

IN THE HIGH COURT OF LESOTHO

In the matter between:-

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R E X

and

TSELISO MAKAE

1st Accused

KHOTSO MAKAFANE

2nd Accused

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 23rd day of May, 1990

The accused are charged with the murder of Sekhola Makae on the 26th September, 1988 at Matomaneng in the district of Thaba-Tseka. They pleaded not guilty to the charge and the Crown withdrew the charge against A1. He was found not guilty and was discharged.

The defence counsel, Mr. Fosa, admitted all the depositions of the ten Crown witnesses who gave evidence at the preparatory examination.

It is common cause that the deceased died as a result of a wound inflicted by the accused with a fairly heavy timber stick. He sustained a gaping laceration extending from frontal area to the right parietal region. There was a depression on the forehead and on the frontal part of the skull and a comminuted (compound) fracture of the frontal right parietal bone; subdural haematoma and cerebral contusion.

The evidence of 'Mamolelekeng Makae, who is the wife of the deceased, is that on the 26th September, 1988 the deceased instructed her to look for a cent that had gone missing in the house. After that the deceased went away. When he came back home that evening he asked her whether she had found the cent. She said she had not. The deceased was not happy at all and said that if the cent belonged to her son she could have searched for it and found it. She replied and said every child is loved by its mother. The deceased punched her with fists.

A young child named Makoena Makae, who was with them in the house, ran away and raised an alarm. The two accused were in a house not far from deceased's house. They came immediately when the alarm was raised. They were armed with sticks. Upon their arrival at the house A2 was following A1 who is the son of the deceased. As soon as A1 entered into the house the deceased struck him with a knobkerrie and A1 fell into the house on the platform built along the wall on which dishes are kept. A2 then struck the deceased with a timber stick on the head once causing the extensive injury described above.

The version of the accused (A2) is not different from 'Mamolelekeng's version but his is more detailed. He says that when they rushed to deceased's house A1 took his stick. He (A2) was still carrying his own stick - Exhibit 1. When they approached the house 'Mamolelekeng was still screaming. A1 was struck on the head with a knobkerrie and fell on the platform in the house. He entered into the house intending to disarm the deceased who had not only a knobkerrie but a knife as well. In fact before A1 entered the deceased had said that they should come in so that he could stab them with a knife. As soon as he (A2) entered into the house the deceased struck him with a knobkerrie on the left hand or wrist and broke his watch. The second blow landed on his waist. A2 says that he warded off the third blow with Exhibit 1 and immediately struck the deceased on the forehead with Exhibit 1. He left immediately without ascertaining what effect his blow had on the deceased.

One of the essential elements of self-defence is that the attack must have commenced or be imminent (S. v. Gerber, 1965 (1) P.H., H. 53). In the present case the attack had already commenced when the alarm was raised. When the two accused arrived at the scene of the fight the complainant was still crying in that house. They did not know what was happening to her. The deceased invited them to come in so that he could stab them with a knife.

To suggest that the accused ought not to have entered into the house is absurd because the complainant was still screaming and there was no indication that the attack had stopped. Even if

the initial attack had stopped I am of the view that the attack was still imminent and the life of the complainant was still in danger. Because a person has the same right to use force in the defence of another from a threatened danger as he would have to defend himself, if he were the person threatened, I am of the view that accused could not stand by and wait until the complainant had been fatally injured (R. v. Mhlongo, 1960 (4) S.A. 574 (A.D.), R. v. Patel, 1959 (3) S.A. 121 (A.D.)).

The entry of the accused into the house was justified because the life of a third person was still in very imminent danger or the initial attack had not ended. What happened when A1 entered? The deceased struck him with a knobkerrie and felled him on the platform. A2 was hot on the heels of A1 and entered into the house immediately after him. A2 was also struck with a knobkerrie and struck the deceased in what appears to me to be self-defence.

I do not agree with the suggestion that A2 ought not to have gone into the house when the deceased hit A1 with a knobkerrie. It seems to me that at that stage the lives of two people were now in imminent danger because A1 had then joined his mother as the second victim of the deceased. A2 had a right to use force in the defence of the two victims but the deceased suddenly attacked him with a knobkerrie. He had to defend himself and used the only weapon he had - Exhibit 1. He delivered only one blow which had the desired effect.

Mr. Qhomane, Counsel for Crown, submitted that even if the Court finds that the accused was defending himself or others, he used excessive force and that he exceeded the bounds of self-defence. He submitted that at least the accused must be found guilty of culpable homicide. I do not agree that A2 used excessive force. He struck the deceased once and he apparently used considerable force because the parietal area of the skull was shattered. The deceased had already seriously injured his wife and son and I think some considerable force had to be used to subdue him. A2 could not take a chance and use light force which would only infuriate the deceased who was already running berserk.


The attack against A2 was also sudden and he could not avoid it by fleeing. As soon as he entered into the house the deceased struck him and to suggest that he should have turned his back to his aggressor and fled is to underestimate the danger he was facing. That would have put his own life in danger.

For the reasons stated above I come to the conclusion that the Crown has failed to prove its case beyond a reasonable doubt.

A2 is found not guilty and is discharged.

My assessor agrees.

Order:- Exhibit 1 must be returned to A2.


J.L. KHEOLA
JUDGE

23rd May, 1990.

For the Crown : Mr. Qhomane
For the Accused : Mr. Fosa.