CR/T/65/91

IN THE HIGH COURT OF LESOTHO

In the matter between :

R E X

v

MASOLE RAKAIBE

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 14th day of December, 1995

The Accused has pleaded not guilty to the charge of the alleged murder of REFUOE HESHEPE TOMI (deceased) who died on the 22nd March 1990.

All the three versions as to how the deceased met his death point to that he died as a result of a severe knife wound on the left side of his stomach. The wound was sustained on the 21st March 1990. The deposition of the doctor and postmortem report were admitted by consent and made part of the record of proceedings in terms of the Criminal Procedure and Evidence Act 1981. These revealed "internal haemorrhage due to punctured spleen, stab wound (L) lower abdomen, with omentum majus coming out. Abdomen

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full of blood. Source of bleeding spleen puncture." There is no doubt that the wound was seen by many people including P.W.1. P.W.1 says she even saw flesh protruding and blood oozing out of the wound. At the Preparatory Examination she has deposed that "I saw intestines out."It is alleged that the Accused was responsible for causing the death of the deceased hence this charge of murder against the Accused to which he pleaded not guilty. The deceased was a nephew of the Accused.

It may later be important to consider an event that happened two or three months before the 21st March 1990. It concerned a heavily pregnant and sickly woman MATHIBANG SELIALIA who was to be transported to Makhoaba Clinic. The chief invited men of the village of the Accused which is Khochaneng to carry this sickly lady to the clinic. This was done. One of the village men was absent. It was the deceased. The absence of the deceased was made an issue before the Chief. The deceased was reprimanded. It was revealed that it was the Accused (deceased's maternal uncle) who informed and reported about the absence of the deceased or rather he caused that to be made an issue. At that meeting the deceased is alleged to have said to the Accused "you will go where you know" (u tla tsamaea moo u tsebang). The meaning of the expression is a threat that the person threatened will be harmed wherever he is met by

the person making the threat. The Chief was urged to take steps against deceased for the threat. The Chief reprimanded the deceased. Indeed the Accused says that he continued to be on friendly terms with the deceased but he no longer trusted him. On the day of the 21st March 1991 the Accused had been on his way to one of the villages to register his animals or such like business but he was going alone into a rivulet where he met the deceased who was also alone. Apparently no one and certainly none of the witnesses saw the events that followed when the Accused and deceased met. The deceased was fatally stabbed and the Accused sustained injury on one of his fingers. It was a knife wound.

All what the Court is asked to work on and reach a conclusion on the circumstances that surrounded the infliction of the fatal wounds on the deceased. There are a number of versions and variations to the circumstances. These are a result of a report made by the Accused and the deceased to P.W.1 MATHOTSE MOTHATINYANE (who was also P.W.1 at the preparatory examination) and P.W.2 No. 1413 2nd Lt. Lechesa a retired police officer who was P.W.5 at the preparatory examination) and lastly following evidence under oath by the Accused himself.

P.W.1 and P.W.2 were honest witnesses. Indeed P.W.1

was quite unsettled by the cross examination of Advocate K. Mosito on a very important issue namely whether at the time the deceased was making a report the Accused had already arrived and both were in the presence of each other. I am satisfied that the true situation is as she deposed to at the Preparatory Examination. That is, after receiving a report from the deceased she walked out. "At the time Accused was dismounting a horse in my forecourt." P.W.1 had taken the knife from the deceased before she (P.W.1) walked out. I would find that there was nothing to gainsay that the knife actually belonged to the deceased. At the time the Accused then came and was dismounting a horse in the forecourt.

At most the only issue over which the deceased and the Accused confronted each other was the ownership of the knife. None of the two people told P.W.1 their stories in the presence of each other. Accused denied that the knife was his. I was satisfied beyond doubt that P.W.2 was telling the truth as to the nature of the statements made to him by the Accused. This is separate from the truth of the statements. Counsel for the Accused argued forcefully for rejection of the statements as being inadmissible. One of the reasons is that when deceased told his story to P.W.1 the Accused was absent and the evidence can only be inadmissible hearsay.

I might as well outline what the three versions of the circumstances of the wounding of the deceased are. The first version (as reportedly told by the deceased) is that the deceased and the Accused struggled after the Accused had asked for tobacco from the deceased. The deceased had replied that he had no tobacco whereupon the Accused stabbed him and they struggled for the knife. In the process the Accused was also cut on the thumb or one of his fingers. It is this version if true, that would still beg the question as to how the knife came into possession of the Accused. This pertinently and inextricably revolves around that unredeeming factor that the knife belonged to the deceased. It is therefore difficult to separate the question of the stabbing from the aspect of the struggle. Unless there is a satisfactory explanation as to how the knife got out of possession of the deceased. In that way it is difficult to characterize the initial report made to P.W.2 by the Accused before the Accused was warned as a different version. It is in that first report to P.W.2 which he said he received after he had sent for a van from Mokhotlong after receiving report about the death of the deceased. The report is stated below.

P.W.2 said that Accused later arrived at the police station and found the witness outside his office. Accused approached him. He said he wanted to talk to him. He

agreed to talk to Accused and they entered into his office. It was then that the Accused reported that he had stabbed the deceased with a knife. After being cautioned he then gave the following story. That the deceased asked for tobacco from the Accused. Accused denied having any tobacco in his possession. Thereafter the deceased produced a knife and threatened to stab the Accused. They struggled for possession of the knife and this resulted in the deceased being stabbed. In this version I do not see the Accused admitting that he stabbed the deceased. The problem with the first version, for whatever it is worth, is that it is certainly unhelpful. No circumstances are mentioned at all. It may even be that the circumstances were similar to those described to P.W.1. This would be very important on the question of culpability or legal guilt as we all understand for the purpose of convicting the Accused on the offence charged or on any of its competent verdict. I suppose this should be called the second version while that of the first report be made to the P.W.2 is the third version which speaks about a struggle of some kind that resulted in the stabbing.

The Accused was taxed by the Crown Counsel about the statement allegedly made by the Accused on Oath in his affidavit supporting the application for bail in case number CRI/APN/198/90 at paragraph 4. He said therein :

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On the 22nd March 1990 the said deceased who I found on the way fought me for no reason whatsoever. He stabbed me with a knife when we struggled for the possession of the same knife he accidentally stabbed himself. He died the following day of the same wound."

The Accused denied making this statement or a statement of this content. He said it was a mistake on the part of the instructed Attorney to have put in a different set of facts. I did not believe the Accused in his regard. But what is the value of the statement? Would it make the Accused culpable or legally guilty of any of the competent verdicts of the charge? It can only mean that he is a liar. But then what is the true story? Would the Accused being obliged to tell a true story? Does he bear any onus?

The final version or a variation of one of the versions is that given by the Accused himself. He chose to give a statement on oath. He was cross-examined with great care by Mr. Ramafole, the Crown Counsel. The deceased was found by the Accused in the rivulet. The Accused was about five paces from the deceased and about to go past him. Then the deceased stood up and said "What did I say to you?

(Ke ne ke reng ho uena?) The deceased had a knife on the left hand and a stone on the right hand. He put off his blanket. It was then that the knife on the left hand was exposed. He hit the Accused with a stone on the left side of the hairline. The Accused fell and was on all fours. But he immediately rose. The deceased was poised to stab him on the upper left torso near the upper chest near the neck-line. The Accused parried the knife blow with the result that he was wounded on his finger. After some struggle or movement the deceased ended up being on the lower end of the slope or the incline. At that time, the knife was held by the deceased next to his lower abdomen, in some movement. Whereupon a kick was delivered by the Accused to the deceased's hand in which the knife was held. As a result the knife stuck into the deceased's body. This resulted in the wound that caused the death of the deceased. This version that he kicked the knife and that it stuck into deceased's stomach he had previously reported to P.W.1 as revealed in the P.E. proceedings. The deceased died twelve hours later while in possession of the nurses at Makhoaba Hospital. There was enormous delay in treating the deceased. It was said in evidence that a letter from the chief had long been awaited. Deceased died before any treatment was ministered on him. I did not accept that this amounted to *novus actus interviniens on the basis of which the Accused ought to be exonerated. I however did*

not accept that there was a good explanation for the delay.

Mr. Ramafole was permitted by this Court to ask the Accused to demonstrate in Court, the manner in which he kicked the deceased as aforesaid. This the Accused did. Mr. Ramafole contends that the Accused has been very pathetic when he tried to demonstrate to the Court how the stabbing took place. That may be so. But what he did was not impossible. Its success depended on so many things, the terrain, the speed and movement of the contestants all which could not be fully demonstrated. I know of situations where people have fallen over their own knives and where people have fallen over their guns with fatal consequences. I repeat that what the Accused attempted to demonstrate was not impossible. Due to the peculiar problems of this case, most specifically that there is no one to gainsay the Accused on the aspect, I would place no value on the demonstration.

At the end of the day we have the following aspects to the evidence before Court which can be said to be common cause. On the day and at the time stated the Accused and the deceased received injuries most probably from each other. (in the event that Accused's story as deceased's self-inflicted is disbelieved.) Both the deceased and the Accused gave reports to P.W.1. Accused gave a report to

P.W.2 in the version or variations as already described. The Accused himself bore an injury attributed to the deceased's attack. The attack may have been unlawful. It is common cause that every allegation of fact made by P.W.1 as relates to the injuries sustained by the deceased and the ownership of the knife (where he says the knife belonged to the Accused), as well as of issue of fact related to P.W.1 when so related by the deceased to her:

(a) The statement was made by the deceased in the absence of the Accused.

(b) The statement was made not in expectation of death and in a way expressing loss of hope or imminence of death.

It will presently be shown how the underlined aspects inevitable assume importance as Accused's Counsel did eloquently argue.

P.W.1 has given evidence about the report by the deceased and the circumstances. I would place no value on the statement of the witness except to accept that it was in fact made. In law a witness cannot rely on a statement made by a non-witness if such statement is to be used

testimonially, that is, if such a witness intends to rely on such statement as proof of the truth of its contents as against that it was in fact made as aforesaid or tendered to prove that it was made. What this means is that in those circumstances, the contents of the statement would be inadmissible hearsay, in that assertions made by persons other than the witness who is testifying are inadmissible as evidence of the facts asserted. (Subramaniam vs Public Prosecutor (1956) WLR 963 1956 Crim. L.R. 621, and Seisa Nqojane vs NUL C of A (CIV) No. 27/1987 at pages 31-33). Refer to statement of Ackerman J.A. in Seisa Nqojane's case (above) at page 33 where the learned judge says :

> "He cannot even prove when his documents came into Respondent's possession, even if there was an express note to such effect by a former Registrar on the document, <u>because to do so would be to use the assertion of a non-witness testimonially,"</u> (My underlining)

It was correctly submitted therefore that the only facts of evidential value or which P.W.1 would rely on her evidence are the wound she saw. what she was told by the Accused and only what she has as her personal knowledge of. She did not have anything of relevance as her personal knowledge.

I accepted the defence's submission that it is trite law that a statement by a deceased person as to the cause of his injuries is admissible on a trial for murder of that person, although the deceased did not expressly refer to his expectation of death. It is sufficient if the circumstances show that he expected death soon and without hope. A dying declaration is admissible provided it is offering the evidence that the deceased at the time of making of the declaration had abandoned all hope of recovering. For his assistance the Counsel for defence cited the two cases of R v Woodcock 168 ER 357 and R v Jenkins 20LT 372). I found the propositions sound on the law and the two cases accordingly very helpful. I did not find that it was fair to the economy of this judgment to belabour this aspect in-as-much as the Crown did not rely on the issue or existence of a dying declaration. I may point out that indeed in evidence, P.W.1 herself expressly said there was nothing and no circumstances pointed to some expectation by the deceased of death, or loss of hope, or all hope of recovery.

The Learned Counsel for defence has asked this Court to disregard to statements made by the Accused to P.W.2 at the police station on the basis that :

"The common law allows no statement made by the

> accused against himself unless it is shown by the prosecution to have been a free and voluntarily made in the sense that it has not been induced by any threat or promise proceeding from a person in authority." (See Innes CJ in R v Barlin 1929 AD 459 at 462)

It is correct that in criminal proceedings compliance with this requirement has to be proved by the Crown. The rationale behind the requirement or insistence to comply are simply to guard against absence of fair play and presence of oppression on the part of the authority to whom a statement is alleged to have been volunteered. When the accused does not deny that a certain statement was made and in fact goes into the witness box to confirm that such a statement was made freely and voluntarily the Court would not infer prejudice of any kind. This element of voluntariness can even be inferred from and measured against all surrounding circumstances. I observe that all that the Crown had to do was to point to such circumstances showing that a statement was made to P.W.2 freely and voluntarily. In effect, this the defence does not deny. To that extent (for the purpose of proving that the statement was made) I would not reject the statement. To reject the statement would be to carry formality too far. But the question still remains. What would the evidence

before P.W.2 amount to?

I may find that I have closed this judgment without commenting about the person of the Accused himself. I want to avoid that. I believed that the Accused was about 55 years old. The careful cross-examination revealed the Accused for what he probably was. He appeared to be greatly endowed with native wisdom. At no time was he flustered by any of the questions form the Crown. He easily rode over them. One of the clear examples is when he went about the demonstration of the deceased's attack with the knife. He was ever so courteous to the Court and all. I became convinced that not only was the Accused too wordly wise by the standard of his community despite his beguiling appearance. He appeared to have had contact with the workings of Courts or had some such experience, may be, from the Republic of South Africa where he previously worked. This normally brings out a man of affairs. It was clear in the way he conducted himself in Court. I thought I could not ignore remarking about this aspect for what it is worth.

It must be clear by now that the following conclusion on unlawfulness, intention to kill and sufficiency of evidence must follow from the analysis of the evidence as a whole. Firstly, the only evidence available is that the

deceased assaulted the Accused with a stone and attacked the Accused with a knife. There is no evidence contradicting the Accused's story that the deceased attacked him with these weapons. There is no evidence that the Accused was carrying the said knife at all. If at all the knife was ever in the possession of the Accused at any stage, there has not been evidential proof of how it was finally found by P.W.1 in the possession of the deceased.

Secondly, perhaps the Accused is telling an untruth when he says that he kicked the hand that was holding the knife and this resulted in the deceased stabbing himself. In paragraph 4 of the affidavit in support of his application for bail the Accused said that the deceased stabbed himself when the two were struggling for the knife. These two statements are inconsistent with each other. They reflect and can only mean that the Accused might have been lying in respect of one or the other of these versions. However, an accused person cannot be convicted simply because he is a liar. Mofokeng J had to say this about this aspect in Rex vs Emmanuel Qoli Ntoi CRI/T/39/77 7th April 1978 (unreported). "Mr. Maqutu submits that an accused person should not be convicted because he is a liar. The onus of proof in this case is on the Crown. There is no obligation on the accused to say anything. The choice is entirely on his own. It is accepted that it is

sufficient if the Accused's evidence or story should reasonably be true. The Court is not entitled to convict merely because the accused's story is improbable. The Court must be satisfied not only that it is improbable but that beyond any reasonable doubt it is false (R v Difford 1937 AD 370 pp 398-9, R v Monyako, CRI/T/7/75 unreported at p.6). If the evidence for the Crown does not establish the guilt of an accused it would not matter what lies the accused told. That would not advance for Crown's case an iota. But, as Jacobs, CJ, said in Rex vs Moroka Mapefane, CRI/T/80/71 (dated 18th day of December, 1972, at page 8 (unreported)

> "His (accused's) lies might in certain circumstances sufficiently swing the balance against him ....." per Mofokeng J in Rex vs Emmanuel Qoli Ntoi CRI/T/39/77 dated 7th April, 1978. (my underlining)

The following factors are clearly underlined in the above quotation. Firstly the Crown bears the onus of proof throughout which it must discharge beyond a reasonable doubt. Secondly, the Accused's story need not only be improbable. It must be false beyond a reasonable doubt.

I now come to the third consideration in the line of

the conclusions I will want to draw. This injury which resulted in the puncture of the spleen might conclusively suggest use of considerable force. It might also mean the opposite. This would be so, in the absence of testimony showing that, in an expert's opinion, the force used was considerable. This is more especially so where, as in the instant matter, there are no factual factors established upon which this Court may infer use of considerable force. I therefore reject the Crown's submission that the means used were more than commensurate with that used through a knife. That a knife could be compared with a kick. That is not so. A kick is clearly less dangerous than a knife. It is clear that all that the Accused did was simply to ward off the attack. The facts of the Accused's case cannot therefore permit of any inference on intention to kill nor unlawful assault. It is only consistent with self defence. The facts go further. They prove that the Crown has failed to establish any motive or premeditation for murder on the part of the Accused.

Having considered all the factors underlined in the above quotation from the case of Rex vs Emmanuel Qoli Ntoi and the other conclusions and having made an analysis of the Crown's case I do not find that any grounds exist upon which I may convict the Accused for the crime charged or at all. He would in addition be entitled to a benefit of

doubt. He is accordingly found not guilty and is discharged.

T. MONAPATHI
JUDGE

For the Crown : Mr. Ramafole

For the Accused: Mr. Mosito