CRI/T/89/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MOALOSI TATABELA

Held at Qacha's Nek

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla
on the 9th day of May, 1990.

The accused is charged with the intentional killing of 'Musapelo Molelejane who died from a stab wound on 24th June 1989 at Ha Malefane in the Qacha's Nek district.

He pleaded not guilty to the charge.

With a view to shortening the proceedings the defence admitted the evidence of

P.W.2 Photholi Tatabela
P.W.3 Tsietsi Taemane
P.W.4 Paki Malefane
P.W.5 Posholi Malefane
P.W.6 Detective Trooper Janki and
P.W.7 Dr Paul Nkurunginzana.

The crown accepted these admissions. Accordingly they

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were read into the recording machine and made part of proceedings in this trial.

The only witness called for the crown was P.W.1 Masoabi Tatabela who testified that on the day in question he had gone to the feast at the home of P.W.3.

It was during the progress of festivities that he and other crown witnesses saw the accused come into the house where the participants in the feast were eating and drinking Sesotho beer, and throw the deceased's blanket on the floor and in reference to the deceased state "that child has sickened me and I have destroyed him."

Then people who were in the house came out and indeed found that the deceased had sustained an injury in the region of his navel.

The deceased was asked what the matter was and in reply he stated that the accused had stabbed him. Asked why, he replied that he had requested the accused to accompany him to the deceased's grandfather's place to fetch sheep at Ha Mokhoantha. It appears that the deceased felt he had a legitimate claim to these sheep because he was the only surviving heir to his grandfather's estate.

In this respect when asked whether the accused was also claiming the sheep for himself he replied that the accused was questioning the deceased's claim in the face of the fact that whilst the deceased's mother was still alive the deceased could not lay any legitimate claim to these sheep for he maintained it was the mother and not the deceased who could claim these sheep.

Be it noted that the deceased and the accused are close relatives; the deceased being the accused's nephew.

P.W.1 denied the suggestion that he and the accused

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were outside when the fight broke out between the accused and the deceased. He denied that he was responsible for the quarrel that broke out leading to that fight. It had been suggested that P.W.1 had introduced the topic about the sheep at an occasion where the deceased and the accused were together with P.W.1 outside the house inside which the feast was in progress.

It is common cause that the accused does not drink. Although the deceased is known to take beer P.W.1 did not see him drink that day. He went further to say the deceased was not drunk at that feast. However at the preparatory examination he had said the deceased was drunk.

When confronted with this conflict in his evidence he charged the magistrate with having falsely implicated him. The defence duly pointed out to P.W.1 that inasmuch as he had made so bold as to suggest that the magistrate was dishonest it would be an easy matter for him to implicate the accused falsely.

Fittingly then the court decided to view P.W.1's version of events with caution. Thus the approach adopted was to accept his story only in so far as it is corroborated by the admitted crown depositions. With this in view the court accepts that P.W.1 was in the house when the accused and the deceased had their encounter. This is supported by the admitted evidence at page 2 of the P.E. record where P.W.2 said

> "I was sitting in the house with P.W.1 and many other people"

when the accused came in and dropped the deceased's blanket on the floor saying he had stabbed the deceased because he did not respect him. The court also accepts P.W.1's story corroborated by P.W.2 that

> "when being asked why the accused stabbed the deceased with a knife the deceased said he was telling the accused to go with him to Mokhoantha's place to fetch his sheep."

/Counsel

Counsel for the defence rightly pointed out that P.W.1 for no apparent reason decided to deny things which are common knowledge; such as that when annoyed by a minor's insubordination or show of disrespect a senior feels provoked. P.W.1 was so ridiculous in his evasion of such matters as to state that even when shown disrespect by a toddler he runs away for the toddler might harm him.

The accused gave his evidence in the course of which he sought to demonstrate how he acted in self defence when confronted by the deceased who was attacking him. Needless to repeat my acceptance of P.W.1's version that he was in the house implies my rejection of the accused's story that P.W.1 was with the accused when the encounter started.

The accused in his explanation of the attack by the deceased on him and his response in self defence to this attack is that the deceased grabbed hold of his blanket around his neck and slapped him on the face. The accused fell to the ground with the deceased still holding on to the blanket squeezing it tight around the neck to throttle him. The accused rose but without the deceased letting go of the blanket the deceased slapped him again. The third time this process was repeated and while the accused was pinned to the ground on his right hand side (which he demonstrated) he drew his knife from the right handside of his trousers back pocket and stabbed the deceased with it trying to scare him by stabbing at the deceased's thigh. Meantime the deceased a man described as robust powerful and well built much more powerful than the accused and towering a foot in height above the accused was squatting on the accused boxing him about the face while still holding the accused's blanket tight about his neck.

At the same moment the accused was covering his face with the deceased's blanket to parry the blows with it.

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Given these set of circumstances, it seems to me not only improbable but false beyond doubt that the accused could draw his knife with his right hand from the back of his trousers, given further the fact that he was lying on his right side and unclasp his knife with his teeth in order to stab the deceased regard being had to the fact that added to the accused's own weight the deceased's weight would have made impossible the manoeuvre the accused says he employed to stab the deceased.

With reference to a case on probabilities, i.e. in R vs Difford 1937 A.D. 370 at 373, Watermeyer A.J.A. is paraphrased as having stated not in so many words that 'even if an accused's explanation be 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.' See R vs Sehlabaka CRI/T/22/86 (unreported) at 71. In keeping with this view, Van der Spuy in S vs Munyai 1986(4) SA. 712 at 716 said

> "The fact that the court looks at the probabilites of a case to determine whether an accused's version is reasonably possibly true is something which is permissible. If on all probabilities the version made by the accused is so improbable that it cannot be supposed to be the truth, then it is inherently false and should be rejected. But that offers no answer to the approach adopted in my view quite properly by Slomowitz A.J. in the case of S vs Kubeka"

In S vs Kubeka 1982(1) SA. at 537 in regard to an accused's story he said

> "Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State."

> "In other words, even if the State case stood as a completely acceptable and unshakeable edifice, a court must investigate the defence case with

> a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false."

See Munyai 715G by Van der Spuy

In keeping with the authorities just cited, reference to the Third edition of South African Law of Evidence by Hoffman at page 409 (the third edition), it is stated that 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 that the story is false beyond reasonable doubt.

Mr Lenono, relying on R vs Mlambo 1959 SA. at 738 made reference to Malan's dictum that

> "there is no obligation upon the crown to close every avenue of escape which may be said to be open to the accused. It is sufficient for the crown to produce evidence by which such a high degree of probability is raised that the ordinary reasonable man after mature consideration, comes to the conclusion that the case has been proved against the accused."

On this score the defence of self-defence is rejected. It remains, then to consider then how this case is to be resolved. During the course of proceedings reference was made to the fact that- and indeed the P.E. record of admitted depositions showed that - mention was made of the accused's annoyance at the deceased's disrespect. I therefore have had occasion to refer to our law, the Criminal law Homicide (Amendment) Proclamation No. 42 of 1959 in section 4(a) which defines Provocation as follows:

> "The word "Provocation" means and includes any wrongful act or insult which is likely, when done, to deprive a man of the power of self-control and to induce him to assault the person by whom the act or insult is done."

Reference to section 3(1) and subsection (2) shows that a person who unlawfully kills another under circumstances

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which, but for the provisions of this section, would constitute murder, and does the act which causes death in the heat of passion caused by sudden provocation before there is time for his passion to cool, is guilty of culpable homicide only. Sub-section (2) says:-

> "The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation."

I have no doubt in my mind that the sort of provocation that the crown witnesses testified to bear reasonable relationship to the crime charged. It is common knowledge among the society of Basotho that minors or younger people are required or in fact expected to show respect to the seniors, and therefore it leaves me without doubt that the case of the accused stands to be dealt with according to the law just quoted. I acquit him of the capital charge and find him guilty therefore of culpable homicide.

J U D G E.

9th May, 1990.

ON MITIGATION

I have just heard your counsel's address in mitigation that you are an old man - and I agree you are an old man if you are between fifty-seven and sixty-seven. It stands you in good stead that you are a first offender and that you have minor children to support and a wife who is not working, and that the customary law would require you to raise the deceased's head. To some extent, as your counsel has stated, the fact that you have been found guilty of culpable homicide under the Homicide Amendment Proclamation may be interpreted as you having already benefitted to that extent; and regard being had to the case of Chumbeshe Mohapi CRI/T/44/89 (unreported) decided by this Court where the same law was applied. The sentence imposed there was 10 years because, as I have stated, that law gives accused persons just the benefit of making them escape from hanging. Otherwise the sentence was fitting to meet the seriousnes of that crime which is, to all intents and purposes murder, but for the application of that sub-section of that law.

I would be failing in my duty if I could dispense totally with the custodial sentence in the circumstances. I have had regard , of course, as I have stated to arguments and submissions adavanced on your behalf in mitigation. As your counsel has correctly stated, the courts have regard - and high regard, (if I may emphasise that) to the sanctity of life. In the circumstances, therefore, the least sentence I can impose on you is that you go to Gaol for 8 years, half of which is suspended for 3 years on condition that you be not convicted of a crime of which violence is an element committed during the period of suspension.

J U D G E.

9th May, 1990.

For Crown : Mr Lenono

For Defence : Mr Ntlhoki.