CRI\T\23\96

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

SECHABA CHAOLE

J U D G M E N T

Delivered by the Hon. Mr Justice M L Lehohla on the 20th day of March, 1998

In this case the accused stands charged with the murder of Ferete Lenka, in that on or about 30th January, 1994 and at or near Ha Fochane in the district of Maseru, he did unlawfully and intentionally kill the said Ferete Lenka. He pleaded not guilty to this charge.

The depositions of PW1 Rashaleng Lenka, PW6 Trooper Ntee, PW7 'Maseipati Chaole, PW8 Sgt Rankuoatsana including the medical report were admitted. The admissions made by *Mr Mohau* on behalf of the accused were

accepted by the prosecution and all these were read into the recording machine and made part of proceedings in this matter.

Then the Crown called oral evidence of PW2 Thabang Mahamo, PW3 Limo Chaole, PW4 Tlokotsi Chaole. The Crown dispensed with the evidence of the deceased's wife PW5 'Mapalesa Lenka. Otherwise those of the witnesses who gave oral evidence were cross-examined.

It was after proceedings, up to this stage, had been concluded that at the close of the Crown case *Mr Mohau* for the accused applied for the discharge of the accused.

The application for the discharge is based on the fact that there is no *prima facie* case for the accused to answer. The position in law is that at this stage of the proceeding the Court looks into the evidence and see if there is *prima facie* evidence. It does not concern itself with the final assessment of the credibility of the witnesses. But at the same time if the sort of evidence that has been led is such that obviously to call the accused into the witness box would amount to asking him to build a case for the Crown because otherwise there is no *prima facie* case, that can't be allowed if the Court has properly advised itself on the matter before it

depending on the nature and reliability of the evidence heard.

So all that the Crown need do at this stage is to show that there is *prima facie* case for the accused to answer. There is also authority by Rooney J in support of the view that if the Crown evidence is so shattered and so contradictory as not to amount to any evidence at all then it would be wrong in that case or in either of those possibilities also to ask the accused to give meaning to it.

Now looking at the evidence just in brief, just the significant parts of the evidence that has been led we were told by PW2 Thabang that he was the first man virtually to arrive at the scene, but the old man the blindman who was the last witness i.e. PW4 Tlokotsi tells us that he is the one who arrived there first and he pointed at what he did when he arrived there, and what this old man said was in line with the sort of case put to the Crown witnesses in cross-examination on behalf of the accused.

We had heard through cross-examination that the first man to have arrived at the place was PW4 Tlokotsi Chaole, who even lit the light, but those had been denied earlier by PW2 Thabang Mahamo. But PW4 indicated in line with that cross-examination that he is the one who arrived at the scene first.

So on that score alone it is found that the crown witnesses are not *ad idem* as to what was happening and what was happening has been supplied through cross-examination. One outstanding feature which was put to Crown witnesses was that the accused was injured on the arm by the man with whom he had been having a set - to in darkness in the house. This man turned out to be the deceased. Given this particular aspect of the matter it becomes difficult to counter the accused's proposition that he fought in self-defence against a stranger who attacked him in his own house without any palpable, let alone wholesome, reason anyway for being at the accused's abode at midnight in the accused's absence; given also that there is evidence by crown witnesses that the accused had previously sought their intervention as the deceased had been carrying on and engaging in an illicit love affair with the accused's wife. Given further that without being prompted the last witness for the crown volunteered this piece of evidence that goes to the heart of the matter that the accused showed him at the earliest possible opportunity that the deceased had injured him with a stick on the arm it seemed to me that the Crown case was at this stage and on this account irretrievably shattered. To ask the accused to answer would amount to asking him to fill this gaping hollow in the Crown's case.

There are also several other factors in which the crown evidence falls short

of what could ordinarily sustain conviction. The accused's story was put to PW2 and that story as put to PW2 is to the effect that when the accused came to his house he knocked at his door. The wife inquired who it was. The accused identified himself. The accused asked for the rope for the horse so that he could tether the horse. The wife indicated that there was no rope in the house but rather it was where the horse is usually tethered. There and then the wife devised a means of sneaking out of the house on the pretext that she was going to show him where the rope was; and when the accused took off the saddle from his horse and entered his own unlit house, a missile went past him. While thus perplexed what could be the source of all this, his perplexity was further compounded when there and then the accused was confronted by an attack from the direction where this missile came from. He stumbled over something and that object happened to be a stick which he picked up and applied in the direction of where this missile had come from. He managed to grapple with the source of his torment, in the process there was a gun shot followed by a click. There was shortly afterwards another gun shot followed by a click

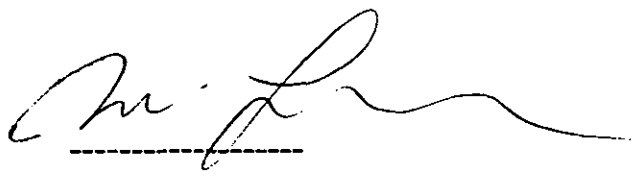
It is for this that I think PW2 probably is or appears to be telling the truth in saying that he heard a gun report from his home hence his coming to the scene.

The problem is or the question is who was the owner or who was wielding this gun. Surely you don't expect the accused to supply all that information, that's the information that ought to have been supplied by the Crown in the first place.

Now there isn't the gun here, no trace of anything of the sort. So for the forgoing and other reasons that could be gathered from the facts of this case it would be asking too much to require the accused to be put to his defence. Our law is very clear on that, if there is no *prima facie* case even if there is a strong suspicion that the accused has committed an offence the strong suspicion is not enough.

In the circumstances, therefore, one of the facts which surfaced in this case is that the deceased was in love with the accused's wife, and if he caught him then the law would support the view that on grounds of extreme provocation, the accused could at worst be found guilty of culpable homicide. But in this case I am satisfied that the case advanced that is of self-defence entitled the accused to his acquittal and

the Court so finds. Thus he is acquitted and discharged.



JUDGE
20th March, 1998

For Crown : Mr Semoko
For Defence : Mr Mohau