

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

MATHIBELI PITSO

Accused

J U D G M E N T

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

The accused is charged with the crime of murder in that upon or about the 25th day of December, 1987 and at or near Thupa-Likaka in the district of Maseru, the said accused did unlawfully and intentionally kill B0'kuluba Mosamo.

The accused pleaded not guilty to the charge.

The preparatory examination depositions of Lt. John Tlhabi and Lefa Khoarane were formally admitted by the defence and form part of the record.

The first witness called by the Crown in this Court is Kelebone Khoarane. He testified that on the 25th December, 1987 he was in the company of Lenka Khoarane (P.W.2), Khojane Mokheseng (P.W.3) and the deceased. They were herding cattle at a place called Sekoting which was a reserved pasture. According to him the area of Likoting falls under the jurisdiction of one Mipota who had actually declared the said area as a reserved pasture. He denied that the area fell under the jurisdiction of the accused who is a headman in a neighbouring village. As they were herding their cattle, the accused and one Naila Mphou (D.W.2) arrived. At the time of their arrival, the witness and his companions were sitting above the cliffs and overlooking their cattle. The accused and D.W.2 were on horseback and when they passed below the cliffs near where the witness and his companions were sitting, the accused insulted them and said they were grazing cattle on an area set aside as a reserved pasture. They did not respond to the insults and the accusation.

The accused and D.W.2 passed and went to the cattle and started to drive them. D.W.2 tried to collect other cattle which did not belong to the herd of cattle which were under the control of the witness and his companions, but the accused said he should leave those other cattle but drive only those belonging to the witness and his companions. Kelebone Khoarane (P.W.1) says that as soon as the accused and D.W.2 drove the cattle away they decided to go home and came down the cliffs through the only route that was available there. This route led them to a spot where they found themselves in front of the cattle which were being driven by the accused and D.W.2. The accused dismounted and fired in their

direction; the bullet passed between them. When asked how he saw the bullet pass between them, P.W.1 said he heard its sound. At that time the accused was about ten paces from them. Lenka Khoarane ran away when .. the first shot was fired. As they continued to descend the slope the accused fired the second bullet which passed on their side. P.W.1 says that he was walking side by side with the deceased and Khojane was in front of them. He heard the third gun report and when he turned he saw that the deceased had fallen down. The accused mounted his horse and drove the cattle away.

The deceased had a small wound on the back of the right shoulder and an open wound on the left side of the neck. The latter wound was bleeding . The deceased died immediately after the shooting.

In cross-examination P.W.1 said that it was customary to graze their cattle at the reserved pastures during christmas day and that there was no need to declare the reserved area open for grazing for that day only. They had just passed in front of the cattle and were about ten paces from them when the accused fired the first shot. The accused was behind them. He denied that when they came down from the cliffs they threw stones at the accused and D.W.2. He denied that the accused fired warning shots in the air. They did not run away when the accused fired shots at them because they had lost hope of survival. He denied that the accused dismounted his horse because of the stones that were being thrown at him.

P.W.2 Lenka Khoarane corroborated P.W.1 on all material aspects of the case. He was sitting above the cliffs with the deceased, P.W.1 and Khojane Mokheseng when the accused and D.W.2 passed below the cliffs. The accused insulted them and accused them of grazing their cattle at a reserved pasture. He pointed a gun at them and passed to the cattle. They decided to go home because the cattle had been seized and were being taken to the pound. He remained at the top of the cliffs when the others went down. Immediately after their departure he heard a gun report below the cliffs and ran away. He returned to the scene of the crime long after he had heard the third gun report. He found that the deceased was already dead and he does not know how he met his death.

P.W.3 Khojane Mokheseng also corroborated P.W.1 on all material aspects of this case. He deposed that on the day in question the accused and D.W.2 found them sitting above the cliffs. The former insulted them and threatened to shoot and kill them. They did not respond to the insults and the threat. The accused and D.W.2 went to the cattle and started to drive them away. P.W.3 says that they decided to go home and came down the cliffs through the nearest route available to them. As they came down the accused dismounted his horse and fired two shots at them. They continued to walk down the slope. The accused followed them. When he (the witness) looked back he saw the accused following them; he warned the deceased that the accused was following them. Even before the deceased could answer him, he (deceased) was gunned down. The accused mounted his horse and joined D.W.2 to drive

the cattle to the pound in the village. P.W.3 says that they tried to help the deceased but without any success because he died on the spot. He denied that they tried to stop the cattle from being driven away by the accused and D.W.2. The deceased had a wound on the back of the shoulder and another on the base of the neck.

The accused is a headman in the village of ha Yopa. He claims that the area of Sekoting falls under his jurisdiction. On the day in question he was going to Loting where one of his cattle had gone missing. That was the reason why he was carrying his shotgun. On his way to Loting he saw cattle grazing at Sekoting which was a reserved pasture. He decided to go and seize those cattle and impound them. He was in the company of D.W.2. When they came near the cattle they saw herdboys sitting above the cliffs. He asked them who had allowed them to graze their cattle there. They did not answer him. They passed and started to drive the cattle. The herdboys came down the cliffs and stood in front of the cattle. They started throwing stones at the accused and D.W.2. All of a sudden they passed the cattle and came straight to him (accused). He was still on horseback. As they continued throwing stones they hit the horse. It jumped up and threw him to the ground. His gun also fell down. Realizing that he had no alternative but to defend himself, he took his gun, loaded it and fired in the air with a hope to scare away the herdboys who had actually cornered him under the cliffs. They did not run away when he fired in the air but they kept on advancing towards him and throwing stones at him. He says that

when he fired that first shot P.W.3 was only about five paces from him; instead of running away when he heard the gun report he merely closed his eyes for a short while. He loaded his gun again and fired in the air. They kept on advancing towards him and throwing stones. He was all the time retreating and evading the stones that were being thrown at him.

The accused testified that there was a group of herdboys who were throwing stones and denies that only P.W.1, P.W.2 and P.W.3 were involved in the fight. Regarding the third and fatal shot that he fired, accused says that he does not know how that happened. He does not know how he loaded the gun and shot the deceased. The reason for this is that he was too frightened because he realized that they were going to kill him. He noticed that something was amiss when some of the herdboys went to one of them who had fallen down. He rode his horse and joined D.W.2 in driving the cattle to the pound.

D.W.2 Maila Mphou corroborated the accused in all material respects of this case. He, however, denies that the accused was cornered below the cliffs. He estimates that there were over twenty herdboys who were throwing stones at the accused.

I have considered the evidence of the Crown witnesses as well as that of the defence witnesses and I am of the opinion that their statements must be taken with a pinch of salt. There was no reason why P.W.1, P.W.3 and the deceased went and allegedly passed in front of the cattle which were being driven to the

pound. Even if there was only one path leading down the cliffs, they would have waited until the cattle and their drovers had passed that point of the cliffs. In any case, the defence witnesses testified that there were several paths that one could take from the top of the cliffs. I am of the opinion that the only reason why they went in front of the cattle was to stop them from being taken to the pound. It is a very common occurrence that Basotho herdboys never let their cattle go to the pound without some resistance especially where there are two conflicting claims over the area in question. In the instant case the accused claims that the area of Sekoting is under his jurisdiction. On the other hand the Crown witnesses deny this and allege that the area falls under the jurisdiction of their own headman.

Having concluded that the herdboys resisted the impounding of their cattle and stood in front of them, the next question is whether they threw stones at the accused and put his life in danger. It seems to me to be probable that some stones were thrown at the accused and the cattle in order to force them to go in the opposite direction. I am saying some stones because I do not agree with the defence witnesses that a group of more than twenty herdboys were involved in the stone throwing. Basotho herdboys learn the art of throwing stones at an early age and it is altogether impossible that they can miss a target just about fifteen paces from them. In fact the accused says that at one stage P.W.3 was about five paces from him. I do not believe that P.W.3 could miss him at that distance. If more than twenty

herdboys of the ages of the Crown witnesses were involved in the throwing of stones, I am sure that the accused would have been hit several times and would have died. I am convinced that only three herdboys were involved in the throwing of stones.

Was the life of the accused in danger at any time during the stone throwing? I do not think so. The accused dismounted, took out a cartridge from his pocket, cocked the shotgun, loaded it and then fired in the air, as he alleges, but I am convinced that he fired at the herdboys but missed them. He loaded the shotgun for the second time and the third time. The loading of the shotgun is a fairly long process and the accused could not have had the chance to load the gun under the circumstances he wants this Court to believe. According to him the attack by this group of herdboys was so fierce that he thought he was going to die. Under the circumstances he has described he would not have had the chance to load the shotgun. He was able to load it three times because the stone-throwing must have been very sporadic.

The Crown witnesses testified that when the deceased was shot they were already walking away and had their backs towards the accused. I think this allegation is confirmed by the fact that the entry wound was on the back of the right shoulder and the exit wound was on the left scapula region. P.W.4 Trooper Makhoali examined the dead body at the scene of the crime and established which between the two wounds was the exit wound. It was, as usual, much bigger than the entry wound. His evidence on this point was not challenged by the defence and I accepted it.

In the view that I take the deceased was shot from behind and was not facing the accused. He was, therefore, not throwing any stones at the accused at the time he was shot. He was not posing any danger to the accused. The accused alleges that he does not know how he shot the deceased because of the fierce stone-throwing at him by a group of herdboys. He is telling a pack of lies about the fierce attack because he would not have escaped unscathed. A stone in the hand of a Mosotho herdboy is a very dangerous weapon and usually directed at its target with a very high degree of precision. The evidence and the indications are that there might have been sporadic throwing of stones at the beginning, but when the shooting down of the deceased occurred, it had completely stopped and the deceased and his companions were walking away with their backs towards the accused.

Miss Tau, counsel for the accused, submitted that the accused was not just under pressure of the attack but he did not have any other avenues open to him to ward off the attack. He is an old man much older than the Crown witnesses who were involved and the deceased. He could therefore never have been able to outrun them. Moreover, he was attacked with stones, and therefore he could not have been able to run and at the same time side track the stones. I think this submission is based on the wrong assumption that the defence evidence is correct that the accused was under pressure of a fierce attack. I have already rejected that evidence.

She referred to The Law of South Africa, 1981, Vol. 6 at page 39 where the learned authors say :

"If it is necessary to use force to repel an unlawful attack, the measure of force must be reasonable in the circumstances. The defence must merely be deterrent and not retributive - the criterion is reasonableness and not whether defence was commensurate with the threatened harm."

I entirely agree with the above statement of the law and it seems to me that in the present case the defence was retributive because the accused shot a person who was no longer facing him or throwing stones at him.

I have already found that at the beginning of the encounter the deceased and his companions probably threw stones at the accused and the cattle in an attempt to stop him from impounding them. However, at the time he shot the deceased the throwing of stones had stopped. The deceased and his companions were either running or walking away as a result of the first two shots which, according to their version, narrowly missed them. I am of the view that at the time he shot the deceased, the accused was not in danger of his life or serious bodily injuries because the attack had stopped.

In Hope v. Rex 1917 H.P.D. 146 Broome, J. said:

"I should be the last to scrutinize too closely any retaliatory action in the presence of threatened danger where an assailant had raised his weapon with the intention of committing an assault. It would of course be absurd to suggest that one must wait until the blow has fallen before taking retaliatory measures, and if, in the present case, there had been nothing more than an assault upon the aggressor there would have been good ground for an appeal. This assault however is justified upon the ground of self defence; but the law is that if the person assaulted does not attack the aggressor until

the affray is over, or until his assailant is running away, that is not self defence such as would excuse an assault. Nothing more must be done than is necessary for the defence of the person or property. If the counter attack is excessive, or greater than is necessary for mere self defence, or is made after all danger is over, there would be no justification." (My underlining).

I find the accused guilty of murder.

My assessors agree.

J.L. KHEOLA
JUDGE

26th October, 1990.

EXTENUATING CIRCUMSTANCES

1. There was no premeditation - the accused found the deceased and his companions grazing cattle at the reserved pasture by chance because he was on his way to Loting where his cow had been reported missing.
2. There was provocation - although the provocation was not a defence to reduce murder to culpable homicide, I think it can be taken into account as an extenuating circumstances. I found as a fact that at the beginning of the fight the deceased and his companions did throw stones at the accused.

I come to the conclusion that there are extenuating circumstances.

SENTENCE:- Six (6) years' imprisonment.

Disposal of the shotgun:- It is forfeited to the Crown.

J.L. KHEOLA

JUDGE

6th October, 1990.

For Crown - Mr. Mokhobo
For Defence - Miss Tau.