

IN THE HIGH COURT OF LESOTHO

In the matter between

REX

vs

MOHLOAI MOHLOAI

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 14th February 2000

The accused a mosotho male adult aged about sixty years is charged with the crime of murder it being alleged that upon or about the 1st day of March 1991 and or near Ha Nthoanyana - Matelile in the district of Mafeteng, the accused did unlawfully and intentionally kill Khothatso Seleke.

He pleaded not guilty to the killing; he tendered a plea to assault common but this was rejected by the crown. Mr Mda, counsel for the accused, then admitted all the preparatory examination depositions of P.W.1, P.W.2, P.W.3, P.W.4, P.W.5, P.W.6, P.W.7, P.W.8 and P.W.9. The defence dispensed with the reading of these depositions and the court however directed that the depositions be photocopied and be supplied to Assessor Mr Khoboko as they now formed part of the record of the case.

The admitted evidence showed that on the 1st day of March 1991 at Ha Nthonyana village, a squabble arose between the deceased and the wife of the accused Mpheng over some money which the deceased had apparently given to one Moleleki with instructions to give to his children. The deceased was in such a fighting mood that Mpheng rushed into a house of P.W.3 Ithabeleng Makhabane and locked herself therein. P.W.3 then ordered some children to run to the home of the accused and make a report. Later P.W.5 Eliza Moqulo passed by and P.W.3 asked her to escort the deceased away. She succeeded to do so.

The accused then arrived and shouted at Eliza saying; “Eliza, wait with that person of yours.” She stopped but asked the deceased to run away because the accused sounded very angry. The deceased began running and the accused pursued him until they disappeared from view. P.W.2 Mamakhooa Manosa saw the accused chasing the deceased and saw when the two men grappled. She saw when the accused pulled the cane stick of the deceased and hit him with it. The deceased was seen warding off the blows with his arms.

The deceased followed the accused demanding his stick but soon fell down. People came and transported him home in a wheelbarrow. He had knife wounds on the neck and waist. P.W.4 stated that he saw the accused behind the deceased and heard him loudly demand “How long have I reprimanded you for my wife?” He says he saw the accused assault the deceased with a stick on the thigh.

The headman then called the accused who then explained that the fight was caused by the attack the deceased had made on Mpheng and that he had stabbed the deceased with a knife because the deceased grabbed his testicles. He handed an okapi knife and a cane stick to the headman.

A postmortem examination was carried out by Dr Mario Drechsel on the 5th March 1991 and he was of the opinion that death was due to a stabwound under the left armpit causing intrathoracal bleeding into the left lung; he opined that a sharp instrument like a knife could have been used with a considerable force.

It was also common cause that the accused was arrested by D/Trooper Koena on the 2nd March 1991. The trooper also examined the body of the deceased and noticed an open wound on the left side of the neck and another wound on the left side of the waist.

The crown closed its case after which the accused then gave evidence in his own defence upon oath. He informed the court that he is an illiterate peasant farmer and had grown up with the deceased. He says that on the day the deceased met his death he had been sitting at his home peacefully eating peaches with his okapi knife when a young boy from P.W.3 arrived reporting that the deceased had barricaded his wife Mpheng and had assaulted her. He says he jumped up and rushed towards P.W.3's house and along the way he met his wife Mpheng. She was crying and explained that deceased had assaulted her.

Along the way he then saw the deceased with Eliza crossing a rivulet. He shouted at Eliza to stop the man but Eliza urged deceased to run away. A chase began. He told the court that he was chasing the deceased in order to ask him why he had been assaulting his wife. He says he was very angry "I was very angry - I could die". When he caught up with him he says he asked him why he had been assaulting his wife - the deceased vouchsafed him no reply but then turned to attack him with his cane stick. He says he warded off the blows using his hands and caught hold of the deceased who then suddenly grabbed his testicles very tightly. He says he felt extreme pain which caused him to become dizzy, he felt he was

going to die. He then took out his okapi knife, opened it single handedly with his left arm (he demonstrated this to the court) and then stabbed the deceased. He says he then managed to get hold of the cane stick and began swinging it at the deceased who was still approaching.

He then told the court that on previous occasions the deceased had molested and assaulted his wife and that the family councils and the chief had intervened to no avail. He further states that most villagers were in great fear of the deceased.

Under cross examination it was suggested to him that he had not stabbed the deceased in self-defence but because he was angered by the conduct of the deceased who was even alleged to have been carrying an illicit affair with Mpheng. He denied ever uttering the words "For how long have I reprimanded you for my wife."

Mr Nku candidly conceded that the evidence did not support a charge of murder but that of culpable homicide because it was the killing under provocation. Ms Nku contended that the deceased grabbed the testicles of the accused because the accused was attacking him. That may be so but we have no direct evidence of the circumstances under which the stabbing occurred; we only have the version of the accused. In the case of R. v. Mohlerepe - 1979 (1) LLR 14, late Mofokeng J. held that where there are two mutually destructive versions presented to the court the test to be applied in such a situation is simply that the court must be satisfied, on adequate grounds that the version it accepts is true and the other false; a court is not entitled to convict an accused person merely because his explanation is improbable. It will only do so if beyond reasonable doubt it is false. An accused person should not be convicted merely because he is a liar. In the present case, it appears that most crown witnesses saw the fight from a distance because no one of them ever saw a knife being brandished or being used. We only have the version of the accused and there are no

adequate grounds - without speculating - to reject the accused's version as false. That he was grabbed with his testicles by the deceased is rendered even more probable by the report he is alleged to have made to his chief.

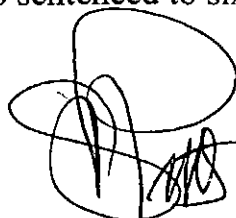
Mr Mda also referred to the case of Rex vs Lerato Phatsoane - CRI/T/6/91 (unreported) a case factually similar to the present case and submitted that there is a reasonable possibility that the accused's version may substantially be true. In the cited case Kheola C.J. acquitted the accused because the crown had failed to prove its case beyond reasonable doubt.

In the present case the stabbing must have occurred at a close encounter and was not seen by the by-standers; it is reasonably possible that when he stabbed the deceased, the latter was holding or pulling the testicles of the accused. There is no adequate grounds to reject this as being false and to convict the accused even on a competent verdict of culpable homicide. The truth of the accused's version is reasonably possible and has not been proven false by the crown.

The accused is found not guilty and discharged on the murder charge. There is however uncontroverted evidence that the accused lashed the deceased; with a cane stick - He has also pleaded guilty to assault common at the beginning of the trial - a plea which was rejected by the crown. The court finds him guilty of assault common.

Mr Mda then pleaded in mitigation pointing that his client was a first offender and had shown remorse in pleading guilty to assault common. We agree.

Sentence: Six months imprisonment or M100.00 wholly suspended for three years on condition that the accused is not found guilty of an offence involving violence to person for which he is sentenced to six months imprisonment without an option of a fine.

A handwritten signature in black ink, consisting of several overlapping loops and strokes, positioned above the printed name.

S.N. PEETE

JUDGE

For Crown : Ms Nku
For Respondent : Mr Z. Mda