

IN THE HIGH COURT OF LESOTHO

In the matter between :

R E X

v

MONGALO CHITJA

J U D G E M E N T

Delivered by the Honourable Mr. Justice T. Monapathi
on the 24th day of November 1995

The deceased Khoabane Chitja died on the 15th January 1994. He had received injuries after an ancestral feast held at the home of Matone Chitja at or near Sekubu, in the District of Butha-Buthe. The Accused stands indicted for the murder of the deceased. It is alleged the Accused did unlawfully and intentionally kill and murder the deceased during his lifetime. The Accused has pleaded not guilty to the charge. Deceased, the Accused, Matona Chitja, Ntumeleng Chitja (P.W.4), Ratlali Chitja (P.W.1) and one Chitja Chitja, are apparently all close relatives. The latter was not called as a witness.

/...

The evidence of P.W.4 and P.W.6 Sethinyane was admitted by consent and read into the machine in terms of the Criminal Procedure and Evidence Act 1981. The evidence of P.W.4 is basically that he identified the deceased's body before a post-mortem examination could be performed. It says that the deceased had suffered a stab wound below the breast. P.W.6 is a medical practitioner. His deposition is about the injuries sustained by the deceased and the cause of death. The report states that there was a wound on the right side of the chest causing a laceration into the right lung which had also collapsed. There was a huge haemothorax in the right lung. The cause of death so the doctor opined, was due to excessive internal bleeding following upon a stab wound.

Three witnesses were led in Court and testified. They were P.W.1 Trooper Monethi, P.W.2 Ramatlali Chitja and P.W.3 Josias Mosola. This was a handful of witnesses. This I say because it was clear in evidence that at around this time of the fight between the deceased and the Accused there was still a lot of people milling around and in groups outside the house. Beer was still being served if we believe P.W.3. This was the situation even at the time of the first incident which involved the deceased and one

/...

Chitja Chitja. It is this Chitja Chitja who after a heated quarrel was locked into one of the houses of Matona Chitja. Not only was Chitja Chitja not called in evidence Matona Chitja was also not called.

Matona Chitja's evidence would have been very beneficial in shedding light on circumstances that led the deceased to be accompanied by P.W.2 and P.W.3 after the deceased's quarrel with Chitja Chitja. The fight between the deceased and the Accused occurred after Chitja Chitja was taken off to be locked in as aforesaid. There are lot of things that needed to be explained. One of them was the time frame around the quarrel between the deceased and Chitja Chitja and the period between when Chitja was locked in and to time when the fight between the deceased and the Accused occurred. This is so assuming that the sequence of events could have been that firstly there was a quarrel between the deceased and Chitja Chitja followed by the locking in of Chitja Chitja, followed by Matona Chitja's order P.W.2 and P.W.3 to take off the deceased. In the circumstances of the irreconcilable features in the evidence of both P.W.2 and P.W.3 the evidence of Chitja Chitja and Matona Chitja would have provided the key to the truth of this matter. The matter being how the fatal

/...

assault on the deceased occurred. But when all is said and done as American philosopher Herbert Hensly Hanson once said: "The difficulty of arriving at the truth when one has nothing but human testimony to rely on is terribly disconcerting."

P.W.5 was Trooper Montsi of the Royal Lesotho Mounted Police who was at the material time attached to the Stock Theft Unit in Butha-Buthe. He received a report about a fight at the ancestral feast. He later received a report about the death of the deceased. As a result he proceeded to the place of Matona where he found the deceased's dead body laid in a tent. He examined the deceased's body in the presence of his next-of-kin. A wound was revealed on the chest below the breast. He saw no other wounds on the dead man. He received certain information as a result of which he arrested the Accused and thereafter questioned him after having cautioned him. Consequently he charged him with murder of the deceased. An okapi knife was handed to him by one JOSIAS MOSOLA (P.W.3). The Accused when confronted with the knife admitted the knife as his own and being the one he used to stab the deceased in their fight. That knife was handed in as Exhibit 1 in the Preparatory Examination. He thereafter took the Accused to the police

/...

station at Butha Buthe. The deceased's corpse was also taken to the mortuary at Butha Buthe.

P.W.3 (the police officer) candidly answered (during cross examination) that the matter was handed over to the Criminal Investigation Department who would normally be expected to continue with further investigation. No account was given to the Court of any further investigation. The witness admitted as much in this Court. Mr. Teele submitted that this perhaps accounted for the fact that only a handful of witnesses testified for the Crown. It accounted for the evidence that did not make sense where there was a large gathering of people such as at that ancestral feast. The explanation given was that the events occurred at the side of the house when the great bulk of the people were unsighted and out of view. Even if this was true much of what is said by witnesses who say they saw is unsatisfactory.

P.W.2 Ramatlali Chitja testified that deceased had clashed with Chitja Chitja during the ancestral feast. This has not resulted in physical combat. Matona Chitja then instructed P.W.2 and P.W.3 to take the deceased home while Chitja was locked in the house. This was actually

/...

done. It became common cause. I have been urged by the defence Counsel to accept that, the fact that Chitja was locked in leads to only one and irresistible inference that the deceased was the trouble maker. The witness then says that they were escorting the deceased and supporting him. He was being supported by way of assistance because he was very drunk. P.W. 3 said the deceased was able to walk freely unassisted that the Accused came from behind and struck the deceased three times on the head with a stick using considerable force. This all happened, as he testified, in the presence of P.W.3. One of the difficulties that abounds in this inquiry is the endless shifting of witnesses from one pole to another especially P.W.2 and P.W.3. I am being mindful of the warning of the learned author of South African Law of Evidence 2nd Edition at page 434 where it is correctly stressed that:

"Whether a witness should be believed or not is obviously not a matter which can be decided by consulting authorities The value of observing the witness demeanour should not be exaggerated demeanour can be a very unsafe guide."

/...

This would be more aptly so if there was something other than the testimony of the two witness to rely on. That is putting aside the evidence of P.W.5 Trooper Montsi.

There are about three things that make P.W.2's evidence difficult to follow as to its truth and value. Firstly, the stick (if it existed) allegedly used by the Accused was not produced in evidence. That is in the context of the Accused's having allegedly attacked the deceased and of P.W.3's testimony that the deceased's stick and that of the Accused broke simultaneously. The reason why the deceased's stick was not produced was thought or was surmised as having to do with the defective or allegedly non-existent investigation. It has been contended that the question of the stick and the manner in which it is alleged to have been used provides a key to the finding of what is true in this case. That is so. It is made significant because it is submitted that the divergent ways in which the fighting occurred, as put in evidence, only succeeds to show that the truth is not being told and it is being hidden.

P.W.2 testified that the deceased was beaten three times with considerable force on the head. But the

/...

following factors make his story strange: Firstly The medical practitioner who performed a postmortem examination did not find any injuries on the head of the deceased. Secondly the identifying witness did not find such injuries. And thirdly the policeman did not testify to seeing wounds on the head.

There was absolutely no sense in P.W.2 stating that he did not mention the injury on the head of the deceased at the preparatory examination, for the reason that he was afraid when he saw blood on deceased's head. If there had been blood that would have been more of a reason for him to have told the Court about the fact. I would find it difficult to reject the submission that there was no wound to see. P.W.2 ended up saying that the deceased was paring off the blows with his hands, that is why so he had one wound. This is obviously a lie that should not be believed. There appears to be no way in which the deceased would have found time to parry the blows with a hand when account is taken of the fact that according to the witness the deceased had been so drunk that he had to be supported to enable him to walk. Furthermore he had been attacked suddenly and unexpectedly from behind.

/...

It may be pointed out by way of emphasis the different ways in which P.W.3 contradicted P.W.2. Firstly P.W.2 said that the deceased could still walk unassisted. Deceased carried a stick and he even fought back with it in exchange or trading of blows which resulted in both sticks breaking simultaneously. It needed an explanation from the witness as to why in the circumstances of an exchange of blows he had to use the word belabour. Whatever his understanding of the meaning of belabour it is not the same thing as trading blows, the latter process which he described when cross-examined. He said (in describing the trading of blows) one made a blow with a stick and the other parried and vice versa as they were moving. P.W.3 conveniently says he did not see where the deceased was hit. This was short of saying that he was not sure if the deceased was hit at all. P.W.3 conceded under cross-examination that he may be mistaken about how the fight began.

P.W.4 Josias Mosola testified that the Accused gave him a knife to keep. The Accused gave no reasons. The witness later produced the knife when the police came. The Accused had informed that the knife was with the witness. This is the knife that the Accused admitted having stabbed the deceased with in self-defence.

/...

I agreed with Mr. Teele that a certain revelation made by P.W.4 under cross-examination was important. I thought it was also disturbing. The witness said that he told the magistrate that the deceased had a wound on the head even though he knew it was not there. He himself had not seen the wound. He said he had heard statements by others that the deceased had a wound on the head. He said there was none. So he thought that because and since others said so he might as well say so too. This was under oath.

I have found it difficult not to accept it a reasonable probability that the Crown witness must have come together to seek to tell a well formulated story of their making. In that event this could not be consistent with the truth. It is the truth that is being hidden in that process. The key to the truth would surely revolve around the evidence as to how the fight began. It is on this aspect where evidence of the Crown witnesses appear to be most unreliable. It is not only a matter of curiosity but it is a mystery of abiding significance as how the deceased having quarrelled with Chitja he (the deceased) came to be attached by the Accused for no good reasons. The deceased had quarrelled with Chitja over a request made by the deceased for beer which Chitja could not give to the

/...

deceased because it was then late. He had another quarel over beer. The quarel was now with the Accused.

The Accused gave evidence under oath being on account of what happened. He says the deceased asked for beer from him and when he refused he was attacked by the deceased with a stick. Accused did not carry a stick. He was hit and he fell down. Deceased came approaching the Accused with an unclasped knife. Accused then took out his knife. He was also stabbed on the left hand. He delivered a blow on to the chest of the deceased with a knife. This resulted in a single wound that made the deceased to fall down. The Accused did not pursue the fallen deceased who later died. Their relations had been good. He had not intended to kill the deceased who was his close relative. He never traded blows with the deceased.

I have been urged to consider it reasonable to accept the Accused's story as the truth in the circumstances of this case. This I am asked to do having in mind the evidence of the witnesses of the Crown and after giving due weight and attention to factors having a bearing on the sequence of events. One of the matters I have taken into account was what I have already said is the improbability

/...

of the Accused having just suddenly come out to strike the deceased. On the other hand it could be that the Crown witnesses have not disclosed that the quarrel between the deceased and Chitja Chitja had occurred a considerable time before that with the Accused. According to the Crown witnesses this Accused's fight with the deceased immediately followed the separation of the deceased and Chitja Chitja.

As I see it I have to reconcile the sequence and the momentum of events that could only have been resolved by the evidence of Chitja Chitja and Matona Chitja. It appears to my mind, as a possibility, that their evidence would to be of such consequence that it would even gainsay the evidence of the Accused who says before this Court that he had a quarrel with the deceased. Even if my view is not correct I must still consider whether the Accused story is reasonably possibly true in the circumstances of case. Before that I cannot help underlining the fact that no exhibits or tell-tales of the stick or sticks were brought about. Furthermore no further investigation seems to have been made on the question of injuries to the deceased (except on the chest) and that on the Accused. It may be there were no such injuries. This tells on the poor

/...

investigation of this matter by the police. Mr. Teele submitted that this was to heart of the problem. It did not take much for the state of affairs to be corroborated by P.W.5 in his candid admission under cross-examination.

The Accused's story was attacked both in cross examination and in the submissions that the Crown Counsel, Miss Mokitimi, made at the end of the trial. The Crown urges me to find that the Accused was not telling the truth when he says that the fight happened at the forecourt of Matona's house and that the fight happened in front of many people. I am being asked to make an adverse finding against the Accused for the reason that none of the people Accused claims saw him stab the deceased has testified before the Honourable Court. I would find fault with this approach. It is tantamount to say that the Accused has an onus to prove his innocence. This approach would only be appropriate as against the case of the Crown not the Accused because:

"..... no onus rests on the accused to convince the Court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is

/...

improbable, the Court is not entitled to convict unless it is satisfied not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal." Per Greenberg J in R vs Difford 1937 AD 370 at 373 (My underlining)

Having commented about the unsavoury aspect of the poor investigation of this case which could only lead to unsatisfactory results I did not accept the invitation by the Crown to find against the Accused based on the following submission. That the Accused claimed to have been stabbed on the hand by the deceased and was also hit with a stick, however there was nothing to corroborate his story, neither a medical report to that effect nor was there a witness who saw the wounds on him.

I would not agree that it was very surprising that the Accused claimed to have been very drunk but when he was questioned he professed to remember everything that transpired. Drunkenness is always a matter of degree. I did not quite appreciate the sweeping attack based on the

/...

submission that the Accused sometimes appeared to hide behind the wall of drunkenness. I thought this was rather unjustified to the extent that it was too broad a generalization of an observation over an attitude. There is a certain common reaction of some people (if not most) of our community when confronted with statements that they were drunk. They became confused and vacillate. It is either that they make a complete denial or exaggerate the extent of their drunkenness. The Accused must have been drunk. Although this did not come out clearly, it must have been the deceased who was too drunk. This is not only my own suspicion. It is borne out by the evidence of P.W.3. Indeed the Accused must have understood what was happening when he handed the knife to P.W.4. He was acknowledging that he stabbed the deceased with that knife. But did that action indicated anything as to his intention either in the actual or legal sense? Did the action by itself or alone say something to negate that the Accused acted in self-defence? It is clear therefore that I took the view that the Crown's attack on the Accused was not valid.

Against the backcloth of the Crown's case, as I have summarized it, it is clear that my task remained to be

/...

that: "..... the Court does not have to believe the defence story, still less does it have to believe it in all details, it is sufficient if it thinks that there is a reasonable possibility that it may substantially be true" per Davis AJA in Rex vs M 1946 AD 1023 at 1027. Moreover I did not have any grounds to disbelieve the Accused who seemed to be an honest witness. With his story it was difficult to find that he had exceeded the limits of self-defence.

That the Accused ought to be acquitted and discharged.
My assessors agree.

T. MONAPATHI
JUDGE

24th November, 1995

For the Crown : Miss Mokitimi

For the Defence : Mr. Teele