CRI/T/8/98

IN THE HGH COURT OF LESOTHO

In the matter between:-

REX

vs

LEBOEA SEKHULUMI

JUDGMENT

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

The accused, a mosotho adult aged about 28 years appears before this court charged with the crime of murder it being alleged that upon or about the 1st day of July 1992 and at or near Kubake in the district of Mohales'Hoek, the accused did unlawfully and intentionally kill Thapelo Mohatle.

To this charge he pleaded not guilty. **Mr Mahlakeng** who represented the accused then admitted the testimony of the following witnesses:-

1. Sergeant Mokheseng
2. Lance Sergeant Lethoko
3. Detective Trooper Mohlapiso

The post-mortem examination report along with its findings as to the cause of death was also admitted.

The crown then called Telang Mvelase who informed the court that she was working as a bar-lady at a beer restaurant owned by one Mohale Lekhaleng. The deceased was also employed as a security guard at the business. She says that on the 1st day of July 1992 the accused came into the bar restaurant at about 7 pm. The accused banged the door in closing it whereupon the deceased who was having his meal at the time inquired from the accused "why are you banging the glass door?" He says that the accused then grabbed the deceased with his clothing and dragged him outside. She goes on say that after a while, the accused came back into the restaurant without the deceased. She then asked Lira Mohatle (deceased's brother) and Peete Teele to go outside and look for the deceased. She followed the two men and below the stoep, they found the deceased fallen and on examining him they discovered that he had a stab wound on the left breast. The deceased then said "this boy has finished me". She told the court that she had observed that the accused had appeared drunk when he arrived at the restaurant.

During cross examination, it was suggested to P.W.1 that she was fabricating the pulling because she had not mentioned this at the preparatory examination; and that at the preparatory examination she had not mentioned that the accused had slammed the door as he entered and as he went out. In fact at the P.E. she did not also state that the deceased had spoken to say "this boy had finished me".

It was put to him that the accused would say that he never caught hold of the deceased's clothing and pulled him outside, to which she replied that she was positive about this.

Question: "Accused will say that the wind blew the door shut"

Answer: "There was not wind on that day."

She says that when she and other two men went out to look for the deceased, the accused had remained in the restaurant dancing to the music. She did not see if the accused was carrying anything when he came back into the restaurant. She concluded her evidence by saying that a report was made to Mohale and the deceased who was alive but unable to speak, was then transported to the hospital where he was reported dead on the following day.

The post-mortem examination report which was formally admitted shows that death was due to a stab wound to the right side of abdomen causing abdominal haemorrhage and peritoneal faecal soiling. The deceased also had sutured wounds on the head.

The crown called Peete Teele who was employed as a beer case off loader at the restaurant. He told the court that on the day in question the accused had entered the restaurant with one Nono Nthama and Mankata Mabitle; he says the accused banged the door and the deceased who was then still having his meal, called out "Hey man, don't bang the door it will break". He says the deceased then went to the accused who was still holding the door and that the accused then pulled the deceased with his clothing. He opened the door and slammed it again as they went out. He says that after about five minutes the accused came back into the restaurant and continued dancing to the cassette music being played. He says P.W.1 then remarked "please go and see what has happened to the deceased because he has not returned." He says that he and Lira Mohatle went out only to find the deceased fallen below a stoep and that he was bleeding below the left breast. The deceased then said "that boy who pulled me has finished me. He has stabbed me."

They then transported the deceased to the police and then to the hospital where he was reported dead on the following day.

On being cross examined by **Mr Mahlakeng** this witness maintained that he actually saw the accused pull the deceased because there was a Coleman light in the restaurant.

Question: "The accused says he did not stab the deceased and that is why he even re-entered the restaurant."

Answer: "I insist he stabbed because the deceased even told me so."

The admitted evidence of Sgt Mokheseng indicated that on the 7th July 1993 one Lehlohonolo Matsoejane arrived at the Mohales'Hoek charge office and handed in an okapi knife. This is worthless evidence because it no where relates to the accused. L/Sgt Lethoko's evidence is about the arrest of the accused on the 5th July 1993. Detective Trooper Mohlapiso testified to the effect that he examined the body of the deceased on the 2nd July 1993 and observed a wound on the left side of the chest and two wounds on the head.

The crown then closed its case and **Mr Mahlakeng** made an application under section 175 (3) of the Criminal Procedure and Evidence Act of 1981 for the discharge of the accused. This subsection reads:

> "(3) If, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged in the charge, or any other offence of which he might be convicted thereon, the court may return a verdict of not guilty.

My Brother Lehohla J. in the recent case of **R v Teboho Mabollane** - CRI/T/14/96 fully discussed the principles governing the exercise of a judicial discretion when an application

of this nature is made at the close of the Crown case. In the exercise of my discretion I took into account the following facts -

(a) That there is undisputed evidence that the accused was seen pulling the deceased and that they both went out.

(b) That the deceased is reported to have uttered words to the effect that the boy who pulled him out had stabbed and finished him.

Despite certain discrepancies between their versions at the preparatory examination and before this court, there was credible evidence that the accused was seen pulling the deceased who was found with a chest wound soon after he went out with the accused. The court carefully took into account what the deceased is alleged to have said and indeed this court takes it as a dying declaration and exercises its discretion to admit it as such. In **R. vs Ngcobo** AD 561 it appears that the court can take judicial notice of the words "he has killed me" in deciding whether the conduct of the deceased and statement as a whole showed that he expected to die. See also **R. vs Abdul** 1905 TS 119 at 122 - 3; see also **S. vs Qolo** 1965 (1) SA. 174 A.

In exercising my discretion to admit this statement, I hold that the assault and the utterance are sufficiently related in time and circumstance for it to be said that the deceased's utterance was spontaneous and excluded any possibility of contrivance or design. The lapse of time between the tussle in the restaurant and the utterance was so short and contemporaneous that deceased had no time or opportunity to devise or to contrive (**S vs Bouwer** 1964 (4) SA 58). I find therefore that there was sufficient proof that when the deceased uttered the words he had a firm expectation that there was no further hope of his surviving. He was finished. I consequently did not grant the application made by **Mr. Mahlakeng.**

The accused then elected to close his defence without leading any evidence. The trite principle of our law at this stage is whether it can be said that the crown has proved its case beyond reasonable doubt. In this case, there is no direct evidence implicating the accused in the stabbing; there is however circumstantial evidence led by the crown and **Mr Semoko** for the crown submitted that the only reasonable inference which the court must come to is that the accused stabbed the deceased on the chest; any other inference is extinguished by the utterance of the deceased to the effect that the boy who pulled him out had finished him. The circumstantial facts must not be treated in isolation but cumulatively and, as stated in **R v Blom** 1939 AD 202, the inference that is sought to be drawn must be consistent with all proven facts and should exclude any reasonable inference. **Mr Semoko** submitted that, speculation aside, there was no other reasonable inference save that the accused is the one who inflicted the fatal stab wound.

Mr Mahlakeng in his strong argument contended that the crown had failed to prove beyond reasonable doubt that the accused inflicted the fatal would upon the deceased, and that there was no direct evidence as to what happened outside. In fact, he contends that the fact that accused returned into the restaurant and continued dancing to the music should be held to be a factor consistent with non-commission of an offence. He further submits that the utterances of the deceased do not qualify to be classed as dying declaration mainly because the words "he has finished me" are amenable to more than one meaning and do not only mean that the utterer is contemplating death; it may have idiomatic interpretation only meaning injury. He cites Campbell - South African Criminal Law and Procedure - Vol V p.833. - but see **R vs Ncqobo** (supra).

He submits that the evidence adduced by the crown falls short the required **quantum** to establish the guilt of the accused beyond reasonable doubt and that there is no onus on the

accused to establish his innocence and in the present case, the accused's silence cannot weigh adversely against him and that the accused must therefore be acquitted.

In a criminal trial, each case must necessarily depend upon its own merits and particular circumstances that is to say, the cumulative effect of circumstantial evidence will depend upon the particular circumstances of the case. In this case a question like this was put

Question: "The accused will say that the wind blew the door shut".

Answer: "There was no wind on that day".

The accused did not controvert the evidence that he came into the restaurant that day; nor was it denied that the deceased remonstrated with him when the door was banged; he did not deny that he went out with the deceased and came back into the restaurant alone. The words "That boy who pulled me out" referred ordinarily to no one else except the accused. The deceased did not even mention his name.

In our law, the failure of the accused to testify is of importance "if, although there is **prima facie** proof of his guilt, some doubt exists whether that proof should be now regarded as conclusive, that is that the only reasonable inference from the facts is one of guilt. His silence then becomes a factor to be considered along with the other factors and from that totality the court may draw the inference of guilt. The weight to be given to the factors in question depends upon the circumstances of each case" - **S V Theron** 1968 (4) SA 61; **S V Letsoko**, 1964 (4) SA 768. In this case, the time factor is also of importance. The accused and deceased went out in the circumstances as described and within a space of five minutes, the deceased was found injured. The court cannot speculate as to what happened

outside and is justified to infer that the accused inflicted the stab wound there being no other reasonable inference.

The crown has however not adduced direct evidence as to the circumstances under which the deceased was stabbed and it cannot be said with much certainty that when he stabbed the deceased the accused subjectively intended to kill the deceased moreso because it was evidence of P.W.1 that the accused was drunk on that day. The accused should benefit from this doubt and he is therefore found guilty of the crime of culpable homicide.

My assessor agrees with this finding.

Mr Semoko informs court that the accused has no previous convictions. **Mr Mahlakeng** in mitigation pleads that the circumstances of the case are such that a non-custodial sentence be imposed on the accused.

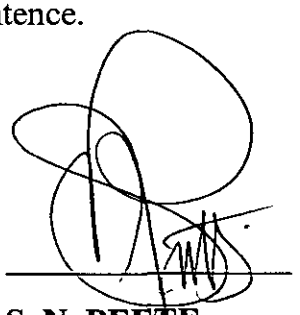
Sentence: Having considered all the circumstances of this case the court finds that it is competent and appropriate to impose a community service order- a new form of non-custodial punishment in Lesotho. The offence of culpable homicide is excluded under the Schedule IV of the Criminal Procedure and Evidence (Amendment) Act no.10 of 1998. I am of the view that the essentials under Rule 14 of the Community Service Rules 1999 have been substantially satisfied and that the accused can benefit from the Community Service Order sentence. The Probation Service Suitability Report by Mr H. Thabane hereto attached is also positive in this regard.

I order that instead of serving twelve (12) months imprisonment-

(a) the accused perform community service for 480 hours at a place(s) and time(s) to be appointed by the district probation officer and supervisor.

(b) Mohale's Hoek Subordinate Court to supervise this sentence.

(c) The sentence of twelve months imprisonment is suspended till the satisfactory completion of the community service sentence.



S. N. PEETE

JUDGE

For Crown: Mr. Semoko

For Accused: Mr. Mahlakeng