

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

SECHACHE PHOLO

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 5th day of August, 1991

The accused pleaded not guilty to a charge of Murder preferred against him in respect of the alleged unlawful and intentional killing of Thabang Mohapi on 9th December, 1987 at Matlapaneng in the Mafeteng district

The Crown having dispensed with the evidence of Molahlehi Moliko who deposed as P.W.3 in the preparatory examination record, accepted the admitted evidence of :-

P.W.8 - Detective Trooper Sekoto

P.W.7 - W/O Mohotlane

P.W.6 - Phatsoana Theoane

These depositions were read into the recording machine and made part of the record of proceedings before

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this Court.

The post mortem report marked "A" as well as Exhibit "1" a knife and a stick collectively so marked were made part of the record in these proceedings.

Exhibit "A" shows that the deceased's death was due to extensive haemothorax couple with lung collapse.

The post mortem report further shows that the deceased had sustained multiple stab wounds beneath the right axilla. There was also a stab wound behind the right ear. The doctor further indicated in his post mortem report that both lungs had collapsed and that he counted up to seven wounds in the deceased's right arm-pit.

P.W.1 Mamonare Kapoko testified that on 9th December 1987 he saw the deceased driving sheep along a path that passes near her yard. The deceased was approaching P.W.1's yard. Time was around 4.30 p.m. P.W.1 did not know whose these were.

From the opposite direction P.W.1 saw the accused who said to the deceased within P.W.1's hearing; "you folded my sheep yesterday, and you doso again today, it seems you are against me".

There and then the accused hit the deceased with a stick on the head. The deceased fell to the ground.

It is P.W.1's evidence that deceased was not armed and that he did not reply to the charges levelled at him by the accused. P.W.1 further testified that the accused belaboured the deceased while the latter had fallen

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to the ground. P.W.1's oral appeals at restraining the accused were to no avail. P.W.1 had seen five blows being delivered at the deceased while he was down.

She went further to tell the Court that she saw the accused hold his stick in his left hand and take out a knife and with it repeatedly stab the deceased whilst still on the ground. She did not see though where the stab blows were inflicted.

After stabbing the deceased thus the accused rose and ordered his boy to drive the sheep away. Throughout this encounter the deceased was not doing anything but had laid prostrate apparently from the head blow which had first felled him followed by the belabouring that was also witnessed by P.W.2 Motlokoa Kapoko a relative of the accused.

P.W.1 testified that she was able to see this encounter staged by the accused on the deceased because she was only 10 to 15 paces away from the spot where it took place.

P.W.1 testified that prior to the incident she knew of no bad blood between the deceased and the accused.

It appears however that the accused's sheep had on a previous occasion shortly before the day of the incident destroyed the deceased's crops and a Court before which the parties had come ordered that the accused should pay damages.

It also appears that the accused had at one stage laid assault and robbery charges against several men in the village including the deceased and P.W.4 Motlalentoa Tlea. These charges had been dismissed as baseless by the Court

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before which parties had appeared.

Medical evidence makes no mention of any assaults with a blunt instrument such as a stick any where on the deceased's body despite P.W.1's and P.W.2's testimony that the accused used a stick to assault the deceased before stabbing the deceased with a knife several times.

Although P.W.5's evidence does corroborate that of P.W.1 and that of P.W.2 as far as the words allegedly uttered by the accused to the deceased are concerned and as far as the events borne witness to are concerned her evidence is tainted by her deliberate lie before this Court that she never attended school at Matlapaneng and that she therefore cannot read or write. Her lie was exposed by her school teacher who showed that she knows her well and taught her at lower primary school three or four years before the alleged incident. I view her evidence as possibly a result of what she heard being spoken about. Because she has discredited herself in her evidence as a deliberate liar she without any hint that she is inventing her testimony I find it fitting not to pay any regard to her evidence.

Although it is stated on Exhibit "A" that the post-mortem was carried out on 16th December 1987, the date stamp purportedly showing the day when the post mortem form was filled bears the date 8th February 1989 while the hand written date shows 7th February 1989.

Mr. Qhomane for the Crown submitted that this exhibit has been handed in by the Crown and that the Court is not bound to rely on it. He submitted that P.W.8 Sekoto observed

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the injuries sustained by the deceased and testified to them before the Court below. His evidence was admitted by the defence.

In his evidence the accused said he and the deceased were fellow villagers:

He received a report from a boy looking after his sheep. The report was about the accused's sheep allegedly driven by the deceased towards the pound.

The accused went to the pound. Finding his sheep there he went along the direction he expected them to take if driven towards the pound. The accused met with the deceased near Matobonyane's gate. Matobonyane is the husband of P.W.1.

The accused asked what the matter was with the sheep but the deceased vouchsafed him no reply. Instead the deceased took out a knife and lunged at the accused trying to stab him with that knife. The accused retreated and hit the deceased with a stick on the hand that was holding the knife.

The deceased kept coming at the accused who levelled a stick blow at the deceased's neck. The knife slipped from the deceased's hand and fell to the ground. The accused picked it up and stabbed the deceased with it. The deceased was still standing while thus being stabbed.

The deceased fell down when the accused stabbed him with a knife. Significantly the accused did not say the number of times or where he stabbed the deceased. He

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only said after the deceased fell he went with his hordboy to pasture the sheep.

He denies stabbing the deceased after he had fallen. He denied levelling a stick blow which felled the deceased. The accused failed to say in what state of mind he was when thus attacking the deceased. He only told the Court that he was scared. He said he did not know how many times he stabbed the deceased before the latter fell to the ground.

The accused said after leaving the scene he went to the Police Station and was carrying the stick and the knife which he handed to the police.

He reiterated that before this incident he had taken the deceased and others before the Magistrates' Court because they had waylaid him and robbed him of M2000-00.

He told this Court that after the charge levelled at the deceased, P.W.4 and others, P.W.4 appeared not to like him for P.W.4 used to pass him without greeting him.

The accused says P.W.1 and P.W.2 are lying in saying he took out the knife and stabbed the deceased with it. The accused said he disarmed the deceased of the knife and stabbed him in self-defence.

He said he was surprised that the deceased appeared angry with him over what the accused didn't know.

The accused stated that the deceased was buried before Christmas 1987.

The accused reiterated that when he went for the knife the stick was still in his hand but he had transferred

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it to his left hand.

The accused denied that he had been lying to the Court. The accused explained under cross-examination that even though he had hit the deceased's hand with a stick the knife did not fall because the stick blow was not hard.

The accused said the knife held by the deceased was already unclaspd at the stage he hit the deceased's right hand. It is a matter of some surprise though because in questions put to Crown witnesses it was made plain that there were two attacks at the accused; and during the first one the knife was not unclaspd. The accused said he did not remember reference to this incident during cross-examination of Crown witnesses. Even though he was told that his statement that the knife was already unclaspd the first time he was attacked was not consistent with the version put on his behalf to Crown witnesses he said the knife was already unclaspd at that stage.

The accused said he dealt the deceased a harder blow during the deceased's second attack for he realised the deceased was angrier then. He explained that the deceased continued making for him notwithstanding this hard blow.

Apparently the accused had this time forgotten that according to his version he had said what happened when he hit deceased on the neck the knife fell. Instead he told the Court he did not understand that question. When it was put to him that he merely wanted to work himself out of the corner he said his misunderstanding of the question was due to the fact that he is partly deaf. Asked if it is possible he did not hear Crown witnesses testify against

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the version he gave on this point he said he heard them.

The accused stated that he didn't recall his Counsel putting to Crown witnesses that after a blow to the neck on the deceased the latter fell. He denies that any stick blow by him to the deceased felled him.

Asked how many times he had hit the deceased with the stick the accused said once.

When the Court asked if this was his reply to the question put earlier by his counsel the accused said his answer then was "twice".

The accused said he did not know at what stage the deceased fell during the stabbing, but that due to confusion he stabbed him even when the latter was on the ground. He explained that he stabbed the deceased in self-defence. Asked if hitting and incapacitating the deceased and continuing to stab him whilst on the ground is the accused's idea of self-defence he replied that confusion caused all this. Asked to answer the question and to stop fencing with it he answered that "this was not self-defence".

The accused said that even though he heard that what his Counsel put to P.W.1 and P.W.5 was inconsistent with his own knowledge of events he said nothing to him. Asked why he didn't correct his Counsel he said he was afraid.

Shown that when applying for bail he had said he snatched the knife from the deceased and did not say he picked it up from the ground the accused gave a garbled reply.

Asked how he accounted for the absence of the

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statement in his bail application that the knife fell and he picked it up he said he didn't know for he ^{had} always been saying the knife fell and he picked it up. Asked why P.W.1, P.W.2 and P.W.5 should say they saw him produce the knife the accused said it appeared they disliked him.

The accused said he was not drunk that day for he does not take liquor or alcohol. He said he did not go to report about his sheep being driven by the deceased because there were no people at the Chieftainess's place. He didn't go to the Senior Chief's for it was too far.

Asked if he heard his Counsel put to Crown witnesses that he was angry he said he did not hear that. Asked if nevertheless he was angry he said no. Asked where his Counsel could possibly have gathered the idea that the accused was angry he said he did not know.

In P. vs. Difford 1937 AD 370 at 373 read with R. vs M. 1946 (AD) 1023 at 1027 it is stated :

"..... the Court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true".

The accused's story judged against the criterion that it should contain reasonable possibility that it may be substantially true fails to meet this subminimum requirement. His story is substantially true on peripheral issues such as that P.W.5 attended primary school at Matlapaneng but when it comes to matters of substance such as his threatening attitude borne out by his utterance to the deceased when the two first met near P.W.1's gate, coupled

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with what the Crown witnesses saw the accused do, the truth in his story is totally wanting.

The number of injuries inflicted on an unarmed man going about his lawful duty of pinfolding stock which had destroyed his crops cannot be ignored. There is an added factor that the accused seemed to have motive for assaulting the deceased fatally because the deceased had won a case against him in 1986 where the accused was shown to have trumped up false charges against him and others. Lately the deceased had just been awarded damages by a Court of law against the accused's trespassing stock. A matter that the accused must have resented to a very high degree.

With regard to intention that accompanied the unlawful killing of the deceased the authorities are unanimous that a man who drives a lethal weapon such as a knife through the chest wall of another without any lawful excuse must have had the requisite intent to kill. See R. vs Butelczi 1925 (AD) 169 at 194.

I find that the accused had no lawful excuse to stab an unarmed man with a knife on the upper part of the latter's body - which is vital. It was particularly cowardly and wicked that the accused continued stabbing the deceased when the latter was on the ground and thus posing no danger whatever to him.

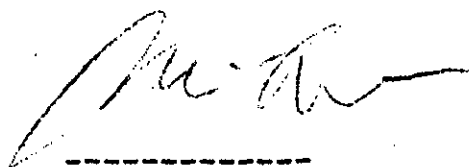
In R. vs Jolly 1923 (AD) 176 at 187 it is stated that :

"The intention of an accused person is to be ascertained from his acts and conduct. If a man without legal excuse uses a deadly weapon on another resulting in his death the inference is that he intended to kill the deceased".

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The accused's version is rejected as not only improbable but as devoid of all truth. He is accordingly convicted of murder as charged.

My assessors agree.



J U D G E

5th August, 1991

(Postponed to 12th August, 1991.)

S E N T E N C E

The accused is sentenced to thirteen (13) years' imprisonment.



J U D G E

12th August, 1991

For Crown ' Mr. Qhomanc

For Defence: Mr. Khauc