

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

BOFIHLA MOTEMEKOANE

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 5th day of February, 1990

The accused is charged with murder. It is alleged that upon or about the 27th day of February, 1988, and at or near Airport Hotel in the district of Maseru the accused unlawfully and intentionally killed Thamsanqa Sixishe (hereinafter referred to as the deceased). To this charge the accused pleaded not guilty.

The defence admitted the depositions of the following witnesses: Dr. Macario Oliver (P.W.1), Tseliso Mahao (P.W.4), Trooper Mahase (P.W.5), Nthomeng Majara (P.W.6) and Thozamile Sixishe (P.W.7).

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It is common cause that on the 27th February, 1988 the accused stabbed the deceased on the base of neck on the left side with a knife - Exhibit 1. The wound was 3 cm. long and 6 cm. deep. The jugular vessels were lacerated. Death was due to massive haemorrhage due to laceration of the jugular vessels. According to the accused the stabbing took place in the course of self-defence.

It is common cause that on the day in question the deceased and one Phineas Molise (P.W.2) went to Airport Hotel to attend a musical performance that was supposed to be held there on that day. The accused and his companions went to Airport Hotel for the same purpose. When Phineas and the deceased arrived there they were told that the festival had been cancelled.

Phineas testified that when they left Airport Hotel they took the road leading to the stadium. Somewhere along the road they found the accused. He was fighting with one boy from Hlotse who was apparently well known to the deceased. The accused had a brown okapi knife with stars on the sides of its handle. The deceased intervened and tried to stop the fight-pleading with the accused not to do such a thing. The boy from Hlotse left immediately after the deceased had intervened. Phineas says that after the stopping of the fight, he and the deceased proceeded towards the stadium and that the accused and his companions followed them. However, under cross-examination Phineas says that the accused and his companions were ahead of them.

Before they reached the gate of the stadium the accused told the deceased that he had made himself a "starring" and he (accused) was in a fighting mood because the deceased had intervened in his (accused's) fight with the boy from Hlotse. Realising that the accused was about to fight with the deceased, Phineas says that he suddenly saw Samuel Sefefo (P.W.3) in his van travelling along the road leading directly towards the gate of the stadium from Mthembu's. He stopped the van and asked Samuel to carry him and the deceased to the bus stop because the accused wanted to fight with the deceased. As he spoke to Samuel he was on the driver's side and was leaning against the van with his head in the cabin. The deceased and the accused together with the other boys were standing about eight paces away behind him.

After talking to Samuel he turned and saw accused clasp his knife, put it into his pocket and leave the place. After that the deceased came to him and held him with his hands as if he was falling on him. He noticed that blood was spurting from the deceased's left shoulder like water from a pipe that has burst. The deceased was carried to the hospital where he died on the same day. This witness says that he did not hear when the deceased referred to the accused and his companions as the "Young of Matlana" and that if he had uttered such words he would have heard him.

Phineas denies that Exhibit 1 belonged to the deceased. He alleges that he was in the house of the deceased that morning when

the latter dressed and he saw that he did not have any knife in his pockets. He says that they met the deceased and his companions at the gate of Airport Hotel and that they were following the accused and his companions but they had no intention of fighting with the accused. He saw Exhibit 1 very well at the time the accused was fighting with the boy from Hlotse. He saw that it was an okapi knife with three stars. However when Exhibit 1 was examined in Court it was found that it had seven stars - three big stars and four small ones.

Phineas admitted under cross-examination that he did not see when accused stabbed the deceased and did not know the cause of the fight. He did not see that there was a struggle between the deceased and the accused before the former was stabbed; but he says that if there had been a struggle behind him he would have heard because the accused and the deceased were not far from him.

Samuel testified that when he came near the stadium he was stopped by Phineas who asked him to carry them to the bus stop because the accused wanted to fight with the deceased. According to him Phineas was standing near the van on the driver's side but his head was not in the cabin. There were a number of boys in front of his vehicle including the deceased and the accused. He did not look at Phineas but looked at the boys in front of the vehicle about

whom Phineas was talking . They were about twelve paces in front of his vehicle. He saw that the accused was talking but he did not hear what he was saying.

While Phineas was still talking to him the deceased was facing towards the vehicle and he (Samuel) saw when the accused took out a brown okapi knife and stabbed the deceased with it on the left shoulder and a lot of blood came out immediately. The deceased spinned several times before he took off his coat and put it on the wound in an attempt to stop the bleeding but in vain. Samuel says that he sat in the vehicle until the deceased came to him and asked him to take him to the hospital because the bleeding was too much. The deceased tried three times to get into the buck but failed and then lay down near the vehicle. He was eventually carried into the vehicle but died on the way to the hospital.

Samuel told the Court that the deceased was not doing anything and his hands were in the pockets of his coat. When his attention was drawn to the fact that at the preparatory examination he said he did not see whether the . hands were in the pockets or (uc) hanging on the sides, he denied having said so. But the preparatory examination proceedings show that he said so.

Again when his attention was drawn to the fact that at the preparatory examination he said he did not see the type of knife accused held, but that he noticed that it was a knife, he said he saw that it was an okapi knife.

In his defence the accused repeated what he had said in his "confession" which was recorded by Miss Nthomeng Majara (P.W.6 - P.E.) which was admitted by the defence. The accused testified that on the afternoon of the day in question he went to Airport Hotel with one Keke Moletsane who is his friend. They met the deceased's group at the gate of Airport Hotel and the deceased said to them: "The young of Matlama, there is no longer any racial performance." They immediately decided to leave, they moved from the gate but the deceased and his companions followed them down the road leading to the stadium. When they were about fifty yards from the gate of the stadium he and Keke stopped and asked the deceased and his companions what they wanted from them. The deceased said they were fighting. He (deceased) and his group kept on advancing towards him. The deceased took out a knife from his pocket and they surrounded him and Keke. The deceased tried to stab him with that knife but missed him.

The accused says that after the deceased had missed him he moved back but was stopped by the deceased's companions who had surrounded them. He then went to the deceased and held his right wrist in an attempt to wrest the knife from him. A struggle ensued.

He finally took the knife from the deceased and stabbed him on the left side of the neck because the deceased was still coming to him. He (accused) ran away with his friend immediately after he had stabbed the deceased. He gave Exhibit 1 to Keke and asked him to keep it; he denies that he asked him to hide it. He went to his home and reported on the same day that he had stabbed a person with a knife. In the "confession" he said he did not report because he was frightened. He reported on the following day when he was told that police were looking for him.

Mr. Pheko, counsel for the defence, pointed out a number of contradictions in the evidence of Phineas and Samuel Sefefo. He also submitted that the evidence given by Samuel in this Court differs in material respects from the evidence he gave at the preparatory examination.

The Court shall now consider the contradictions in the evidence of the two Crown witnesses. It is Phineas's evidence that when he went to Samuel's vehicle the deceased was still surrounded by people and the accused was near him, but Samuel denies this. In my view this is not a very material contradiction, if it is a contradiction at all, because during the time that Phineas was moving from the group of boys towards Samuel's van, the deceased may have changed his position. At the time Samuel saw him, the deceased was already on the side of the other boys and they were behind him. Samuel cannot know where the deceased and the accused were before he came to the scene.

Another contradiction is that Phineas says that while he was talking to Samuel his head was in the cabin and that the deceased and the accused were behind him. This is the reason why he did not see when the accused stabbed the deceased. On the other hand Samuel says that the boys were in front of his vehicle; he was not even looking at Phineas as he spoke to him, but he was all the time looking at the boys about whom Phineas was talking. But when he was asked by the Court he said 'they were in the road and on the right side. They were in front of me'. This statement seems to suggest that there were other boys behind Phineas because if they were on the right side they must have been behind him. Be that as it may Phineas was positive that the deceased and accused were behind him. Samuel was also positive that the accused and the deceased were in front of him.

I tend to believe Samuel who appeared to be more reliable than Phineas who was involved in the fight and frantically went to Samuel seeking help. His observation may not have been very accurate. That his head was in the cabin when he spoke to Samuel is most improbable. The head of a driver of a van is usually so close to the window that a person outside need not put his head through the window in order to talk to him. It does not make sense why Phineas had to do that. Even if he wanted to whisper to Samuel there was no need to do that. I believe the evidence of Samuel on this point. In any case the position of his head when he spoke to Samuel is a very minor point. What is important is whether the

accused and the deceased were in front of the vehicle or on the right side of it. I have already said that I believe the evidence of Samuel who is an independent witness who gave his evidence in a more straightforward manner than Phineas.

I agree with Mr. Pheko that the evidence of Samuel Sefefo before this Court differs to some extent to the evidence he gave at the preparatory examination. He previously said he did not see the type of knife used by the accused in stabbing the deceased. He now says he saw that it was a brown okapi knife. He gave his evidence in the magistrate's court in December, 1988 and in this Court in October, 1989. He was describing the events which took place in February, 1988. In addition to the long interval between the dates on which he gave his evidence and the date of the events, there is a possibility that he saw Exhibit 1 at the magistrate's court. I did not have the impression that the witness was deliberately telling the Court a lie. It must be taken into consideration that he was giving evidence about the events which took place long before he appeared before the Courts.

Another example where Samuel contradicted himself is that at the preparatory examination he said that when the deceased was stabbed his hands were in his pockets but he immediately qualified that statement by saying he is not sure whether his hands were in the pockets or just hanging on his sides. Before this Court he was positive that they were in the pockets of his all - weather - coat.

It is not clear why he is now sure and yet at a much earlier date which was closer to the date of the occurrence of these events he was not sure.

It was also suggested that Samuel says the fighting took place along the road from Mthembus and about thirty paces from the T-junction near the gate of the stadium. On the other hand Phineas says that the fight took place along the road running from Airport Hotel and on the side of the stadium to the airport. He says that it was before they came to the junction opposite the gate of the stadium. This statement is attributed to Phineas wrongly. He never said the fight took place before they came to the junction. What he said is that (and I quote his words from my notes):

"We went down and before we reached the gate of the stadium accused said to deceased 'I think you have made yourself a starring (or a boss)' (A starring is a person who knows a lot). Accused and the boys were coming behind us. I tried to talk to the accused and said that they should stop fighting because accused was following the deceased."

There is nothing in the above statement to indicate that the fight actually took place before the boys came to the junction. The impression one gets from the statement is that they were still moving. The next thing Phineas refers to is the arrival of Samuel's van but he does not specifically mention the exact spot where Samuel found them.

The version of the accused regarding the spot where the stabbing took place is that they were about fifty paces from the junction referred to above and they were at a junction of a gravel road which leads into the village. He alleges that Samuel could not have seen them from where he had stopped his vehicle. He claims that he was defending himself because the companions of the deceased surrounded him and the deceased and the latter advanced towards him. He lunged at him and tried to stab him with Exhibit 1 but missed him. In his so called confession the accused says that the deceased fell down when he missed him. There is no mention of this in his evidence before this Court. He (accused) went to the deceased and held his right wrist in order to wrest the knife from him. A struggle ensued till he managed to take the knife. He stabbed him on the left side of the neck and ran away with his friend Keke, because the other boys rushed at them.

I find the story of the accused to be most improbable that the boys who were, according to him, on the side of the deceased and had completely surrounded him and the deceased, did not intervene when he overpowered him. He alleges that when the deceased advanced towards him he moved back and collided with the boys who were in the circle. It is unbelievable that after he had stabbed the deceased they allowed him to escape without any resistance.

The truth seems to be that the boys who were in the circle before Samuel arrived were on the side of the accused. I have

already found that when Samuel arrived the deceased was no longer surrounded by any people; they were all behind him.

If Exhibit 1 belonged to the deceased, why did the accused ask Keke to keep it? He says that he was not hiding it but merely asked Keke to keep it. He does not explain why the knife could not be safe in his custody. A reasonable man would have taken this knife to his parents and told them what had happened. Again the accused does not explain why he did not report to his parents that he had been involved in a fight with another boy and that he had stabbed him. After all he ran away immediately after he stabbed the deceased and did not know that his victim had died. What was he afraid of? He alleges that he was defending himself but was afraid to tell his parents; he also decided that the knife which was not his property would not be safe in his custody.

I have formed the opinion that the accused intended to hide Exhibit 1 when he gave it to Keke. He knew that he had done a wrong thing with it and wanted to distance himself from it.

The other part of the story of the accused which is most improbable is the description of the manner in which he wrested the knife from the deceased. He alleges that the deceased was holding

the handle of the knife which is about five centimetres long. The hand of the deceased must have covered almost the whole of the handle with less than two centimetres sticking out on the thumb-side of his hand. It seems to me that it would be impossible for the accused to have a good grip of that small part of the handle and to pull the knife out of the hand of the deceased. Even if by magic he had succeeded in gripping that small part of the handle the blade would have cut deceased's palm. There was no such injury according to medical evidence.

I have formed the opinion that the accused is not telling the truth that there was a struggle between himself and the deceased before he allegedly wrested the knife from him. Samuel saw that there was no such struggle before the stabbing of the deceased. According to the evidence of the Crown the accused already had that knife when he earlier fought with the boy from Hlotse.

According to the Crown the cause of the fight between the accused and the deceased was the intervention of the deceased in the fight between the accused and the Hlotse boy. The accused was not very happy about that and accused him of making himself a "starring" (boss). On the other hand the accused says that the cause of the fight was that the deceased referred to them as the young of Matlama and followed them saying that he wanted to fight with them. He finally attacked the accused with a knife. It is hard to believe that the deceased could call the accused and Keke the young of Matlama and then decide to fight with them for

no apparent reason. On the other hand it is understandable why the accused could be angry with the deceased. The latter had intervened in a fight that was no concern of his and that way he had 'got too big for his boots' and had to be taught a lesson.

Mr. Pheko referred to the recent case of S. v. Jaffer, 1988 (2) S.A. 84 in which the criminal standard of proof was re-stated. At page 88 Tebbutt, J. stated the law in the following words:

"It is, of course, always permissible to consider the probabilities of a case when deciding whether an accused's story may reasonably possibly be true (see S v Singh 1975 (1) SA 227 (N); S v Munyai 1986 (4) SA 712 (V) at 716B). The story may be so improbable that it cannot reasonably be true. It is not, however, the correct approach in a criminal case to weigh up the State's version, particularly where it is given by a single witness, against the version of the accused and then to accept or reject one or the other on the probabilities. This approach was considered by Van der Spuy AJ in S v Munyai (supra) where he said at 715G:

"There is no room for balancing the two versions, i.e. the State's case against the accused's case and to act on preponderances."

Dealing with Singh's case Van der Spuy AJ, with whom Klopper ACJ concurred, said that the proper approach was for a court to apply its mind not only to the merits and demerits of the State and the defence witnesses, but also to the probabilities of the case. This was to ascertain if the accused's version was so improbable as not reasonably to be true. This, however, did not mean a departure from the test as laid down in R v Difford 1937 AD 370 at 373 that, even if an accused's explanation to 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 his acquittal."

I have considered the merits and the demerits of both the Crown and the defence witnesses and have come to the conclusion that the story of the defence is not only improbable but beyond any reasonable doubt it is false.

For the reasons stated above I find the accused guilty of murder.

My assessors agree.

J.L. KHEOLA

JUDGE

5th February, 1990.

EXTENUATING CIRCUMSTANCES

At the time of the commission of the offence the accused was a youth of eighteen (18) of age. It seems that our Courts might hold youthfulness to be an extenuating circumstance (See R v Jantjes, 1908 E.D.C. 382, R v Ndhlovu, 1954 (1) S.A. 455. (A.D.) at p.459) but the general rule is normally to require some factor in addition to youthfulness. In the present case the additional factor is the absence of premeditation.

The defence counsel pointed out that in convicting the accused the Court did not indicate whether or not there was premeditation. I agree with the criticism. If I may be allowed to correct the omission, this was a case of dolus eventualis and not of dolus directus. The fact that this is a case of dolus eventualis is an extenuating circumstance (See S v Siqwahla, 1967 (4) S.A. 566 (A.D.) at p. 569; S v Arnold, 1965 (2) SA 215 (C) at pp 219 et seq.).

I find that there were extenuating circumstances and the accused is found guilty of murder with extenuating circumstances.

SENTENCE:

Although it is not a good idea to sentence a youth, who is a first offender, to imprisonment without the option of a fine, the Courts are sometimes under an obligation to do so because of the

seriousness of the offence and in order to pass a sentence that will be deterrent to others. The cases of murder where a knife has been used are prevalent throughout the country and it is the duty of our courts to pass sentences that will have a deterrent effect.

The accused is sentenced to five (5) years' imprisonment.

J.L. KHEOLA

JUDGE

5th February, 1990.

For Crown : Miss Moruthoane
For Defence : Mr. Pheko