CRI/T/14/90

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

MALEFETSANE BELEME

HELD AT BUTHA BUTHE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 14th day of June, 1991

In this case the accused was charged with the crime of Murder, it being alleged that on the 2nd day of December, 1987 he killed, unlawfully and intentionally, one Chibiriti Daemane Moloantoa. The accused pleaded not guilty to this charge.

The rest of the Crown evidence which had been led at the Preparatory Examination, save that of P.W.6 was admitted on behalf of the defence. Well, to put the record straight, the entire record was admitted by the defence but the Crown accepted only up to and excluding P.W.6's evidence in which event the viva voce evidence of P.W.6 was led.

The preceding evidence of Crown witnesses was to the effect that on the day in question, the accused and the deceased were together, drinking and chatting merrily. They had been to a horse race and to all day to day harmless diversions commonly indulged in as means of killing time in the villages. When they came back they sat together

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and were seen by these Crown witnesses chatting merrily.

After a while they went into the kitchen. A short while after their disappearance into this house P.W.1 said she heard two gun shots. When she rushed to the scene followed by P.W.2, they met with the accused who threatened them with a gun. It is common cause that the accused was found later elsewhere in a rondavel. The deceased was found lying on his side. Medical evidence shows that the bullet entered from the left side of his arm, travelled through it across into the chest. It is significant, or it's got to be borne in mind that the doctor didn't give evidence here, and therefore was never subjected to any questioning about what he seems to have drawn in his sketch, or what information he has purveyed in his post-mortem report.

His evidence stands in sharp contrast as to the number of wounds - or rather the number of wounds is consistent - but as to the direction of the gun shots that were fired into the deceased with that of P.W.6. I may at this juncture point out that P.W.6 gave me an impression that he is a level headed, sharp witted and very reliable witness. Apart from the fact that he is a trooper of no less than nine years' standing, he seemed to me to be very duty-conscious. He told this Court that the entry wounds are two. There was an entry wound according to his evidence into the inner or front upper arm exiting through the outer upper side of that arm. There was another entry wound which went into the left chest penetrating it, and that wound didn't seem to have had an exit. The accused was confronted with this type of evidence. Needless to say his was just a garbled and confused account of how possibly the bullet fired in the manner that P.W.6 indicated would have found its path into the left chest if it entered the inner side of the arm and exited through the outer side thereof.

This is not the only evidence which relates to the

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physical SETTING. There was evidence also showing that three empty shells were found in the room where the deceased was found lying; and that these shells were consistent with the type of shells to be expected from the gun of the type the accused was holding. Needless to say S/L Telukhunoana's evidence to that effect was accepted without any challenge.

P.W.1 had given evidence at P.E. that she had heard two gun reports. The accused says he only fired once. P.W.6 indicated that the room in which the deceased was found lying consisted in its wall of corrugated iron sheeting and its thickness is no more than the thickness of an iron sheeting itself; in other words it isn't a conventional double sheeting - and that there were a number of holes on those walls, and further that he didn't search outside this house for whatever bullet that might possibly have exited from the upper outer arm was landed there. So possibly it might have gone through the thin iron sheeting. The witness said it might have got obscured by a number of household items or articles which were in that particular room. But what really matters is that three empty shells were found in there.

The accused said he fired only once. Asked if it was possible for a single firing to result in two empty shells being ejected, he once more gave a garbled account of incomprehensible nonsense. His story however is that when he came in there he asked the deceased to give him a sum of about one thousand five hundred (sic) owed to the accused by the deceased. This money, it was stated, the deceased had undertaken to pay back to the accused any time during the month of December, it having been lent to him in November the previous month. When the accused made his demand for this amount, the deceased offered only two hundred rand. The accused refused to accept that amount, and held the deceased to his undertaking that he would pay back this amount of one thousand five hundred(Maloti)

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anytime during the month of December; and in due form, the accused had come there during the month of December, Then the deceased said the accused should find his path out, not only of his house, but also of the deceased's garden. Then the accused told him "I'm not going to march out unless I have been given by you my money". Then when this was happening the deceased happened to have been standing towards the exit, i.e. towards the door. And there and then the deceased took out his gun, cocked it twice, showed the accused that he was in the war path, and the accused shot the deceased and made good his exit without bothering to look back because of his fright.

What I find difficult with this is that a man should order another to go out and then when the accused refuses to go out the other should threaten him with a gun, but does not give him right of exit. Indeed the accused's story according to authorities need not be true. The authorities say that an accused's story need not be true, it is alright as long as it is possibly reasonably true.

In my Judgment the story purveyed by the accused in this instance strikes me not only as improbable but as completely false. There was also the question of his explanation on how the bullet - as I have indicated according to P.W.6 which had exited from the outer upper arm - could find its path back into the rib cage. The accused was insistent in this regard (perhaps consistently with the medical evidence) that it entered through the outer upper arm and travelled in a straight path into the inner upper arm and into the chest. But that is inconsistent with ballistic theory on tragectories or even the court's knowledge of wounds caused by bullets. The simple test as to the path, the points of entry and exits caused by bullets is that the entry wound is smaller than the exit wound. Now if the wound on the upper outer arm was bigger than the wound on the inner upper arm definitely it cannot be said the wound was caused from the outer upper arm

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backwards. Needless to say it is impossible for a bullet exited on the outer upper arm to find its part into the left chest. On that score I reject the medical evidence and rely on the sensible commonsense evidence given by P.W.6.

Furthermore P.W.6 had given a story to this Court as to how the accused said the difference between him and the deceased came about. The story in brief was that the accused had said they fought over diamonds. This evidence was not challenged and naturally ought to have been accepted. The accused came later to say that's not what he told P.W.6. But he let that evidence which he wants the Court to believe is false, pass over in silence. Authorities are adamant that it is grossly unfair that evidence by the Crown witnesses or by an opposing party should be let pass over in silence and later be labelled as false. In fact authorities go further to show that any evidence which tends to contradict it at a later stage without it being put to the Crown witnesses at the appropriate stage is nothing but a last minute fabrication. I have indicated already that the accused was most unimpressive in the witness box. He was evasive, and downright stubborn and refusing to answer certain questions. At times he would avail himself of pretences at stupidity. But all those attempts left the question of circumstantial evidence against him begging. His hope to avail himself of the escape from this charge through the"reasonably possibly true" standard depended on his coming off well in response to these questions. There is abundance of authority that an accused should not and must not be convicted simply because he was telling lies. Jacobs C.J. as he then was in R. v. Moroka Mapefane CRI/T/80/71 (unreported) at 8, did indicate that, in the event that the accused purveys lies in the face of prima facie evidence existing against him, then the fact that he has been telling lies may swing the balance against him. This is buttressed also in the authority of Broadhurst v. Rex 1964 AC 441 at 457 where Lord Delvin said an accused

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person who gives false evidence is in no different a position from an accused who gives no evidence at all, but the fact that he has given false evidence may give additional impetus to the evidence given on behalf of the Crown. In other words it has the effect of strengthening it. That is not to say he has any obligation to prove any case on behalf of the Crown, that being an onus that rests on the prosecution throughout. The rationale in this is that Judicial officers should not fall into the trap of concluding that the accused embarks on the type of lies that he has, because he was guilty, but even if he could have had something to hide hence his lies, unless there was prima facie case then he would be entitled to his acquittal.

But in this case what confront the accused are these three empty shells where he gave a palpably false story and one that is irreconcilable with scientific phenomenon. The accused failed when he was obliged to say if his story could be said to be reasonably possibly true. He failed to say how and where the first bullet struck the deceased, he failed also to give an account of how the shell which is consistent with the firing of second bullet came about. He didn't even attempt of course to say how the third shell came to be in there. His story which I must say deserves nothing else but rejection is that the two shells were planted on him by the police who were doing the tests. Implying thereby that he concedes or admits or own's up firing only one bullet. But the fact of firing once is defied by the fact that there are these two entry wounds which are in opposite directions. It is further defied by the hearing by Crown witnesses who heard at least two gun reports.

In fairness to him the accused did concede for a short while that he might have shot more than once. But when asked whether in the process it was possible for only one shell to have been ejected from the gun, he said it was; which of course is nonsense. So, this whole episode puts in jeopardy the defence that he wants this Court to

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believe he was put to by the actions of the deceased.

As properly submitted by Mr. Mokhobo for the Crown any one of the bullets which found its target in the deceased was enough to immobilise him, should there have been any threat by the deceased against the accused. So that having fired the second and the third in whatever order the accused was in no danger at all even if it could be said in respect of the first shot he feared he was in some danger. Be it remembered that the accused never said the first shot he fired might have gone wide. So according to him because he shot only once that one shot got its mark. I am not blind to the fact that the deceased's gun was a rusty tool that could not be fired.

There is also authority that in a criminal case, the accused's conduct immediately after commission of an offence is of paramount importance concerning his intent. In this case the accused without bothering, as he says, to see what the fate of his great and clever friend was, decided to march out and hide himself in a rondavel. And he was not taken out of that rondavel until much later when teargas was thrown in there in order to flush him out. And his gun was pointed out to the police where it was hidden under the pillow.

The accused was present in Court when P.W.6 indicated that the gun was hidden under the pillow. Once more the accused let this evidence pass over in silence only to come when it was his turn to give evidence in the witness box and say the gun had been accidentally covered under the pillow by a child. The evidence of P.W.6 had not been contradicted on that issue. The fact that the accused had to be flushed out by use of teargas and the fact that the gun was found under the pillow is consistent with the fact that the accused had actually hidden this thing and had actually tried to defy capture.

In answer to a question put to him by one of my

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assessors the accused said that when he fired at the deceased they were standing face to face. Thus one would have expected the bullet to hit the front of the deceased's body. But bearing in mind that the accused's evidence is that the bullet entered the left upper arm from outside and towards the back thereof it is to be wondered how a bullet fired at such a target should go past it and then describe a boomerang path in relation to the man who fired the shot in order to enter the target more or less from the back or from the side and exit through the front inner part of the upper arm and then enter the chest wall and finally rest inside the right part of the chest. Entry through the outer side or even the back of that arm is defied by scientific evidence; the wound on the outside of the arm being bigger than the one inside. This accounts for one firing. The wound on chest wall is as narrow as the one on the inner upper arm and the bullet that caused it was found in the right part of the deceased's chest. This accounts for the next firing. But considering the accused's story for all it is worth, it would seem that in order for the bullet to hit on entry the outer side or almost the back of the arm the deceased must have been facing away from the accused. In which event the deceased could not have posed any danger to the accused. Thus once the deceased was hit on the front of his inner arm, assuming the accused apprehended danger from him at that stage, there was no reason why the deceased who was hit on the left side of the rib cage towards the arm pit should have been fired upon, for by then he was not only facing towards the left-hand side of the accused therefore facing away from him, thus posing no danger to him but on the back of that he must have been immobilised. It does not matter which injury was inflicted first; the thing is when the second one was inflicted the deceased must have been immobilised by the first. It should be borne in mind that the third firing has not been accounted for. We have only the third empty shell to show for it.

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But as I stressed earlier the accused's theory that the entry was towards the outer upper arm is at variance with the axiomatic and incontrovertible truth in such matters that if the outer arm has a bigger hole than the inner then the bullet must have exited through the bigger hole on the outer arm.

Thus this preposterous proposition by the accused only serves to illustrate what great lengths he is prepared to travel in his attempt to deceive this Court. This in my view is not only improbable but beyond all doubt false. Thus it must be rejected as such.

Now camping on the accused's story because it is the only thing to go by as to what occurred in the room where he had his combat with the deceased it is undeniable that this gun which is Exhibit 2 was found in deceased's kitchen. Mr. Makhene referred me to the P.E. record which shows that it had five live bullets. It is possibly reasonably true that the accused was apprehensive that his life was in danger at one stage or another. Even granting that, there is but the fact that there were three shells at the scene and evidence of two firings on the deceased body borne out by evidence showing two entry points in opposite directions. The entry points of gun shot wounds on the deceased indicate to me that excessive force was employed to quell the apprehended danger; and on this score I find that the two firings happen to have been on the upper part of the deceased's body. Any one of these firings would be enough to immobilise the deceased. Thus the accused is found guilty of Murder; having exceeded the bounds of self-defence.

Your Counsel has catalogued a few things which he says I should take into account in finding that in fact there is extenuation in the offence committed. He did establish before he gave me that address that the Crown concurs in the factual accuracy of that statement he gave

ex parte. This consists of the fact that there was no premeditation. Further that there was no history of bad blood between you and the deceased. And that he submitted that the indications are that you committed this offence in the heat of passion. He submitted also that because of the element of provocation whereby you were going to demand what was due to you this should be read as sufficient, taken along with other factors, to reduce your moral blameworthiness.

Whether one agrees or doesn't with the bulk of these submissions I still ask myself what sort of thing it is that when you go to your friend to seek redress for whatever it was you felt you were owed you should go there armed with a gun.

However the Court does find that there are extenuating circumstances in this matter. I have just been addressed briefly on what factors to take into account in trying to have the sentence made as light as possible. I have noted all those - may be the fact that you are the first offender - I am afraid you will have to part from your stock for a considerable length of time. The least possible sentence to be imposed on you is that of going to jail for ten (10) years. My assessors agree.

J U D G E
14th June, 1991

For Crown : Mr. Mokhobo

For Defence: Mr. Makhene