

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

MANUEL KHOELI

J U D G M E N T

Position in Law outlined by Mr. Thetsane and endorsed
by Mr. Seotsanyane

CC: Where during a criminal trial, and I assume during
criminal trial would also mean before the crown closes, an
accused changes his plea the Director of Public Prosecutions or
his representative has no power to accept change of plea without
the consent of the court. Now, it goes on to say now

"when once the accused has pleaded the Attorney
General or Director of Public Prosecutions has no
power to accept without the consent of the court a
plea different from that already recorded".

The case which reference is made to in that is a case of R vs
Nkomo 1947(2) SA 508 at 511.

The highlighted portion, My Lord, the true position is, i.e.
after counsel had made their respective submissions, then the
learned Hathorn, J.P. went on to say :

"The case is in the hands of the Attorney General until the accused pleads. For instance the Attorney General, (in our case the Director of Public Prosecutions) may accept a plea of guilty of any other offence of which the accused might be convicted on the indictment. Reference is made to section 157(1); and the court has no power to prevent him. But once an accused has pleaded not guilty, the position changes. The accused demands by his plea that the issues raised by it shall be tried by the court and the court takes charge of the case. It frequently happens that, with the consent of prosecutor, the accused changes his plea of not guilty to a plea of guilty of a lesser offence. But that is always with the consent of the court, either express or implied, and I should say that in the ninety-nine out of a hundred cases the consent is given as a matter of course. But there is the hundredth case, and I cannot conceive any reason whatever why it should be supposed that when the court is performing its duty of trying the issues raised by the plea of not guilty, the Attorney-General has the power to step in and direct the court not only to refrain from trying the issues, but also to enter a verdict on a lesser charge. I cannot find anything in the Act which confers upon the Attorney-General expressly or by implication, this astonishing power".

My Lord, I stop here to say that in principle the crown is not opposed but at the end of the day the discretion is of the court.

SUMMARY OF EVIDENCE BY MR THETSANE CONVERTED
INTO JUDGMENT OF COURT

CC : It is common cause in this case My Lord that the accused Khoeli stood charged with the murder of the deceased Katsotso Moremi it being alleged that on the 20th May, 1989 he intentionally and unlawfully killed him. It is also common cause that he, the accused, stood charged also with the offence of assault on the complainant 'Mapapali Litaba. I must state that to both these charges the accused pleaded not guilty. It therefore behoved the prosecution to lead evidence proving or

attempting to prove the guilt of the accused in respect of both two charges. The trial of the accused proceeded up until today when the accused informs the court that he intended changing his plea of not guilty in respect of count I to that of guilty of or to Culpable Homicide. The position in Law is very clear. Even though the prosecution may consent to that at the end of the day the discretion is that of the court; and the court has so consented to the plea entered or the change of plea by the accused. I must add that the prosecution also has informed the court that in respect of count II it withdraws the charges thereon.

Now the evidence which had been led up to this stage relating to count I was as follows :

The deceased Katsotso Moremi was the lover of 'Mapapali Litaba. They had on the 20th May, 1989 been together at drinking place hall and at a certain stage they retired. They went to their respective homes and on the way to whatever place they were going - presumably, as lovers, they were going to sleep - they both met up the accused in this case and apparently the accused wanted to propose love to 'Mapapali Litaba in the presence of the deceased. There was a stage at which he in actual fact manhandled 'Mapapali Litaba and I should mention that this was still in the presence of the deceased. The deceased who of course was the lover of PW1 wanted to know what the matter was. Evidence went on to show that the accused took an offence at this and in the result he hit the deceased with an iron-bar. It was

at this stage that the complainant PW1 also wanted to intervene whereupon she also got injured on the hand. Realising that she could not manage to separate the two who were apparently engaged in a scuffle, she took to her heels going to raise an alarm with neighbours. It was at that stage that one 'Mammako came to the scene.

Evidence also went to show that as the accused was assaulting the deceased one Teboho Ntsoele pitched up. From a certain distance he observed that the accused was belabouring something on the ground. He was able to see this by aid of moon light. He approached the scene whereupon he asked the accused what he was doing but he did not get any positive results for he thought that the accused would stop what he was doing. Instead he got very cold welcome from the accused who reprimanded him saying that "as it was typical of him he had started" whatever was meant by that.

It was upon or at this stage that the accused was seen leaving the vicinity of the scene. It must be stated again that there was a stage at which PW2 Teboho did observe from whatever distance he was that a thing which was being belaboured by the accused was a human being; and that he was able to observe because he saw some movements from what was being belaboured.

The upshot of his evidence was that he ultimately went to the scene where he discovered that the thing which had been belaboured by the accused was indeed a human being. He

identified that human being to be the deceased Katsotso Moremi who was then already dead. Many people gathered at the scene and, to cut the long story short about the deceased in this case: the post-mortem was conducted on the deceased in this case by the doctor who, according to him, death of the deceased was due to severe head injury on the skull; and the doctor, when doing the post-mortem observed that no clear sub-epidural bleeding was found. The medical evidence went on to show that there was plenty of dry blood on the face of the deceased and there were also multiple wounds on the skull. There was also a laceration on the lower lip of the mouth of the deceased.

That is briefly the evidence in this case which had been led up to the stage when the accused pleaded guilty to a lesser offence and the stage at which the crown withdrew the charges on count II. That is briefly the evidence.

H.L. : Further evidence from what I learned from you in the presence of counsel for the accused was that because of the absence of the Doctor the written record of his findings was admitted in the lower court in terms of Section 223 sub-section 7 of the Criminal Procedure and Evidence 1981.

Because of the absence of the Doctor at the time of the proceedings at the preparatory examination who had already then left the country as he was an Ex-Patriate, the post-mortem referred to earlier was handed in in terms of our Criminal Procedure and Evidence Section 223 sub-section 7 thereof and it

was handed in as Exhibit B thus it forms therefore part of proceedings in this court.

I think it should also be mentioned that when asked if he agreed with the text and summary of the evidence by the Crown Mr. Seotsanyana expressed his reservations with regard to the crown's interpretation of some unspecified portions of the evidence. Basically he stated that the summary was accurate.

SENTENCE

You are found guilty, on your own plea in Count I, of Culpable Homicide. With respect to Count II you are acquitted and discharged because you had pleaded not guilty to that and the crown has withdrawn that charge so you are free from any criminal liability in that you are entitled to a verdict once you had pleaded not guilty. I wish further to indicate that the statement outlining the case or summarising the evidence, (the summary of the evidence by the crown) is made judgment of this court.

These are factors which your counsel proposed should be taken into account by the court in its consideration of what sentence would fit the crime: It is common course that you have no previous convictions. It is suggested that you are a family man. It has also been suggested and I endorse the view that by your agreeing to change your plea, you have shown some remorse for the wrongful act. It has been also suggested that you

possibly could have been acting under the influence of drink. This possibility is based on the fact that evidence of PW1 shows that you were at the beer drinking house where the deceased and PW1 were. It was also suggested that you could possibly deny having taken any drink but the court is asked to think that you must have taken drink because no how could you just sit in the company of people who were drinking but take none yourself. This has got a bearing on the senseless assault, which according to the crown witnesses, you meted out on a man who didn't appear to be on a warpath with you.

I take particular notice of the fact that your counsel says that you might deny having taken any drink. The particular importance I attach to this suggestion which it is suggested you might deny, consists in the fact that your counsel has manifested the bond of honour that he, as an officer of this court, owes to court even before your own interests as his client. For that reason alone the possibility that you were drunk ceases to be a matter of sheer speculation but transforms into reality.

The court was also invited to consider the question of the degree by which you exceeded self-defence if there was any; and in this regard the court was referred to the medical evidence which seems to be of a lesser degree (as shown in the doctor's findings of the extent of injuries) than that adduced by the eye-witnesses.

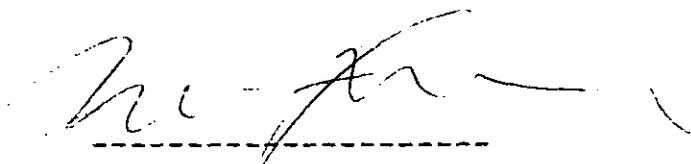
It was stated that if the court were to accept PW1's

and PW2's evidence on the issue then medical evidence would have shown greater damage to the skull than was in fact established. In fact it was suggested that the use of the iron rod and the big stone that PW2 said he witnessed being applied would have shattered the skull.

I wish to indicate that the age of this case gives cause for concern. Even though the accused was on bail and remained so from the start of this trial in December 1991 to date, the long passage of time before finality was reached in the case cannot have alleviated the accused's anxiety. I consider the accused's anxiety about the impending balance of trial for this long period to have constituted a substantive portion of punishment.

The main point that I take into account is your remorse more than anything else. One may refer briefly to evidence to say why you embarked upon this senseless attack on a man who didn't offer to you any cause for this savage attack on him by you. Evidence shows that the deceased was in love with PW1. It went further to show that you had some amorous designs on PW1. In other words you wanted her to accept you as sweetheart some ten years before the incident. But then she rejected you, thus one can rightly infer that you must have felt wounded by this repulse as it must have aroused intense jealousy in you when you saw the love affair between PW1 and the deceased flourish when the wretched you had been rejected. If I may accept the fact that you must have taken drink; these two things i.e. jealousy

and influence of drink, may be accountable for the savage attack that you meted out to the deceased. On the other hand while taking these mitigating factors into account one also has to take into account that the society on the other hand is owed a duty to be protected. Taking that view then I find that the least sentence I can impose to meet the justice of this case is that you be sentenced to six years' imprisonment half of which will be suspended for two years on condition that you are not convicted of a crime of which violence to a person is an element committed during the period the suspension.



J U D G E
13th April, 1995

for Crown : Mr. Thetsane
For Defence: Mr. Seotsanyane