

CRI/T/35/92

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

PLAINTIFF

and

MOTLATSI SANKU LEPEKOLA

DEFENDANT

JUDGMENT

Delivered by the Honourable Acting Justice Mrs. J.K. Guni
On the 5th day of September, 1995

The accused person, MOTLATSI SANKU LEPEKOLA, is charged with the crime of murder. The particulars of the alleged crime are that on or about 25/12/89 at or near Auplasi HA RATAU, in the district of MASERU, the said accused did unlawfully and intentionally kill LAGDEN NKAKALA.

The post mortem report indicated that the cause, of death of LAGDEN NKAKALA, was due to internal and external bleeding. The report went on to show (6) six stab wounds at the back, three on each side. The evidence of Dr. Raymond Makoi-Shara of Queen Elizabeth II Hospital confirmed the understanding that there were three stab wounds on each side of the spinal column. There were three more stab wounds in front. Two deep wounds on left infraclavicle region going deep into the lung tissue. There was yet another wound between the 6th and 7th rib.

This medical report is supported in material respects by the evidence of other witnesses such as the policeman who attended the scene of the crime. Detective trooper Lichaba Mokhali told this court that on arrival at the scene he observed pools of blood between 4 to 5 paces approximately from where the body of the deceased was lying. He saw numerous wounds around the neck of the deceased. He claimed he could not count them. The impression he got from his observation of the wounds around the neck, was that an attempt was made to cut off the deceased's neck. He mentioned a wound at the back of the deceased's head. This policeman observed no less than (11) eleven wounds on the body of the deceased. All the wounds are concentrated on the upper part of the body - mainly the chest region. The accused person's father Mr. Nthako Lepekola indicated that he observed eight wounds in all, on the body of the deceased. According to him they were all at the chest area and at the back behind the shoulder. Like the policeman Lichaba Mokhali, he also saw a wound at the back of the head of the deceased.

The Chief of Ha Ratau Morena Bofihla Theko was present when the policeman, Detective trooper Lichaba Mokhali, stripped the body of the deceased at the time he inspected it. The Chief testified to the effect that he observed between 13 and 15 stab wounds on the body of the deceased. The accused person when he made a report to his father, according to his father's testimony, he mentioned he inflicted wounds although he did not specify the number. I am satisfied by all this

evidence that this accused person inflicted upon the deceased those numerous stab wounds.

No attempt is made on behalf of the accused person to deny that he caused the injuries which caused the death of the deceased. The accused person after the charge was put to him, in answer to the allegation put to him he admitted that he killed the deceased, but indicated that he had a reason or reasons for doing so. The plea of not guilty was accordingly entered on his behalf. During the cross-examination of Crown witnesses it emerged that the accused person's reason for killing the deceased was self defence now commonly known as private defence.

The accused person is therefore pleading private defence. For him to succeed in his defence he must establish the following essentials:

- (1) There must have been an unlawful attack or threatened attack, which gave him reasonable grounds for believing that he was in physical danger.
- (2) The means of defence must have been commensurate with the danger and dangerous means of defence must not have been adopted when the threatened injury could have been avoided in some other reasonable way. *Ntsomi v Minister of Law and order* 1990 1 SA 512. c

It appears that the deceased and the accused person were the only people present at the scene of the crime when the alleged fight took place between them. The accused person is the only one left to tell the story about what happened. It

was argued strenuously, on the accused persons's behalf by Mr. Phoofofo, that the court is not entitled to reject the accused persons's story because he is the only eye witness of the alleged fight between him and the deceased.

The story as told by this accused person is to the effect that he was actually attacked by the deceased with a sword. Later on as the trial progressed, and he was now under cross-examination, the accused person claimed that he was threatened with imminent attack with an iron bar. He later on changed the weapon with which he was attacked by the deceased into "Kepi", which is a tool no more than half a metre in length. It is ordinarily used by herbalist for digging out the herbs. The accused person's father went along with his son on this point; That the deceased was a herbalist and used to carry along on his person this "Kepi". The accused person's defence is incoherent. It gives me the impression that it was being built as the crown case unfolded and at times contradicting or at variance with what has been claimed previously by this accused person. For example it was being alleged by the accused person that he pulled out a knife from his pocket, unbugled it and stabbed the deceased who had already commenced a murderous attack using a sword upon the accused person. The variation of this defence is that the accused claimed that the deceased was still brandishing an iron bar, threatening to launch an attack upon the accused person, at the time the accused person then took out of his pocket that knife, unbugled it and stabbed the deceased? Where did he stab?

He does not say. How many times, did he stab? He does not know.

Was the accused person attacked or merely threatened with imminent attack which gave him reasonable believe that his life was in danger or his person was likely to suffer grievous bodily harm? An attempt was made to seek reliance on the ~~h~~istory of conflicts between the deceased and the accused person. It appeared that on 1/12/89 the deceased and the accused person had a fight in which the accused person claimed to have sustained an injury on his head. The accused claimed that the deceased assaulted him with a sword and slashed him on the top of his head. The scar which was still vissible was indicated before the court. According to his father, the accused person sustained a bruise around his eye which got swollen as a result. Both the accused person and his father agreed that the accused person received no medical attention for that injury. 'Mabotle, who resides in the same village never saw any injury on the accused person during the relevant period that is between 1/12/79 to 25/12/89. This was an attempt to claim that he sustained a very serious injury. It was strenously canvassed on behalf of the accused person that his injury was of common knowledge amongst the villagers. That he wore bandages which must have attracted attention of other people. The accused person may have had a fight on 1/12/89 with the deceased; an attempt was being made on behalf of the accused to exaggerate the injury or injuries sustained in that fight. The accused person's father, Mr. Nthako

Lepekola is in good terms with his son, the accused person. They live together. The accused person has parted ways with his wife and children. But he still lives with his father. This should indicate the extent and depth of the smoothness of their relationship. It is the accused person who assisted the registrar of the High Court to locate and bring this crown witness to court. When Mr. Nthako Lepekola told the court that his son may have numerous scars all over his body as his defence Counsel put it, but none of them was caused on 25/12/89. Mr. Nthako Lepekola told the court that his son, the accused person woke him up on the night of 25/12/89 and informed him that he had had a fight with the deceased. He put on the light. Although he did not remove his clothes and inspected his body he was certain he did not see any injuries on him. When the accused person reported to his father that he stabbed the deceased with a knife and that he doubted if the victim will survive the father asked the son to show him the knife he claimed he used. Mr. Nthako Lepekola told the court that he did not touch the knife but he asked the son to open it as it was still clasped. The accused person opened the knife and showed it to his father as he had requested. While performing this action the accused person was being watched by his father. The father told the court that he saw the hands of his son. There were no injuries on those hands or forearms. It was argued on behalf of the accused person that he feared for his life because when the deceased threatened to assault him or actually delivering the blow on the accused person, he recalled the previous assault of the

1/12/89 and the injury he sustained then. The threat of assault and the actual assault coupled with that memory of previous assault gave the accused person fear that his life was in danger.

There is no evidence that the accused person was ever assaulted with a sword by the deceased as claimed by the accused person. According to the accused person's father to whom the accused person made a report of that assault, the stick was used not the sword. The wound on the top of the head was caused on the previous occasion by the accused person's fall on top of the three legged pot which lost that leg as a result of that fall upon it by the accused person.

The allegation that the accused person ever suffered a serious injury at the hands of the deceased using a sword was found to be false. The threat of assault and or the actual assault upon the accused person by the deceased on 25/12/89 is an allegation made by the accused person. Initially when the crown witnesses were being cross-examined on behalf of the accused person by his counsel, it was being put to them that the deceased carried around with him a sword. That on 1/12/89 the deceased assaulted the accused using that sword. The father of the accused although he testified to the effect that he knew the deceased to be a herbalist and he saw him go around in possession of "Kepi" that is used by herbalists to dig out herbs, he had not seen the deceased use it to assault anybody. On 1/12/89 the accused person when he reported to

his father about the fight that took place between him and deceased, he reported to his father that the deceased hit him with a stick. The father has no reason to change the name or nature of the weapon used on his son. If at all there was a taint of favouritism in his evidence, Mr. Nthako Lepekola, favoured his son. On the 25/12/89 and on any other day, the Chief of the village "Morena Bofihla Theko" saw the deceased holding a thin stick. The issue of a sword, that was so canvassed as a weapon used by the deceased upon the accused person was a new phenomenon to the Chief. None of the witnesses except the accused and his father ever saw a sword or "Kepi" in the possession of the deceased. I am convinced that the defence canvassed that a sword is the weapon used by the deceased merely to find justification for the accused person to inflict more than 11 wounds on the deceased.

When the accused person came on the witness stand himself, he changed the weapon from a sword to an iron bar. The size of the iron bar as indicated by the accused person was about half a metre. When asked to state the colour of the iron bar, the accused person indicated that it was dark brown. How he saw that colour at night was going to be a problem. The accused person got around that problem by saying he did not actually see the iron bar. He heard the sound of the iron bar as the deceased dragged it along the ground. It was not going to be easy for a person to drag the iron bar on the ground unless he was bending or he was a dwarf, which features were not even alleged by the accused person. The accused

person realised that he has to lengthen this iron bar. He then increased its length to about a metre; that was doubling its length.

When asked how the deceased assaulted him with the iron bar, the accused person told the court that the deceased delivered chopping and, thrusting blows upon his person. None of these blows caused a dent or scratch on the accused person's body according to the evidence of his father and the policeman who arrested him. Even if his body was made of steel, there should have been some signs, such as dents or scratches to show that he was involved in some sort of scuffle. Particularly if the assault gave the accused person reasonable believe that his life was in danger. The chops, the thrusts and or stabs on the accused persons's body caused not even a bruise or scratch. The law does not require that a person should suffer an injury first before he could defend himself. S.V. Jackson 1963 (2) SA 626 (A).

The scar indicated at the top of the accused person's head is long approximately 4 - 6 centimetres. It should have been fresh and bleeding at the time he woke up his father and made the report about having stabbed the deceased to the extent that he even expressed his doubt if the deceased would survive. The scar at the hand also should have been fresh and bleeding. The father saw no blood nor injuries. Although the accused person claims that his father is lying he does not

suggest any reason why his father would falsely implicate him by denying that he sustained any injuries in that fight when he actually did.

The policeman testified to the effect that on the ground where the body of the deceased was lying there were signs that there were two people involved in some struggle. The accused person claimed he was struggling to get away from the deceased who was assaulting him with a sword. The accused person claimed that the deceased held him in front close to him face to face. It was during this time that the accused person had an opportunity to stab the deceased these numerous wounds at the back and front. The demonstration carried out before this court by the accused person and his defence counsel the accused and the deceased had to be very very close to enable the accused person to have that long reach to stab the deceased at the back of his shoulder from the front.

The accused person was asked why did he not run away at the time the deceased was still brandishing the sword, he said, the deceased was too close for his comfort and he feared to expose his back to the danger of sustaining serious injury. The law does not require the man to expose his back to danger. He apparently stood his ground. K.V. Mathlan 1958 1 SA 350. According to the accused person he stabbed the deceased eleven or so wounds as he defended himself.

At the same breath the accused person claimed to have

been detained by force by the deceased who held him close to his body as he, deceased, delivered those cutting, chopping, and thrusting blows at the accused person with a sword. The fact that this accused person sustained no injury at all, while all these was happening is nothing short of a miracle. This performance described here by the accused person is incredible. It was while the accused person was struggling to free himself from the deceased's grip that his shirt or jacket got torn at the shoulder area. This was said at the end of the defence case. Initially the accused person claimed he did not run away because he feared that the deceased who was brandishing a sword was too close, for him to get a chance, safely to run away. This variation in the defence story leaves no doubt in my mind that the whole story is false. The proximity of the two persons as they fought according to the demonstration the accused person made before this court, there was no way the deceased could have delivered any blow upon the accused person with a sword. It was at that stage that the accused person produced another variation as regards the fashion in which blows were delivered by deceased to the accused person. He claimed the weapon was now "Kepi" no longer a sword; and the blows delivered were now in a thrusting fashion. The length of the weapon had also to be fashioned in such a way that the accused person could with great difficulty stab with it. According to the story of the defence this weapons, sword, iron bar or \ and "Kepi" is one and the same thing. It is not three different weapons or tools as commonly known. There is no evidence that this

weapon apart from becoming three (3) different things, it also had properties of an elastic. It became long when the accused person heard it knocking on the ground as the deceased dragged it along. It became short when the deceased who was holding the accused close to his chest stabbed or thrust it upon accused person. These must be lies.

The accused person as he demonstrated before this court the deceased held him quite close almost chest to chest and face to face. In this way the accused person was able according to his demonstration to stab the deceased six (6) wounds at the back. What was the deceased doing to the accused person at this time, the accused person is the only one who knows. He claimed that the deceased held him making it impossible for him to get away and at the same time beating and thrusting upon his person with a sword. In those circumstances as explained by this accused person it is definitely false that the deceased could hold the accused person that close while the accused is stabbing him, instead of pushing the accused away from him. The time the accused used to get the knife out of his pocket, to open it as he demonstrated, that it does not open automatically, to get it ready to stab, was sufficient time to run away from the threatened or commenced attacked.

As evidence has shown, there was no sword, no iron bar, and no "Kepi" found anywhere near the scene of the crime or on the person of the deceased. There was no evidence of anyone

taking it away either. These weapons are of the accused persons's fiction of the mind here at the court. The deceased had no weapon unless the defence could satisfy this court that apart from stretching and lengthening, this weapon did not only take different shapes and lengths as circumstances suited accused person's cause, but that it also evaporated away.

The doubt, regarding the unlikelihood of the survival of the victim expressed to the accused person's father by this very same accused person who must have been well aware of his actions and their likely consequences, was founded; especially considering the number, nature and location on the body of the deceased of those stab wounds inflicted by this accused person. The intention to kill a person is seldom expressed. Almost every time it is gathered from the surrounding circumstances of the particular case. "In order to arrive at a conclusion as to the state of the mind it must be gauged to some extent by surrounding factors and circumstances". This was said by the honourable Justice Evans in *Rex v Thabiso Lejoetsa* 1972 177 at page 180 A. In our present case this accused person does not deny inflicting the numerous stab wounds on the body of the deceased. The concentration of those stab wounds at the upper part of the deceased's body - their nature and the number, leave no doubt in my mind whatsoever, that the perpetrator intended to put a definite end to the life of the person on whose body those wounds were being inflicted.

Extenuating circumstances have been found to exist.

SENTENCE

You have been found guilty of the most serious crime. Taking away another man's life is indeed a very serious matter, particularly in your case when the excuses you claimed could not be found to exist. You were kind of workmates with the deceased as you told this court that you were both hired by Mr. Makoni to play drums as the accompaniment while he played the accordian. In other words you were a team of amateur musicians. You claimed that you bore no personal grudges against the deceased even though you may have had fights previously with this deceased. It was being alleged by yourself that the deceased claimed to be a better player of drums than you. You were not jealous, because as far as you were concerned there has been no contest to determine which one plays best. The period of Christmas is the time of giving. It is the time to rejoice. You were all doing just that - merry making. You went partying and drinking at 'Mabotle's place, later on that evening, the partying and drinking went on at Mapolosi's place. Here you were entertaining the people as you were engaged in the playing of the accordian and the drums. The consumption of alcohol may

have played a little part in your behaviour. You had been drinking though you claimed you were not as drunk as the deceased. According to you, the deceased was more drunk than you. Your state of sobriety was confirmed by your father when he commented on your behaviour, attitude and demeanour, at the time you reported to him the events of that night regarding your fight with the deceased. He told this court that you spoke very well and coherently. At the time you reported to your father what you have done, you even expressed an opinion based on your observations, that you doubted if the victim will survive. You were not wrong in that judgment. The brutality involved by inflicting so many stab wounds, particularly at the area you chose to concentrate all those stab wounds, is an aggravation. By taking away another man's life you offended against whole humanity and in particular against the Basotho as a nation. That is why you are being sued by the crown representing the people. Your debt to the Basotho people is an enormous one. You must be expecting to pay quite a high price. It is a general expectation of which the court is entitled to take a judicial notice. You may have heard some irresponsible expressions made by some people who want to take a chance to break the law, that they would rather go to jail than remain in control of their faculties and exercise some restraint. I am trying to explain to you that when a person breaks the law, there is some reflection in his/her mind that there is a price to pay for that unlawful act, and deliberately prefers to take the responsibility for the consequences. In this case you must have expected to pay

and pay very dearly.

You are sentenced to 13 years imprisonment. My brother assessors concur.

K.J. GUNI
ACTING JUDGE

For the Accused : Mr. Phoofolo
For the Crown : Mr. Mofelehetsi