crown - Miss Moruthoane
For Defence - Mr. Pitso.