CRI/T/22/99

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX

vs

THABO QEBISO

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 1st September, 2000

The accused, a 75 year old Thembu man of Phamong in the Mohale's Hoek district appeared before this court facing a charge of murder of his son it being alleged that on the 6th day November 1993 and at or near Ha Teboho in the district of Mohale's Hoek, the accused did unlawfully and intentionally kill Wangabantu Qebiso. The weapon used was a **mohloare** (olive) stick.

The main witness for the crown was Kulegile Qebiso P.W.2, deceased's younger brother, who told the court that on the evening of the 6th day of November he and the deceased were preparing to go to bed in a rondavel owned by the accused. The deceased appeared drunk as he had been to a **"letsema"** (communal ploughing) on that day. The accused then entered and demanded tobacco from the deceased who replied he had none. The accused also appeared drunk; he then went out and soon returned carrying a "**mohloare**" stick and again demanded tobacco from the deceased who again said he had none. The accused then struck the deceased on the neck as the latter was bending down. "It was not a heavy blow" he said.

The deceased then fell down after a little while. According to him there was no fight between the two. When the accused came in again, P.W.2 says he warned him "you will kill this person". The deceased was at the time snoring or groaning hard and could not talk. He says he went to awaken his uncle Eric Adonsi and his mother who having examined the deceased left saying he could come and see him in the morning. In the morning he says he left the deceased still snoring; he left for the veld to attend to his herd. In the evening the deceased was brought back from the clinic already dead.

Under cross examination by **pro deo** counsel **Mr Khauoe**, this witness insisted that he also had assisted in the "**letsema**" ploughing at Mochokochoko's and that Challa's field had already been planted seed.

He admitted that the accused was once a mine worker and that he used to remit money home to support them all. He denied that the deceased ever forcibly demanded money form their mother or that he even broke the tin-trunk in the process.

He further denied that before the accused struck the deceased with the stick, the accused had remonstrated with the deceased over Challa's field. He insisted that the accused only demanded tobacco from the deceased who used to smoke even dagga. He admitted that the deceased used to be very violent and wild at times.

The evidence of Mangoejane Qonokelo was to the effect that he was a close relative to the accused though their villages were apart. He told the court that the deceased was the eldest son of the accused but was always cheeky and disrespectful. He told the court that on that day he met the accused who reported to him that he was from reporting the assault to the police, and that when he got home he found the deceased already dead.

Under cross examination, he told the court that the accused had explained that it was the deceased who began the trouble by coming into his hut.

The defence then admitted the depositions of Trooper Kelepa who attended the scene of the crime and examined the corpse and observed a wound on the head. He then transported the body to the government mortuary in Mohale's Hoek. Trooper Rametse's deposition was also admitted and showed that the accused arrived at

Phamong Police Station and surrendered himself and also handed in a stick. The postmortem examination report was also admitted. It showed that the cause of death was "fracture of the right temporal bone causing epidural haematoma." All these were read into the machine and formed part of the record.

The crown then closed its case indicating that it now supported a lesser charge of culpable homicide. In this regard, I can only say the accused having formally pleaded not guilty to the main charge the matter was entirely in the hands of the court.

The accused in giving his evidence informed the court that he was born on the 8th May 1925 and was a Thembu peasant farmer living at Phamong in the Mohale's Hoek. He was a mine worker till he was retired when his shoulder got dislocated. The deceased was his eldest son who also used to work in the mines but was then retrenched. He told the court that he used to remit money to his wife for family upkeep. He told the court that there existed bad blood between himself and the deceased and that the deceased used to drink liquor and smoke dagga; he once received a report that the deceased had forcibly demanded money from his mother and had broken a tin-trunk in the process. He was a disobedient young man who always demanded money for satisfy his gluttonous needs. He was of tall physique and was a feared "Goliath" in the village. The deceased and one Shalla were on very good terms and used to do share cropping.

Despite his orders that Shalla's field should never be ploughed with his cattle, the deceased persisted though. He says that he had however permitted Shalla's field to be planted seed only to placate his son.

He told the court that on the 6th May he had joined the "**letsema**" ploughing at Mochokochoko's field and had unspanned at about 11 am. as they were going to the chief's court to attend a meeting. He then saw the deceased and his friend Shalla in company and looking very drunk. What annoyed him was the fact that he had noticed that the field of Shalla had not been planted seed. At Mochokochoko's hut they were given food and one tin of Sesotho beer. He retired and went home at about 9 pm. He was carrying his **mohloare** stick as usu. On arriving at home he entered the rondavel occupied by his two sons. It was open. He went in and inquired from the deceased "Wangabantu, guteni unga ya ga planta etsimo ea lo Shalla?" - "Wangabantu why have you not planted seed in Shalla's field?" To which deceased replied "I would never go there as there were people planting." The accused then said "It is better that you leave my house." Deceased retorted "This is my home ...you are the one to go". Accused says the deceased then bent down to grab his stick. Sensing danger, he struck the deceased pre-emptively on the neck. He then left the house. He says he did not intend to kill his son.

Question: When you left were you aware he was injured?

Answer: No.

Question: Did you intend to injure him?

Answer: No.

Question: If you saw he was injured what would you have done?

Answer: I would have raised an alarm.

He says that on the morning of the following day he went into the rondavel and found out that the deceased had just passed away. He then raised alarm and went to the chief and Phamong Police to report.

He says he was arrested on the 9th November 1993 and was refused permission to attend the funeral of his son.

Under cross examination, he described vividly how bad the relations between him and his son were. He was even afraid of him. He says he struck the deceased because the Shalla affair had annoyed him and he struck him when he tried to raise his stick. He sought to explain that his son P.W.2 had been coached by Challa and his colleagues to deny the altercation over Shalla's field.

The defence then closed its case.

The court finds that as the concession that evidence did not support a charge of murder was correctly made by Mr Semoko for the crown, the issue at this trial then is whether the crown has proven the charge of culpable homicide beyond a reasonable doubt or whether the version of the accused may reasonably possibly true. In the case of **Moshesha vs Rex** - 1976 LLR 47 it was held by **Mofokeng J** that where a court is faced - as is the case presently - with two conflicting stories, it must satisfy itself that the story of the party on whom the onus rests is true and the other false; and that the judicial officer must bear in mind the cautionary rule applicable to the evidence of a single evidence and that where a motive to mislead exists on the part of such witness, absence of corroborating evidence renders such evidence

unsatisfactory and may result in a reasonable doubt as to the guilt of the accused.

In this case the crown case rests upon the evidence of a single eye witness (P.W.2) and in the circumstances of the case it is not improbable that he could have been coached by Challa and his friends to testify adversely against his aging father. I am of the view that the story of the accused has a ring of truth because it is rather improbable that he could have attacked his son for merely not giving him tobacco. It is more probable that an altercation occurred provoking the accused into striking his son; on the other hand I do not believe that the deceased was struck in self-defence, but under provocation.

In cases of culpable homicide the test is whether the accused ought reasonably to have foreseen the possibility of the death of another resulting from his conduct. The act must be both the factual and legal cause of the death. "The accused need not foresee the actual manner of his victim's death if the manner of the victim's death is within the ordinary range of human experience" - per **Mofokeng J.** in **Motjekoa vs Rex** 1976 LLR 258 at 261; see also the judgment of my Brother **Lehohla J** in **Rex vs Mafupara** - CRI/T/19/96 dated 10th February 1999. Even according to the evidence of P.W.2 Kulegile Qebiso the blow with a stick was not a heavy one. In my view the fact that death results from an act does not **ipso facto** necessarily mean that the actor must be found guilty of culpable homicide; it must be proven that death was foreseen as a possible result. **Snyman** - Criminal Law (1995) - p 403 says-

> "It is, admittedly, usually easy to draw this conclusion in cases of assault resulting in death, yet there is no general presumption that in

every case of assault which results in death the person committing the assault ought to have foreseen that death might result and that he was therefore negligent."

In **S v Van As** - 1976 (2) SA 921 the accused had slapped deceased - a very fat man, who then lost his balance and fell, became unconscious and died. The court found the accused guilty of common assault!

In the case before court, I am of the view that the crown has failed to prove that the accused ought to have foreseen that the deceased's death would result when he struck only once with the **mohloare** stick. In other words, it is not the consequence of the act that is decisive but also the mental culpability of the accused at the time he committed the act - see also **Rex vs Chobokoane** CRI/T/90/99 per my Brother **Maqutu J.**(dated 16th August 2000) where the accused was charged with attempted murder but was ultimately found guilty of assault with intent to do grievous bodily harm.

Having considered all the circumstances of this case, I hold the view that the accused was annoyed by the conduct of the deceased on that day and by his most impudent replies. He struck at him only once perhaps in a fit of anger but foreseeing that injury might result. I find him guilty of assault with intent to do grievous bodily harm.

Crown Counsel: The accused has no previous convictions.

In mitigation: **Mr Khauoe** points that the accused is a first offender and an old man of 75 years. His act that resulted in death was unfortunate but had fatal consequences. Postponement or suspension of sentence was appropriate.

Sentence: Having considered the circumstances of this case and what was said in mitigation the sentence of the court is as follows:

– 1 year imprisonment or M500.00 wholly suspended for a period of three years on condition that the accused is not during that period found guilty of an offence involving injury to person for which he is sentenced to six months or more without an option of a fine.

S.N. PEETE

JUDGE

For Crown : Mr Semoko

Defence : Mr Khauoe