CRI/T/14/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

THABO THOLOMI TAMOLASE **ACCUSED**

JUDGMENT

Delivered by the Honourable Chief Justice Mr. Justice J.L. kheola on the 15th day of March 2001

The accused is charged with the murder of Lehlohonolo Morake (deceased) on the 8th July, 1992 at or near Welkom in the district of Quthing.

The accused was called upon to plead to the charge. He said: "I am guilty because I have done the act". He eventually pleaded not guilty.

The first witness called by the Crown was Trooper Seitlheko who testified that on the 9th July, 1992 he was on duty in the C.I.D. office in Quthing when he received a report from Welkom village. As a result of that report he went to that

village. He went to the house of the late 'Matsepang Tsenki and found the body of the deceased on the bed, he had a wound on the left wrist which almost amputated the arm and another wound below the left breast. He was already dead and there was blood on that bed. The deceased was naked. The late 'Matsepang was present when Trp. Seitlheko examined the dead body. After that examination the dead body was taken to the mortuary.

On the same day Trp. Seitlheko returned to Welkom and found the accused at his (accd's) brother's place. He charged the accused with the murder of the deceased. He says that the accused later volunteered to show the police where he had hidden the sword used to injure the deceased. It was hidden in a culvert on the road to Mt. Moorosi which was about one hundred metres from the village. In his brother's house the accused took out a knobkerrie from under the bed. The two weapons were handed in by Trp. Seitlheko and marked as exhibit "1" (collectively).

Under cross-examination Trp Seitlheko said that one of the windows of 'Matsepang's house was broken. He denied that this was a fabrication because he never mentioned it in his evidence-in-chief. He also denied that both exhibits were found in the house under the bed. He insisted that only the knobkerrie was

taken out from under the bed.

The second Crown witness was one Likopo Makhetha. He testified that he resides in Welkom village. In July 1992 the deceased died. On the night in question he went to the late 'Matsepang's house as a result of a report made to him by the late Tsokolo. On his arrival there he found the deceased lying on the bed. He was already dead. He had a wound on the left wrist and another below the left breast. There was a basin full of blood which was placed under a wardrobe and the police took it out.

On the following day he accompanied the police to accused's brother's place. They found him and he was arrested. During the afternoon of the same day the police came back to the village with the accused. He accompanied them to accused's brothers place. Accused took out a knobkerrie from under the bed and also led the police to a culvert along the road to Mt. Moorosi and took out a sword wrapped in a white cloth.

Under cross-examination Likopo said that although the police took out the basin full of blood from under the wardrobe they did not take it as an exhibit because 'Matsepang claimed that the blood was hers. It was never established

what she meant by saying the blood was hers. That could have meant menses.

The defence suggested that there was blood on the floor after the accused and the deceased had fought in the house. They seemed to suggest that the blood was removed from the floor and poured into the basin in order to give the impression that the deceased was killed on the bed and that he never fought with the accused on the floor.

Likopo never saw any blood on the floor nor on the bed because the wounds were no longer bleeding.

At this stage of the proceedings the Crown made an application in terms of section 227 (1) of the Criminal Procedure and Evidence Act of 1981 that the deposition of the late 'Matsepang Tsenki who was P.W.1 at the Preparatory Examination proceedings be admitted as evidence in the present case. After it was proved on oath to the satisfaction of the Court that the deponent is dead the application was granted.. The deposition was read into the record.

In her deposition the late 'Matsepang states that she was in love with both the deceased and the accused. On the night of the 8th July, 1992 she was sleeping

in her bed with the deceased. She had locked the door and closed the windows. During the night she heard that somebody was entering into the house through a window. That person struck a match and lit a lamp. She identified him as the accused. He entered into the bedroom and uncovered the blankets which they were wearing and asked the deceased what he wanted there. However the deceased did not answer him because he was fast asleep. The accused then produced a sharp instrument (later identified as a sword) and struck the deceased on the left hand (wrist). She states that she tried to stop the accused from assaulting the deceased but he (accused) hit her with a knobkerrie on the back. She ran out of the house and went to the home of a neighbour and made a report to her. She also reported to the late headman Tsokolo Motemakoane who went to her house accompanied by other villagers. When they arrived there she found the deceased still lying on the bed. He was dead. He had a wound on the left hand and another below the left breast which she saw later when the police examined the body of the deceased.

The late 'Matsepang says that on the night in question, she and the deceased were drunk. That she was a married woman but her husband was at work in the mines in the Republic of South Africa.

The report of post-mortem examination was handed in as an exhibit by consent of the defence. According to it the cause of death was left haemothorax, severe haemorrhage and shock. Externally there were: (1) Rigor Mortis (2)Paper white conjunctivae (3) Avulsion of the left hand at the wrist (4) Perforating wound about 2cm on the left side of the chest just below the axilla (5) Severe haemorrhage with clotted blood, about 3 litres in the left pleural cavity.

After the Crown had closed its case, the defence made an application for the discharge of the accused on the ground that the Crown had failed to establish a **prima facie** case or a case on which the Court might convict.

The Court refused the application on the ground that the Crown had established a **prima facie** against the accused. This finding was based on the ground that the evidence or the admitted deposition of the late 'Matsepang was evidence before this Court and had not been challenged in any way.

The evidence that the accused led the police to a place some distance from the village where he pointed out a hidden sword wrapped in a cloth tends to show that he had hidden this weapon because he wanted to conceal his unlawful acts.

It also tends to corroborate the evidence of the late 'Matsepang which appears in her deposition properly recorded at the preparatory examination proceedings.

At this stage of the proceedings I did not consider the credibility of the witnesses especially that of the late 'Matsepang whose evidence directly implicates the accused because she is the only eye witness who was present when one of her lovers killed another lover of hers.

After the dismissal of the application for the discharge of the accused the defence immediately put the accused in the witness box to enable him to give a sworn statement.

He testified that he reside at ha Ntho in the district of Quthing. At the time relevant to this case he had visited the home of his brother in Welkom village. 'Matsepang was his lover. On the night in question he decided to visit her at her home. When he left his brother's house he armed himself with a sword because the people of that village often attacked other people at night and assaulted them for no apparent reasons. When he arrived at the home of the late 'Matsepang he knocked at the main door which was locked. The late 'Matsepang opened the door

for him. She did not tell him that she had a visitor in the house. As he entered the bedroom door he saw a person rushing towards him holding an unclasped knife in his right hand. He was raising it up and ready to stab him. Before that person could stab him, he delivered a blow with the sword he was holding. He struck him on the left hand because that person warded off the blow with the left hand.

When the blow landed on the left hand, the knife held by that person in the right hand fell down. That person moved backwards. The accused says that he then stabbed that person with the sword below the left breast. He left immediately after that and never returned to 'Matsepang's place.

He denies that he entered through the window. He also denies that he lit a lamp. He says that he never spoke to the deceased at all that night because they fought before there was any exchange of words between them. According to accused both the sword and the knobkerrie were found in his brother's house.

Under cross-examination the accused said that when he hit the deceased on the left hand his knife fell down and that he (deceased) moved backwards and was no longer holding any knife. He admits that the deceased was then harmless. Nevertheless he stabbed him because he was frightened. He says that when he

stabbed the deceased with the sword below the left breast the latter fell down. He then left without rendering any assistance to him.

The deposition of the late 'Matsepang was admitted as evidence in the present trial in terms of section 227 (1) of the Criminal Procedure and Evidence Act of 1981. The Crown proved to the satisfaction of the Court that the late 'Matsepang had died. However an additional requirement of section 227 (1) of the Criminal Procedure and Evidence Act of 1981 is that it must also be proved to the satisfaction of the court that the evidence offered is the evidence which was sworn before the magistrate without any alteration. The Prosecution made no attempt to prove this important part of their case. The proper person to prove the evidence at the trial is the magistrate who took it **(The State v Nellmapius,** (1886) 2 SAR 121).

For the above reason it is clear that the deposition of the late 'Matsepang ought not to have been admitted as evidence in the present case because the Prosecution failed to comply with all the requirements of Section 227 (1).

Nevertheless when I made the ruling that there was a **prima facie** case for the accused to answer I also relied on the evidence of pointing out. The accused

pointed out a sword which was hidden in a culvert along the road to Mt. Moorosi. That sword was used in the killing of the deceased.

In his evidence the accused admitted that he killed the deceased but says that he did so in self-defence. Now that the evidence of the late 'Matsepang has been found to be inadmissible because of the irregularity committed by the Prosecution what is left for the Court to consider is the self-defence raised by the accused. He says that when he entered into the bedroom he saw a person rushing to him with his right hand holding an unclasped knife and raising that hand and ready to stab. He struck the left hand of that person with the sword he was holding causing the knife in the right hand to fall down. That person moved backwards when he was struck on the left hand and his knife fell down. Accused admits that at that time that person was harmless because he was moving backwards and was also disarmed of his knife. However it was then that the accused stabbed that harmless person below the left breast with a sword.

The accused had a chance to run away because that person was disarmed of his knife and was moving backwards. He was no longer posing any danger to the accused. In other words, the imminent attack that was facing the accused ceased or disappeared when the deceased was hit with a sword on his left hand causing

the knife in his right hand to fall. Any measures taken by the accused after the complainant's attack has ceased would be retaliatory rather than defensive and therefore, unjustified (**R. V. Hayes,**1904 T.S. 383).

It is clear from the accused's own story that he exceeded the bounds of reasonable self-defence. He first disarmed the deceased of the knife and the latter started to retreat. It seems to me that it was at that stage that the accused had a good chance to flee.

In **R. v. Molato** 1974-1975 LLR. 30 the accused admitted causing the death of the deceased, but contended that he had done so in self-defence. However, it was held that even though the deceased may have been the original aggressor, the accused had failed to take the opportunity to flee while the deceased was still in his hut and appeared to have been ready and willing to engage in contest with his father. In those circumstances the question of self-defence failed. It was found that the beating of the deceased was persistent and immoderate and he was accordingly found guilty of murder.

In **R v. Mathlau** 1958 (1) S.A. 350 it was held that where an intentional killing has exceeded the bounds of reasonable self-defence the proper verdict in law is not necessarily murder: such cases are susceptible of treatment as cases of

culpable homicide. However, if the excess was immoderate, a verdict of murder will be returned. In **R. v. Krull** 1959 (3) S.A. 392 (A.D) at p. 399 Schreiner, J.A. said:

> "In self-defence the motive is fear, which from the law's viewpoint is a better motive than anger, which operates in provocation. If you kill intentionally within the limits of self-defence, you are not guilty. If you exceed those limits moderately you are guilty of culpable homicide; if immoderately, you are guilty of murder. No greater precision is possible as a matter of law. In this respect our treatment of the subject is more direct but less logical than that of the English law which, if self-defence fails, re-examines the facts to see whether the Crown has negatived provocation (see **Bullard v R.,** 1957 A.C. 635). Under our system it does not follow from the fact that the law treats intentional killing in self-defence, where there has been moderate excess, as culpable homicide, that it should also treat as culpable homicide a killing which though provoked was yet

intentional. Since a merely provoked killing is never justified there seems to be no good reason for holding it to be less than murder when it is intended."

On the question of provocation see the Criminal Law (Homicide Amendment) Proclamation No.42 of 1959.

I have come to the conclusion that the accused exceeded the bounds of reasonable self-defence moderately. He stabbed the deceased only once after the latter was no longer a danger to him. He admits that at the time he stabbed the deceased below the left breast he was already harmless.

I find the accused guilty of culpable homicide.

J.L. Kheola.

J.L. KHEOLA
CHIEF JUSTICE

15th March, 2001

SENTENCE

Three (3) years' imprisonment. The whole of that sentence is suspended for 3 years on condition that during that period the accused shall not be convicted of any offence involving violence to another persons.

J.L. Kheola

J.L. KHEOLA
CHIEF JUSTICE

15th March, 2001.

For Crown: Miss Mofilikoane
For Accused: Mr. Fosa