CRI/T/86/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

LETLAMA BOROTHO

ELD AT BUTHA BUTHE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 12th day of June, 1991

In this case the accused Letlama Borotho faces a Murder charge stating that on the 16th November 1988 at I.Y. reserve in the district of Berea he did unlawfully and intentionally kill Sebeo Lazarus Likotsi. The accused pleaded not guilty to this charge. It seems to be common cause that the officer policewoman Maile did issue a gun to the accused with serial numbers 6900223 as well as ammunition of twenty rounds. At the end of the day there were three bullets missing from this number. In his evidence the accused said when he went out on patrol he had occasion to fire a bullet out at Malimong whereas on the day of the events, i.e. on 16th November he had occasion to fire into the air the two other bullets.

On that day the police officers who gave evidence in this Court, namely, Moholoholo, Makhele and S/L Raleaka told the Court that the accused did make an admission to them that he had killed or shot the deceased. With respect

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to the police officers Moholoholo, Makhele and Raleaka the police who had gone on the raid under the command of Makhele, mounted a raid to curb the practice of hooligans who were playing dice in the township of T.Y. They devised a scheme whereby they divided themselves into a group of two when they saw a group who were engaged in a game of dice. The scheme was that one group should go to a lower side of where the dice were being played while the man in charge of this raid, namely, Makhele decided that sergeant Mafata who was armed with a rifle should go to the upper side; and the best way of communicating to the side that had gone to the lower side that it was time to pounce on the hooligans was that Sgt. Mafata should fire into the air; and this he duly did. Immediately the fellows who were busy in a game of dice fled.

It was the Crown evidence that the police who were engaged in this raid or operation, with the exception of Mafata were armed with either whips, or riding crops or something of the sort. This first gun report was heard by Ponto who later heard two other gun reports; and these were in turn heard by the last Crown witness Mr. Macheli - the difference here being that while the police who were engaged in this raid heard a total of two gun reports that day the civilian witnesses heard a total of three, the accused attests to a total of five in all.

I was impressed with the evidence of P.W.6 who told this Court that he saw this man coming running - that is the deceased. Alongside the direction where this man was running to P.W.6 saw the accused who was armed with a rifle and no sooner had the two disappeared from his view than did he hear two gun reports. When he later went to the scene he found the deceased wounded. Although the deceased was his son-in-law he didn't recognise him at the time because he was already placed in a vehicle transporting him apparently to hospital.

Although the evidence of Ponto for all it was

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worth could be credible one would not readily accept it on account of contradictions and unrealibility attributed to his nervous break down or mental disorder that he suffered years ago. This became pretty manifest when he was giving evidence here especially under cross examination. But the credit that could be given to him was that he was ready to inform the Court that these things occurred a long time ago, and that he is not in the best mental frame.

The evidence of the police officers as I have stated was to the effect that the accused admitted to them that he had caused this accident. But surprisingly before this Court the accused denies ever making any such admissions to them. It was indirectly suggested on his behalf that the admissions made to these police officers could be inadmissible confessions. But the authority of David Petlane v. Rex 1971-73 LLR at p.85 is in point in this matter because when an accused person says to a policeman that he has killed somebody he doesn't thereby imply that he has done so unlawfully. It may well be he was doing it in self-defence or in response to superior orders or simply because he was not in his right frame of mind.

The accused was hard put to it to say why these officers should all of them without exception fabricate against him in the manner that he wanted this Court to believe. With respect to S/L Raleaka albeit belatedly the accused sought to proffer an excuse that he is fabricating against him because they had quarrelled over a woman somewhere. Strangely enough even though he had this good reason for discrediting Raleaka he never put it to him when Raleaka was giving evidence before Court while the accused had the opportunity to challenge him with that. On the basis of the case of Small v. Smith 1954(3) SA at 434 coupled with that one of Phaloane v Rex 1981(2) LLR at 246 I reject the accused's explanation or contention in this regard as not only improbable but completely false. His was a clear case of an afterthought of a man who was

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inventing evidence as he was going along. There was no reason why he shouldn't have supplied to his Counsel such an incident as a form of ammunition with which to attack the particular Crown witness. With respect to Trooper Moholoholo the accused showed the Court that Moholoholo harbours no ill will against him. It was a matter of great bewilderment to the accused that Moholoholo could say things that he said about him. The same goes for Makhele. The accused's story was full of contradictions. His evidence was absolutely full of conflicts and was unreliable. At one stage he would tell me that from the scene he had left Moholoholo there. In the same breath he would tell me that actually it was Moholoholo who had left him there. He did to his "credit" confess to the Court that he had given the Court two conflicting stories. The question still remains but why if he is a man who was witnessing these events in the manner of a policeman or a person who is later said by the same Crown witnesses to have told them that he was responsible for this? His insistence on the subsequent version / again is an instance of useless fabrication which should be rejected in its entirety. The question that now remains to be dealt with is that one relating to intention that is in the event that it is found that the accused is responsible for the homicide it should be established what his intention was? What type of homicide it was? In other words the Court is to determine whether this case falls under the category of murder or that of culpable homicide.

It would have been an easier matter to find whether in fact there was a case of culpable homicide if the accused had confided in this Court and come open and tell this Court the truth now instead of doing that he decided to lie. There is authority for the view that an accused person who purveys a tissue of lies to the court does thereby strengthen the case for the Crown. Of course the Crown would have had some prima facie case in the first instance; and in order to be true to the contention that an

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accused person should not necessarily be convicted because he is a liar the Crown should in the first instance have had a prima facie case.

It was submitted to the Court by Mr. Qhomane for the Crown that the intention could be gathered from the fact that the deceased was hit from the back by a bullet therefore he couldn't have been any danger to whoever shot him. So there couldn't be any case of self defence in such circumstances; and that the injury was effected on the upper part of the body which is vital, and that the Court should infer that there must have been recklessness on the part of whoever fired the wound that resulted in the fatal consequences because a reasonable man ought to have realised that a shot fired under such circumstances would result in the victim's death or serious injury; but nonetheless the accused fired without regard to such consequences. I agree with this contention and do accordingly find the accused guilty of Murder on basis of recklessness. My assessors agree.

The Court accepts what your second Counsel has said in extenuation, namely, the fact that you didn't pre-meditate on going to kill this man. I think that is the only reason.

I have just been addressed in mitigation. The Court sentences you to six (6) years' imprisonment.

J U D G E
12th June, 1991

For Crown : Mr. Qhomane
For Defence: 1. Mr. Drametu
2. Mr. Fosa