

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

KELEBONE MASOABI

Accused

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 3rd day of June, 1991

The accused is charged with murder, it being alleged that upon or about the 14th day of December, 1985 and at or near Ha Matala in the district of Maseru, the said accused did unlawfully assault one Amelia Ramashamole with intent to kill and inflict upon her certain injuries from which the said Amelia Ramashamole died on the 15th December, 1985. The accused pleaded not guilty.

The single eye-witness is Fani Masoabi (P.W.2) who is the father of the accused. At the relevant time he was working as Court President of Matala Local Court and had a house at Ha Nelese where he lived with the deceased as his mistress. He had been living together with her as man and wife for about nine (9) years. He alleges that during that period he properly maintained his wife and children who lived at his home at Setleketseng at Ha 'Matsoana. On the 14th December, 1985 P.W.2 was sleeping in the kitchen of his house at Ha Nelese. He was awakened by a sound similar to that of a gun. It was at daytime at about 11.00 a.m. or 12.00 midday. He stood up and saw the deceased pass near the kitchen window. She was running towards the door of the sittingroom. He also went to the kitchen door leading into the sittingroom. When he opened the door the deceased had already entered into the sittingroom and was entering into the bedroom. She closed the bedroom door immediately after entering. At that same time the accused was already in the sittingroom and aimed his gun at the bedroom door and fired one shot. When he turned round he saw P.W.2 at or near the door leading into the kitchen. He immediately aimed his gun at him. P.W.2 says that he rushed at him and caught him around the waist. A struggle ensued until P.W.2 pushed him out of the sittingroom. When they came to the forecourt P.W.2 threw him to the ground and the gun fell down. P.W.2 took the gun. The accused ran away and disappeared behind some houses.

Thereafter P.W.2 went into the bedroom and found the deceased lying on the ground and bleeding profusely from a wound on the buttock. She appeared to be tired. He tried to help her but she waved him away. She had another wound below the left breast. He went out of the house and raised an alarm. People came. He told them what had happened. They chased the accused and arrested him.

The accused was taken to the Maseru Central Charge Office and the gun (Exhibit 1) was handed over to the police together with twenty - bullets in its magazine. P.W.2 was of the opinion that there was no bad blood between the accused and the deceased. The accused was not in the habit of visiting P.W.2 at his new home at Ha Nelese where he lived with his mistress and never had any quarrel with the accused over his mistress. Just before the present incident the accused had assaulted his mother but never apologized to him (P.W.2).

Under cross-examination P.W. 2 said that although he was afraid when the gun was pointed at him, he rushed at the accused who was only two paces from him and grabbed him around the waist. He denied that he grabbed the gun and that the deceased was assisting him and that during the struggle over the gun he (P.W.2) accidentally pulled the trigger and the bullet hit the deceased on the chest. He denied that he failed to provide for his wife and children at Setleketseng. All his cattle were at Setleketseng except a few which he kept at Ha Nelese. He denied that he removed the empty shells at

the scene of crime. When it was suggested that the sound he heard in his sleep was of a scuffle between the accused and the deceased, he said that was not so.

It is common cause that at the relevant time the accused was a member of Royal Lesotho Mounted Police stationed at Tsupane Boarder Post in Mafeteng. Sergeant Hlaele was the officer Commanding, Tsupane Boarder Post. He testified that on the 13th December, 1985 accused came to him and asked for a big gun because he alleged that he was going on patrol. He gave him Exhibit 1 and twenty-six bullets. On the following day the accused again asked to be allowed to go and consult a doctor at Mafeteng dispensary. Sgt. Hlaele allowed him to go there without demanding the return of Exhibit 1. On the following day the accused ^{did not} report back for duty until two weeks later when he came and reported that he had shot and killed a person with the gun which was given to him on the 13th December, 1985.

Sergeant 'Neko testified that on the 14th December, 1985 he was on duty at the Maseru Central Charge Office when P.W.2 brought the accused to him together with Exhibits 1 and 2. In the presence of the accused P.W.2 reported to Sgt. 'Neko that the accused had shot a woman at Ha 'Nelese. The accused and P.W.2 were on the other side of the counter when the latter made the report but the former just kept quiet.

On the 16th December, 1985 the accused was handed over to Detective Warrant Officer Molefi. He went to the scene of the crime on the same day but found no shells or any blood stains .

He saw a hole on the middle of the door of the bedroom.

According to the post-mortem examination report the deceased was shot with a gun on the chest. The exit wound was on the right buttock. Internally there was hemoperitoneum, the spleen was shattered and the small and large bowels were perforated. The doctor formed the opinion that death was due to internal hemorrhage and perforated bowels and spleen.

The accused testified that towards the end of November, 1985 he was on leave and went to Ha 'Matsoana at his parents' home. When he arrived at home he found that the arable fields had not been ploughed and there ^{was} insufficient food for the family. His mother was in distress and could not give him any answer when he asked her why she was in that condition, she sat down and cried. When his leave expired he returned to work. On the 14th December, 1985 he left his station without any permission from his superiors. At that time the gun and its bullets were already in his possession. He denies that they were issued to him on the 13th December, 1985. He did not seek permission from his superiors because he had just returned from leave and he knew that he would not be allowed to go away again. He put the gun in a canvass bag and came to his father at Ha 'Nelese. Arriving at his father's place he found the deceased in the garden. She was hoeing. She was a stranger to him. He approached her and asked her the whereabouts of his father. She asked him to tell her the purpose of his mission.

The accused says that he refused to tell her because he had not come to her but to his father. The deceased ordered him to leave at once because he was wasting her time. She dropped the hoe and proceeded towards the house. He followed her. When she approached the house she walked fast. He also walked fast because he realized that his father was in that house and the deceased intended to close the door as soon as she entered making it impossible for him to see his father. After entering she tried to close the door behind her but the accused was already there and pushed the door from outside before the deceased had closed it. She also pushed it from inside. While the struggle over the door was going on the accused says that he suddenly saw his father come into the sittingroom from the kitchen. He suddenly rushed to him and caught him around the waist with the right hand while the left hand caught him on the shoulder. His father (P.W.2) pushed him to the verandah and he suddenly saw the gun in bag. P.W.2 took the gun. However, before he pointed it at him, he (accused) grabbed the gun and pointed the muzzle away from himself. The struggle over the gun ensued. At that time the deceased was standing besides P.W.2. During the struggle P.W.2 apparently held the trigger and the gun went off. The deceased ran away and went into the bedroom slamming the door behind her.

The struggle over the gun continued until P.W.2 overpowered the accused and the gun fell down some distance from them. P.W.2 rose first and took the gun again. He pointed it at the accused but the latter managed to escape. The accused was later arrested by the villagers and taken to the charge office where he was

interrogated by Sergeant 'Neko (P.W.5). He says that when they arrived at the charge office he remained outside when his father and the others were in the charge office. He was eventually handed over to P.W.5 who interrogated him and on the 16th December, 1985 he was handed over to Detective Warrant Officer Molefi (P.W.4).

In cross-examination the accused admits that when he left his station on the 14th December, 1985 the safety catch of Exhibit 1 was on "F" and there was a bullet in the chamber . In other words the gun had already been cocked and could go off as soon as the trigger was pulled. Asked why he carried the gun in that position when he knew that he was going to travel by bus from Mafeteng to Maseru and endanger the lives of other passengers in the bus, he said the gun was safe because he carried it in a bag hanging from his shoulder.

It is common cause that the case for the Crown depends on the evidence of a single eye-witness. Section 238 of the Criminal Procedure and Evidence Act 1981 reads as follows:

"(1) Subject to sub-section (2), any court may convict any person of any offence alleged against him in the charge on the single evidence of any competent and credible witness.

(2) No court shall -

(a) convict any person of perjury on the evidence of any one witness unless, in addition to and independent of the evidence of such witness, some other competent and credible evidence as to the falsity of the statement which forms the subject of the charge is given to the court; or

(b) convict any person of treason except upon the evidence of two witnesses where one overt act is charged, upon the evidence of one witness to each such overt act."

The two questions to be decided by the Court are:-

- (a) Is P.W.2 a competent and credible witness?
- (b) Is the explanation of the accused reasonably possibly true?

It is common cause that the accused and his father were never at loggerheads before the present incident which led to the death of the deceased. P.W.2 testified that the accused knew the deceased but the accused denies this. P.W.2 had lived with the deceased as his mistress for about nine (9) years. It is improbable that during that long period the accused never visited P.W.2 at his place of work. I believe the version of P.W.2 that the accused did not visit him regularly but on some rare occasions he did so and met with the deceased. The impression I had of P.W.2 as a witness was that he was honest and trustworthy. He gave his evidence in a very straightforward manner and never hesitated in answering questions. I, however, cautioned myself about a possibility

or likelihood of his bias against his own son who had killed his mistress. It was suggested that P.W.2 was not properly maintaining his wife and children. This allegation was refuted by P.W.2 who pointed out that even the cattle that he owns are kept by his wife at Setleketseng.

The evidence of P.W.2 is that he was awakened by the sound of a gun and saw the deceased run past the kitchen window towards the front door. He ran into the sittingroom and saw the deceased enter into the bedroom and slamming the door behind her. The accused fired and shot at the door. When the door was later opened the deceased was found lying near it with the injuries described above. A bullet hole was found on the middle of the door. There was a pool of blood on the floor where the deceased was lying. There is at least one point on which there is no dispute. It is that the deceased was being chased by the accused when she entered into the house. The accused cannot get away with it by using euphemism and saying that when the deceased walked fast he also walked fast. He was actually running and chasing the deceased.

It is not clear how the bullet entered at the chest, but it is likely that after entering into the bedroom the deceased immediately turned and held the door and pushed it so that the accused could not enter. She had no time to lock it because the accused was hot on her heels. I reject the version of the accused that the gun went off during the struggle over it when P.W.2 accidentally pulled the trigger. The accused was chasing the deceased and when he noticed that she had entered into the bedroom and that she was likely to lock the door, he decided to shoot her before she got away from the door. He was successful in his act because the deceased was found near the door having been seriously wounded by a bullet.

The indications are that the accused wanted to kill the deceased because there was no other reason why he chased her and shot her if all he wanted was to see his father. He is obviously telling a lie that he did not know the deceased. How could he be so sure that his father was in that house and even go to the extent of chasing a stranger and finally shooting her before he had seen his father. I am satisfied that when the accused found his mother in the condition that he alleges she was, he decided that his father's mistress was responsible for her distress. She was probably in that condition because there is evidence by P.W.2 that not long before the present incident the accused had assaulted his mother and never apologized. P.W.2 was of the opinion that the accused shot the deceased because he wanted to appease his mother after he had assaulted her.

It is common cause that the accused left his station without the permission of his superiors and also took the gun. He was not going on patrol when he decided to take the gun. As a member of the National Security Services of the Royal Lesotho Mounted Police he did not wear the police uniform. He could not be identified or connected with the R.L.M.P. by the members of the public. He says that he carried the gun for his own protection. Protection from what? The truth seems to be that he was angry and had a very strong belief that the unhappiness of his mother was caused by his father's mistress. He had the intention to kill and that is the reason why he chased and shot the deceased even before he met his father.

It was alleged that P.W.2 removed the shells from the scene of the crime because he shot the deceased. P.W.2 denied this allegation. It is common cause that after the shooting many villagers came to the home of P.W.2. It is possible that any person might have taken the shell or shells. The investigating officer, Warrant Officer Molefi, went to the scene of the crime after two days and found no shells and no pool of blood in the bedroom. He saw the bullet hole on the door. It seems to me that Sergeant 'Neko hampered the proper investigations of this case. The accused was handed over to him on the 14th December, 1985. He knew very well that murder and other serious cases are usually investigated by the Criminal Investigation Division (C.I.D.) of the R.I.M.P. He ought to have handed over the accused to the C.I.D. as soon as possible to enable them to start their investigations immediately after the event. He handed the accused over to the C.I.D. on the 16th December, 1985.

The accused and his father were never at loggerheads before the shooting of the deceased. Then why did the accused have the impression ^{that} if he did not chase the deceased she could close the door and that he would never see his father? He had never had a serious quarrel with his father before this incident and there was no reason why his father would refuse to come out of the house to discuss a family matter. The accused is obviously lying when he says he had the impression that he would never see his father if he allowed the deceased to go into the house and to close the door. He chased the deceased because he had actual intention

to kill her (dolus directus). The accused premeditated the killing of the deceased.

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

My assessors agree.

J.L. KHEOLA
JUDGE

3rd June, 1991.

For Crown - Miss Moruthoane
For Defence - Putsoane.

EXTENUATING CIRCUMSTANCES

The father of the accused had been living with the deceased as man and wife for a period of about nine (9) years. At the same time the marriage between the accused's father and mother still subsisted. In other words, the father^t was living in adultery with another woman while his wife and children were living at the matrimonial home. There is no conclusive evidence that the father did not maintain his wife and children. Be that as it may there is no doubt in my mind that the father of the accused was paying more attention to the woman with whom he lived than to his wife who lived over hundred kilometres away from him.

The accused was very unhappy about this state of affairs in his family. As the eldest son he must have been aware of the relationship of his father with the deceased for a long time and this must have caused him some stress. The state of distress in which he found his mother must have been the last straw.

In the South African Criminal Law and Procedure, Vol. II by Hunt at page 362 the learned author has this to say under Provocation and other emotional disturbances:

"It is clear that provocation short of what is required to negative guilt may constitute an extenuating circumstance. Moreover, X's emotional instability may be such, as a result of a series of events spread over a long period of time and not strictly amounting to provocation, as to amount to an extenuating circumstance. In R. v. Von Zell, for instance, one of the extenuating circumstances specified by the Appellate Division was:

'the strains and stress to which appellant was subjected of his relations with his wife and her daughter, because of his wife's desertion and because of the legal proceedings which she instituted against him."

I find that there are extenuating circumstances.

SENTENCE:- Twelve (12) years' Imprisonment.

My assessors agree.

J.L. KHEOLA

JUDGE

3rd June, 1991.

For Crown - Miss Moruthoane

For Defence - Mr. Putsoane.

"If any person has been convicted on more than one occasion of any of the offences mentioned in schedule 2 whether of same or different kind or whether in Lesotho or elsewhere, and that person thereafter is convicted in Lesotho by the High Court of the offence mentioned in schedule 2, that person may be declared by the High Court to be an habitual criminal".

Schedule 2 makes reference to the types of previous offences which would warrant a man being declared an habitual criminal if subsequently he is convicted of any crime. These are Rape, Robbery, Assault, Housebreaking or entering any premises with intent to commit an offence Theft either at common law or as defined by statute.

I have already indicated that the accused committed Rape previously. He has also been convicted of the crime of Assault with intent to do Grievous bodily harm in the past. I therefore have no qualms in finding that the accused as the Magistrate has indicated deserves a sentence which will indicate to him this time that this game that he is playing is not worth the candle. I therefore have no hesitation in declaring him an habitual criminal and thus ordering that he serve an indeterminate sentence.

J U D G E
17th May, 1991

For Crown : Mr. Lenono

For Defence: Mr. Putsoane