CRI/T/54/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

v

LEPHETHESANG MABELE

For Crown : **Mr. L B Moqhali**

For Accused: **Mr J T Molefi**
Assisted By: **Miss L Mosisili**

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi
on the 16th day of November 2001

The Accused of Ha Ramarothole, Mafeteng district was said to have been 38 years old at the completion of the Preparatory Examination (PE) held by the magistrate of Mafeteng, in June 1995. He was indicted on a charge of murder to which he pleaded not guilty. He pleaded self defence the particulars whereof

which will emerge in Accused's confession which was admitted by consent and was marked Exhibit "B". It was alleged that he killed Khothatso Machaea (Deceased) who was about the same age as the Accused on the 8th May 1993. Accused and Deceased were co-villagers. It became common cause that the Deceased died from the injuries inflicted by the Accused with a putty knobkerrie.

The deposition of seven witnesses given at the PE were admitted as evidence by consent including the post-mortem examination report which was marked Exhibit "A" and the said Accused's confession which was marked Exhibit "A". Molahlehi Namane (PW 1) who was PW 6 at the PE testified for the Crown under oath. He was followed by Manteseng Machaea (PW 2) Deceased's wife who was PW 1 at the PE (Manteseng). Thereafter the Crown closed its case. Mr. Molefi then made an application for discharge of the Accused at the end of the Crown case. This application I dismissed a few minutes later after the Crown had indicated that it would oppose. It was one of these applications that come before the Courts like a kind of a ritual ceremony whose absence of merit often shines oppressively. Quite impulsive they often are.

I thought, in the discretion that the Court has, on such on the application for discharge the ruling deserved a speedy decision in view of the fact that the facts

were not complicated. Furthermore I referred Counsel to the consideration whether if an accused is not guilty of the main charge he may not be guilty of:

"..... any other offence of which he might be convicted thereon".

Refer to section 175(3) of the Criminal Procedure and Evidence Act 1981. I felt that even through the evidence that the Accused admitted he would *prima facie* be convicted of a competent verdict. He admitted that he administered the fatal wounds. It might perhaps be a different thing after the close of the defence case.

Accused then elected to close his case without leading any evidence in his defence. This situation did not, of course, despite admission of a number PE depositions, make the case any simpler. Nor would the existence of the admitted confession. I will come to the question of the confession later in the judgment. But the case remained a short one indeed.

The post-mortem report revealed that the cause of death of the Deceased was due to brain damage from increased intracarnial pressure from epidural haematoma. The doctor said at "Remarks (8)" there was multiple occipital scalp lacerations. At other areas of the body which he would comment about if it was relevant the doctor said everything was normal.

Indeed PW 1 Molahlehi Namane (who was PW 4 at PE) confirmed seeing the wounds one towards the top left middle of the head (which had a depression) and are towards the back which was also bleeding. This witness added that there was pool of blood where the Deceased was found having fallen prostrate. Importantly his face was all covered in blood seeming to come from the nose and the ears. This is the witness who made a report to Lekarapa Phakalasane whose evidence was admitted as shown hereinafter.

The number of wounds on the Deceased's body was also corroborated by Detective Trooper Tšeloa of the Lesotho Mounted Police Service (LMPS) (PW 9 at the PE). His evidence was admitted. The latter witness had on the 12th May 1993 attended at Mafeteng Hospital mortuary. The mortuary workers had shown him the Deceased's dead body which he examined. He found that the Deceased had sustained three (3) open wounds on the head. Two of the wounds were situated on the left side of head while the third one was situated on the occipital area of the head. He had seen no other wounds on the body of the Deceased.

Phallang Nchakha whose evidence at the PE (where he was PW 6) was admitted said that the Deceased was the son of his younger brother. He also knew the Accused. In May 1993 he attended at a mortuary in Mafeteng Hospital where

he identified the dead body of the Deceased before the doctor who did a post-mortem examination. After that examination the family buried the Deceased at Ha Ramarothole.

Trooper Molelle whose evidence at the PE (where he had been PW 7) was admitted was a member of LMPS. He said he knew the Accused. At the material time he had been stationed at Mafeteng charge office. While at his post he saw Accused arrive in his office. He surrendered himself. Thereafter he gave an explanation "how deceased met his actual death." The witness had cautioned Accused and ended up giving him a charge of murder. He was placed under arrest.

Defence Trooper Mpojane whose evidence at the PE (where he was PW 8) was admitted was a member of LMPS at the Criminal Investigation Division. He said he took initial steps in the investigations. In that regard he met the Accused at Mafeteng charge office where he was already under arrest reportedly on the 15th May 1993. As a result of his interrogation "a positive explanation" was given by the Accused in connection with the death in question.

The witness and Detective Rabolinyane followed up the Accused's explanation whereupon they, accompanied by the Accused, attended at the latter's

village at Ha Ramarothole. On their arrival the village chief sent a messenger by the name of Maqhubu Ramarothole to accompany them to the Accused's house. That chief's messenger became PW 5 at the PE.

At the Accused's house the witness said after entering inside the Accused came out carrying a timber (lebetlela) stick and a putty (pody) knob-kerrie which he handed over to the two police officers. He then gave an explanation about the two items. The witness thereafter took the two items into his custody and then went back to the charge office. On their arrival the witness filled up a form LMP 12 (for keeping of intended exhibits) and brought the form to the clerk of court. The latter instructed the witness to keep the intended exhibits in police custody for use later in trial. It is recorded that at the PE the two items were handed in as exhibits and marked EX 1 collectively.

Maqhubu Ramarothole was the chief's messenger as said earlier in the judgment. He testified at the PE that he had known both the Accused and the Deceased who were his co-villagers. The latter he knew during his lifetime. In May 1993 he saw two police officers arrived accompanying the Accused. He went together with the three-some to the Accused's house. On arriving thereat the Accused surrendered in the witness' presence a stick and a knob-kerrie to the

policemen. He said the stick belonged to the Deceased then the knob-kerrie belonged to him the Accused following his explanation. At the PE the witness pointed at the two items which were before the Court.

Tšeliso Monoto whose evidence at the PE (where he was PW 1) was admitted stated that he had been at his parental home on the day in question when Accused arrived and made a report about his assault on the Deceased. He had not known whether the Deceased had died as a result of the assault. Accused asked the witness to accompany him to a grazing place outside village called Mohlakeng. The report made by the Accused was made in the company of the Accused's herd boy. At the same time the witness noticed that the Accused was in possession of a stick which the witness pointed out which was exhibited before the Court. At that time the witness did not see the putty (pody) knob-kerrie that was also exhibited.

The witness proceeded with Accused's herd boy to Mohlakeng where he found one Lekarapa Phakalasane who was PW 3 at the PE. PW 3 was accompanied by his own herd boy. The witness noticed the Deceased who lay prostrate on his face and appeared to have sustained a bleeding wound behind the head. He was bleeding through the ears and nostrils. His whole head was covered

with blood. PW 3 tried to help Deceased to sit up. It was in vain.

One Mantena Mabele (Accused's wife) arrived and saw the Deceased. She was instructed to look for a motor vehicle to carry the Deceased to hospital. She did not succeed. The witness then went to one Rahlabaki Thatho who made his vehicle available. When the witness arrived the Deceased had already been taken to the road. From there he was taken to hospital where he was admitted. Along the way the Deceased did not receive any further injuries. The witness learned on the following day that the Deceased had died.

Lekarapa Phakalasane whose evidence was admitted attended on the Deceased where he had fallen, following a report. He was bleeding through the ears and nostrils. He was unable to speak. On trying to remove Deceased away from the pool of blood in which he was he observed three lacerations on the head. One wound was bleeding.

The witness said he sent Molahlehi Namane and PW 4 at the PE (PW 1 in these proceedings) his heard boy who had made the report to him to fetch some bandages from his house. At that stage PW 2 and Accused's herd boy arrived. Later on Lira and others arrived. Deceased was bleeding profusely

notwithstanding attempts to bandage his wounds. Deceased was loaded on to tractor trailer towards the road where a vehicle later arrived which took him to hospital. Along the way the Deceased had received no further injuries.

Accused had been seen by the witnesses driving his cattle home. It was before the witness arrived at the scene. The witness had known Accused and Deceased to be friendly and herded their cattle together. According to the witness the report given to him by Manteseng was to the effect that the Accused and the Deceased were fighting or assaulting each other. This evidence that there was fighting was corroborated by evidence of Tšeliso Monoto to whom a report was given by the Accused. This was further corroborated by Manteseng in her evidence-in-chief before this Court. Manteseng's testimony differed from others in the following respect. That while others said the Accused was all along standing when delivering blows with the knobkerrie, that is he did not himself fall to the ground or lie on top of the Deceased, Manteseng said she saw the Accused on top of the Deceased on the ground. That is when and where the Accused was delivering the blows on the Deceased.

I now introduce the question of the Accused's confession by saying that the Crown accepted that the statement (purported confession) was not a confession

legally speaking. It was because while a confession is an unequivocal admission of guilt the statement is Exhibit "B" was not one. It established a defence on Accused's part or that it was intended so. It could not be said that the Accused admitted to having killed the deceased with intent nor that that was unequivocal. In some respects the statement actually tallied with the Crown's story the obvious one being on the number of wounds found on the Deceased and that it was the Deceased who set out and approached the Accused where Accused was tending his animals at Mohlakeng pasture. Deceased intended to recover a sum of M15 which was owed to him by the Accused. It arose out of a loan for payment for release of impounded cattle. This and the circumstances (of the loan) were not disputed by the Accused. This was corroborated by the Deceased's (Manteseng) wife who ended up admitting that the Deceased was in an unhappy or unpleasant mood. This can only mean that he was angry when he approached the Accused

A short statement of the contents of confession shows that on the day on which the money owed to the Deceased was to be paid accused had received a message that he was to attend at the initiation school. He arrived on a Friday. Early next morning he drove his cattle for grazing as aforesaid.

It was moments later when Accused saw Deceased coming down from the

village to where Accused was. Accused had originally formed an impression that the Deceased was hurrying to another place after collecting the debt money. When he arrived he was in an extremely angry and fighting mood. Deceased asked Accused where the latter had been the previous day. Accused explained that he duly arrived from Mafeteng but had received a message that he had been summoned to an initiation school. He had then travelled to the initiation school with "speed".

On receiving the above explanation Deceased asked Accused whether he had thought that his being required at the initiation school was more important than paying over the amount owed to Deceased. Accused replied that he still thought the need to pay Deceased was still weighty but Deceased had been absent during the day when he could have been given the money by Accused.

Without a warning the Deceased had hit out at Accused with a stick. This the Accused warded off with a putty knobkerrie which he had in his possession. At that time it appeared that Deceased was unstoppable. Accused could not, as he said, run off and escape because he had a bad leg. This (that he had a bad leg) was confirmed by most witnesses. Accused was forced to fight back. He said he hit out at Deceased causing two wounds. This third blow caused the Deceased to fall

down. Accused realized that the Deceased was bleeding through the ears and nostrils. He thereafter thought the Deceased had died or would die from the way he looked.

I attached significance to the fact that in no way was the Accused injured or actually assaulted as against the fatal injuries found on the Deceased on the other hand. Not that there should be evenness of any kind. It is because in the nature of things the victim is overcome and vanquished. I concluded that the fact that the Deceased was the initial aggressor and carried a timber (lebetlela) still could not counterpose the fact that the Accused used quite great force to overcome the Deceased. From any account it was excessive as the evidence of the two Crown witnesses whose evidence despite certain imperfections was wholly credible, reliable and compelling on the aspect of the passion of the assault. While the most credible of witnesses may be unreliable or plainly wrong the converse may also be true on certain aspects of their testimony.

The statement (of the purported confession) went further to show that Accused absconded and unsuccessfully sought work in the mines of South Africa. He was advised to come back home and he did. He discovered that the Deceased had in fact died.

According to the evidence of Manteseng Machaea (PW 2) when Accused went to Mohlakeng he passed near Deceased's home. However neither the Accused nor Deceased said anything to each other about repayment of that sum of money owed by Accused to Deceased. It was only when the Accused was already at Mohlakeng that the Deceased armed himself with a stick and told Manteseng that he was going to demand his money from the Accused. He left his home taking the direction of Mohlakeng. However Mantseng did not see when the Deceased arrived at Mohlakeng where the Accused was.

The testimony of Manteseng goes further to say that she was at Thoteng on the way to the shop at Makeneng where "she looked back" at Mohlakeng. She then saw fighting by both Accused and Deceased who were already on the ground. They were standing. She saw the Accused "on top" of the Deceased belabouring him with an object. She said she was about 1.5 kilometres from where the fight was going on. She looked at the scene for about two (2) minutes. For that period Accused was belabouring the Deceased as stated above.

I found it difficult to believe that Manteseng could have seen the fighting in the way she described. She could not be so accurate in seeing exactly how the proceedings took place. To the extent I would not rely on her account of things.

The brevity of the fighting is much more towards the account given by the Accused. Two minutes is quite a long time. The witness must have inclined towards exaggerating or recreating the events at the scene.

It was PW 1 (Molahlehi Namane) who said he saw the Deceased approaching the Accused at Mohlakeng. He did not, however see what happened when the Deceased got to where the Accused was as he was busy going about his business. He saw something later.

The witness further testified that when he looked at where the Accused and Deceased were, he saw the Accused belabouring the Deceased with a knobkerrie. The incident happened at a distance of about 1.5 kilometres away from him. He then ran to the place and that took more than five (5) minutes to get there. He say that for this time, the Accused was continuously belabouring the Deceased with the said knobkerrie as said before.

On his arrival at the scene the witness testified that he asked the Accused why he was killing the Deceased. Accused replied issuing out a swear word and asking the witness whether he was joining the fight for the Deceased or words to that effect. The witness then rushed home and gave a report to Lekarapa

Phakalasane (PW 5 at PE) whom he met on the way to the scene of the crime. They went together to the scene. They found Deceased lying prostrate face downwards. The witness observed three (3) wounds on the Deceased's head. He said that the Deceased was bleeding from the ears and nostrils.

I have found certain problems with the testimony of the witness in connection with whether he saw what he said he saw accurately enough. In the first place a distance of 1.5 kilometres that along the way he travelled for five (5) minutes observing all along what was happening at Mohlakeng. Secondly, that for that length of time he could have been focussed at what was happening. Thirdly, that the fight itself could have taken that long. This is belied by the number of injuries. In all probability the fight could not have taken that long even if the time of five (5) minutes is reconcilable with the distance for which the witness travelled.

My conclusion was that it was for a shorter time that the witness saw what he said he did. What he said he saw mostly amounted to a recreation of the events. At the original distance from which he saw the fight he could not even see the object that was used. There could be no doubt however that he arrived at the scene and could have been attracted by what he originally saw, to have had to attend as

he did. I thought his evidence merely corroborated the aspect of the fight having occurred, the wounds, the condition in which the Deceased was found.

I would recapitulate the conclusion which I have already reached that the statement made by the Accused was not a confession. This I say having looked at its statement in its entirety. As the learned authors of **South African Law of Evidence 4th edition** say at page 210 about such a statement; that:

> " ..... this does not signify the bare words in it, but extends to what the words necessarily imply."

Having commented about certain illustrative cases the learned authors state, at page 211 of the last mentioned book, that:

> "The logical conclusion from these cases is that in crimes which require *mens rea*, an account by the accused of his actions, however detailed and damning, will hardly ever amount to a confession (unless there be something in the summary circumstances to indicate that what was said amounted to an unequivocal admission of guilt, and unless, taking the statement as a whole, the necessary implication

is that he confessed) because it would almost always be possible to give some further explanation which would negative necessary mental intent. ....."

This is in connection with contention that the Accused could not have intended to kill (directly or indirectly) but had merely been negligent by having used excessive or immoderate force. I agreed with the submission in page 212 of **South African Law of Evidence** (supra) that an exculpatory statement is not a confession. And finally on page 213 and 214 of the said work it is concluded in the affirmative that those statements which are exculpatory with regard to major crimes charged: for example murder, can be incriminating as to a lesser offence such as culpable homicide or assault. This provides an answer as the Crown submitted in the circumstance of the present case where the Crown has contended that the Accused ought not to be found guilty of murder but of a lesser offence. The Crown did not however show anything that pointed to an irresistible inference that the Accused's story was improbable and could not be said to be reasonably possible. See **Lehoqo v Rex** 1981(1) 163 at pages 168-169.

The question as to what the value of the statement of the Accused was where it has not been objected to was answered as follows. That it could not be

equated to a statement made by the Accused in his defence (in the witness box) because technically it could not belong to the procedural stage of an accused's testimony as after close of Crown's case. It remained a statement from the Crown that favoured the Accused (in its effect or testimonial value) and was on the same level as other pieces of evidence intended to be in support of the Crown case. The statement cannot therefor be dismissed simply as mere hearsay. There is truth in its contents even if it is not in the whole of the statement. See **South African Law of Evidence** (supra) page 232-233, 229 and 231. Also A Kean **The Modern Law of Evidence 5th Ed.** Page 312 and 344. The statement can be admitted as informal admission being an exception to the hear say rule. See De Toit et al, **Commentary on the Criminal Procedure Act (1993) S 217 at 24-66D-C 14-66E: Criminal Procedure and Evidence Act 1981** S.228(4) and S.273. WKL Kasozi et al **Introduction to the Law of Lesotho (1999)** 194-195, 204. And Peter Murphy, **A Practical Approach to Evidence,** 4th Ed, 218-219.

The next question that flows from above is this one. What is the effect of the purported confession where it is in conflict with other admitted depositions? The answer would simply be that the evidence is evaluated on the basis of credibility of witnesses taking into account their demeanour, observation, recollection, variation, contradictions, reliability, probability and so forth. The

remarks of Mr. Justice H C Nichol as quoted in **South African Law of Evidence** (supra) are to be borne in mind. Therein at page 611 the learned judge is said to have said:

> "For the assessment of credibility of witnesses (whether it relates to their veracity or their reliability) there are no formulas no rules of the thumb. The evaluation is essentially a subjective judgment, and is a resultant of number of factors whose varying weight depends on the circumstances,"

This would sums it all. So has followed the necessary approval of the above statement by the learned authors. See however the remarks of Steyn P in **Rex v Sehloho Joseph Maphiri** 1999-2000 LLR-LB 198 at pp 203-213 in relation to regularity or otherwise of deposition made at preparatory examination untested by cross examination.

The next and most crucial question should surely be what the is position where witnesses PE depositions have been admitted (whose demeanour could not be tested) on the one hand and testimony of witnesses who have testified by word of mouth before the trial Court on the other hand where there is conflict. This is

precisely the same position in the instant matter where the greater part of evidence has been admitted by both the Crown and the defence. It was submitted by Mr. Molefi that the latter overrides the former. This he based on **Rex v Lejaka Lebona** 1991-1996 LLR 989 where Kheola CJ had this to say:

> "The most important deposition admitted by the defence is that of PW 8 Trooper Monyau. It is important because it gives a detailed account of what happened before the deceased was stabbed and how the stabbing actually took place. It is the evidence adduced by the Crown to prove or disprove its case by admitting that piece of evidence the Crown accepts that it is true. In other words the evidence of PW 8 is not disputed by the Crown and the defence. It will not be acceptable when the Crown turns around and says that the evidence of PW 8 should be rejected because it conflicts with the evidence of other Crown witnesses." (My underlining)

Excepting for the criticisms that I have advanced in the valuation of the Accused's statement, which might be valid as far as they went I was not persuaded by the Crown that it was possible to defeat the above principle. This meant that in principle one would have no way of attempting to rely, in the circumstances, on

the evidence of the two witnesses, to the extent that it seeks to contradict that of the contents of Accused's statement. Alternatively the conflict between the two is such that there remains a doubt on to what actually took place. That doubt should redound to the Accused.

It is the confusion and particularly the lack of clarity of the evidence of the two witnesses of the Crown that makes it unsafe to convict. See the remarks of Steyn P in **Lebohang Letlaka v Crown** C of A (CRI) No.3 of 2000, 12th April 2001 at pp 7-9. In addition there is a reasonable possibility that the story of the Accused might be true. It may even be improbable. Nothing indicated that his version was not a reasonable possible explanation of the true events. In the circumstances he is entitled to an acquittal (See **R v Difford** 1937 AD 370 **R v M** 1946 AD 1023 at p 1027). In that situation it cannot be said that the Crown has proved its case beyond a reasonable doubt and the Crown has thus failed to discharge its onus.

The Court was worried that the criticisms against the statement of the Accused, even if those criticism were valid, were based solely on imperfections of essentially what the Accused ought reasonably to have done "as a reasonable man". This indicated, wrongly in my view, that the test is objective. For example

as Mr. Moqhali contended Accused ought to have delivered a single blow which, if he had done, would have prevented any further attack on him by the Deceased. That the Accused had therefore exceeded the bounds of self-defence. (See **Pone v DPP** 1999-2000 LLR-LB 214 at 226, and **Malefetsane Beleme v Rex** 1993-94 LLR 7) This was said bearing in mind the weapon that the Accused had which was an effective and lethal weapon. How safe would it be to rely on this as a factor? It would, in my view, definitely not be safe to do so without more.

It is correct that that all factors be taken into account, in dealing with the circumstances of a particular case, in a case of a defence of self-defence such as the present one. This is necessary in:

> "..... deciding whether in the circumstances of the particular case the means used by the accused were reasonable and justified, or whether he exceeded the bounds of reasonable private defence."

See **R v Lejaka Lesoma** (supra) at page 994 and cases cited therein. Such factors must be based on facts that give rise to inferences that are irresistible, hence need for proof beyond a reasonable doubt. According to PW 1 and PW 2 the Accused had belaboured the deceased with a knobkerrie for a period of more than two

minutes. I concluded that these witnesses were not completely credible on this aspect and ought not to be relied on by this Court, as was correctly submitted by Mr. Molefi. Moreover Isaacs AJ in dealing with a case where it was contended by the Crown that the accused had exceeded the bounds of self-defence, said in **Lehoqo v Rex** (supra) at page 169:

> "But in considering whether a person acted reasonably in self-defence one must try to imagine oneself into the position in which the accused was .....".

This confirms that the test is subjective.

A conviction based the testimony of the witnesses and alleged imperfections in the evidence of the Accused would be unsafe for the main charge nor for any competent verdict as I concluded. I thought, as was held in **The Minister of Railways and Harbours v Bunn** 1914 AD 27, that men placed in moment of crisis with a choice of alternative are not to be judged as if they had both time and opportunity to weigh the pros and cons. Allowances must be made for circumstances in their position. It is noteworthy that Gentlemen Assessors Mafatle and Leboela disagreed on the ground that the Accused had been negligent, had

used immoderate and excessive force and ought to have been convicted of Culpable Homicide. See **R v Lefu Ntobo and Another** CRI/T/69/2000, Ramodibedi J, 26th September 2001 at p.11 with regard to position of assessors.

That the Accused had not testified in his defence does not carry the matter any further. The situation is aptly summed up by the learned authors of **South African Laws of Evidence** (supra) at p.599 where it is said:

> "An Accused's failure to testify can be used as a factor against him, it has been held only when at the end of the case for the State the State has *prima facie* discharged the onus that rests on it. (In the sense, here, of evidence upon which a reasonable man could convict), it cannot therefore, be used to supply the deficiency in the case for the State, that is to say where there is no evidence on which a reasonable man could convict."

There are various cases from this Court which agree with the above principle. I respectfully agree with the statement from the learned authors. In addition the case has to be:

"..... of such nature that the first appellant's failure to give or call evidence made the case conclusive." (My emphasis)

See **Lerato Mahanye and Another v Rex** 1999-2000 LLR-LB 105 at 126

It is clear therefore that the Accused ought to be acquitted and discharged. As pointed out earlier my assessors did not agree.

T Monapathi
Judge