CRI/T/38/99

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

TŠEPO MOSIUOA

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu
on the 15th day of September 2000

In this case accused is charged with the crime of murder:

In that upon or about the 26th day of September, 1995 and at or near MAPUTSOE in the district of LERIBE the said accused, did unlawfully and intentionally kill SEQOBELA SIMON MOHALE.

Accused pleaded not guilty.

The Crown led the *viva voce* evidence of three children of between 14 and 18 years, all of whom gave evidence on oath. The medical evidence was

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accepted by consent. The preparatory examination depositions of the investigating officer Lance Sergeant Mopeli and that of the identifying witness Molomo Mohale who identified the deceased's body before the post mortem were admitted and read into the record. The accused gave sworn evidence in his own defence.

The Crown led the evidence of Pontsa Ramarou (PW1) who showed that at dusk they were singing at the forecourt outside the row of rooms in which accused had rented premises. Deceased (the late Seqobela Mohale) was singing with them. The words of the song were:-

> "Litampi tsa ntate Mohale ke tseo, chesa morosoroso" translated it means "there comes the little children of Mohale, burn or eliminate all cheating"—or words to that effect.

From the wording of the song, it is clear that they must have admired deceased or he must have taught them that song in his own praise. PW2 Mamello Jane says when they saw the deceased they started singing that song. PW3 'Neheng Makhele actually says that song, which they sang with deceased, was his method of playing with them. This portion of the Crown case is undisputed.

While about ten children were singing with deceased, accused accordingly to PW1 and 3 came out of Tsuinyane's premises, told the children to disperse. He even insulted the children by including their mothers private

parts in the abusive language he used. PW1 and PW2 agree on this. PW3 agrees with them but does not go into details about the nature of the insult. All witnesses i.e. PW1, PW2, PW3 and the accused himself, agree on the fact that the witnesses and the deceased were singing aloud. There is no dispute that not all the children (except two) lived in the site in which the accused lived. Deceased lived in the same site although he did not live in the block with lines of room in which accused lived.

PW2 and PW3 say the singing continued although it was no more very loud. PW1 was not asked to clarify this issue. PW1, PW2 and PW3 deny they were causing any nuisance. PW2 says they continued singing for 30 minutes while PW2 said they continued singing for only two minutes. However when accused rushed into the house they dispersed because they all agree that someone said accused was going to get a sjambok. They dispersed although some did so more slowly than others.

PW1 and PW2 say accused came out from his premises carrying an SLR rifle about 1½ yards long. They ran away. PW2 claims he saw deceased also running but unable to get far because he was ill. I do not believe PW2 saw anything after seeing the accused coming out carrying a rifle as she ran for her life. PW1 says deceased did not run away. Accused (according to PW1) shot deceased where he had been standing. Accused said in his evidence that he saw deceased coming towards him and he shot deceased. Although accused says he did not know where deceased was going he thought deceased was coming

towards him because even when accused had got out of the deceased's way, deceased still came towards him.

All witnesses including the accused say he was very drunk at the time. Accused says his memory is not very good about what happened. He does not even remember using abusive language. He just heard a lot of singing, he could not distinguish whether they were adult voices because he was drunk. Accused could not say why he took the rifle (and what threat he perceived) that made him take that rifle for his defence. He lied and said a firearm which could hit a target at two kilometres had a range of only a little over half a kilometre.

PW1 who says he saw accused shoot deceased says she saw him through a partially closed door, where she was hiding. She was not challenged or shaken on this point. I do not believe the accused is telling the truth when he says deceased was coming towards him. I believe PW1 when he says he shot deceased who was just standing where he had been during the singing. I also accept what PW1, 2 and 3 said namely that deceased drew the attention of all people to the effect that he had been shot for no reason at all. Deceased before he died said God should receive his soul, as PW1 and PW2 testified. PW2 and PW3 only heard a gun report but did not see what happened to deceased. PW3 ran away even before she saw accused carrying a rifle.

There is no doubt that accused was irritated by the singing in which

children were saying they belong to the deceased, who was singing with them. Accused went for his rifle when they continued singing. When he came out he shot deceased who was standing where he had been standing during the singing. Accused's mind was befuddled by drink. A person who has taken alcohol even if provoked can still be able to form the intention to kill. See *Rex v Khotso Bothata* 1978 LLR 427. At page 429 Cotran CJ dealing with a form of verbal provocation that occurred on a person who had taken alcohol immoderately said:

> "The words uttered by the deceased may be said to have been provocative, and to a person who had imbibed liquor more so, but I do not consider the two factors sufficient to reduce the crime to culpable homicide."

It will be observed that accused could still remember a lot of what he did. He is only shocked by his lack of logic. We do not consider voluntarily induced intoxication as an excuse in the commission of any crime. If a person was temporarily insane because of voluntary intake of intoxicating substances, the court returns a special verdict of guilty but insane. See Section 2(3) of the *Criminal Liability of Intoxicated Persons Proclamation 60* of 1938 read along with Section 17(2) *of the Criminal Procedure and Evidence Act* of 1981. This issue was dealt with by the Court of Appeal in *Tsitso Matšaba v Rex* 1991-1996 LLR 615. It is clear as I have already stated that accused remembers a lot of what he did although he was drunk. Consequently he does not allege (nor is there evidence showing) temporary insanity in the sense of being dead drunk.

Therefore accused is liable for his actions.

But then, that is not enough. Accused is charged with a crime that involves the presence of a special intent. This the Crown has to prove beyond a reasonable doubt. As Williamson JA said in *S v Mini* 1963(3) SA 188 at 192:

> "In order to hold that an accused on a charge of murder, had the requisite *mens rea*...the court must find as a subjective fact, that the accused intended to kill the deceased: This fact falls to be established beyond reasonable doubt. The finding (like any other fact) may be one based on inferences from established facts and circumstances."

In the case of *Mini* there was evidence that accused was not sober- he was drunk to some degree. Judges who were in the majority found accused guilty of culpable homicide. While the minority of two out of five judges said he was guilty of murder.

What this court has to decide is what was in the mind of this particular accused, in the condition he was in, not what could be expected of a reasonable man.

It is difficult to delve into a person's mind. If a person takes a dangerous weapon and shoots another on the chest there is a strong inference that he subjectively intends to kill. However, this must be the only inference that the

court can make. This has to be so, because the Crown is relying solely on circumstantial evidence. In *S v Sigwahla* 1967(4) SA 566, it was shown the onus to prove subjective intent is on the Crown in such circumstances. The Crown conceded that with a mind soaked in alcohol and drunkenness, it could not say it has proved subjective intention to kill beyond reasonable doubt.

I have no option but to give the accused the benefit of doubt on *mens rea* to kill.

I therefore find the accused guilty of culpable homicide, but not murder.

Stand up accused. You are guilty of culpable homicide.

My Assessors agree.

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WCM MAQUTU
JUDGE

For the Crown : Mr T *Semoko*
For the accused : Mr M *Mathafeng*