

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX

VS

SEMAKALE LEABUA

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 29th August, 2001

The accused, a mosotho adult aged 38, appears before this court charged with the crime of murder it being alleged in the first count that upon or about the 19th day of September 1997 and at or near Caltex Garage Hlotse in the district of Leribe, the accused did unlawfully and intentionally kill Mohau Lefosa. On the second count he was charged with being in unlawful possession of a firearm without a valid licence. He pleaded not guilty to both counts.

The defence admitted the depositions of P.W.9 Molefi Lefosa, P.W.11 Mosiuoa Lefosa and P.W.13 Dr Seqhobane and these were read into the machine and form part of the record in this case.

The first witness called by the Crown was John Mohanoe Lefosa P.W.1 who told the court that deceased was the son of his elder brother. On the 19th September 1997 he says he had gone for a drink at Caltex Garage and was sharing a nip of Gordons gin which he aptly called "*konyananyana*" with one Makhabane.

He then saw a man called Tumelo sitting in the company of the deceased who, upon noticing him, stood up and came to greet him saying "Hey, uncle, I did not see you." He then returned to his seat. He says the accused then came in wearing a Basotho National Party hat and scarf with green, white, red and blue stripes. After greeting them, he went to where the deceased and Tumelo were seated.

After a while he heard some altercation and accused was saying "That one is talking shit. Come outside." He saw accused and deceased confronting or grabbing each other, and they went out. After a short while he heard a gun report and one Ntjolota rushed into the bar announcing "Hey, someone has shot another." Tumelo retorted saying "If people are shooting each other why do you come inside?" There was commotion and when he got out, he found that Mohau had fallen on the cement stoep and the accused was standing about five metres away. One Kobeli soon arrived driving deceased's car and was crying bitterly. This witness says he advised that the car would not convey the injured man comfortably and that he decided to use his own van to transport his injured cousin to Motebang hospital.

He says that at the hospital he was allowed to see the wound below the breast; and after the doctor had examined the patient, he informed them that Mohau had passed away.

Under cross examination P.W.1 admitted that in the bar, the deceased took accused's BNP cap but that he thought they were joking. Mohau was a BCP man and the accused a BNP. He took them to be friends.

Robbithaele Mahanetsa - P.W.2 - was called as the next witness. He informed the court that he was related to the accused and that on the 19th September 1997 he was at Caltex at dusk and was playing cards with the accused in the public bar. At one stage, he went to see Ntjolota Monyane in the private bar. As he entered, the accused remarked "By the way do you drink with silly children in this private bar?" He asked accused to whom he was referring. He said "This Mohau" Mohau then said "You, Semakale you will excrete." The accused then stood up and walked to the door and the deceased came following him. P.W.2 says he even tried to prevent the deceased from going out as he then appeared angry. Deceased then said "If you break my watch, you will pay". Accused was saying "Leave him so that I give him his mother". He says the deceased grabbed his shoulder as he went round the partitioning wall. He then heard a gun report. When he rushed after them, he found the deceased already lying prostrate. He rebuked the accused who was then saying "Do you see I told you; you will excrete." Deceased then said "Truly, brother Semakale do you really kill me."

This witness admits that he did not see the actual shooting as he was behind the wall at the time it occurred. He entered the bar and made a report.

Under cross examination he says that he did not see any exchange of fists when the two men were in the bar; he insisted however that he found the accused holding a gun; he could not dispute the suggestion that the same gun could belong to the deceased.

He says he did not see deceased holding anything except a can of beer.

Ntjolota Monyane, P.W.3, told the court that on the 19th September 1997 he was at the Caltex bar. The accused arrived later wearing a BNP scarf. After a while, the accused asked "Cousy, how are your party people" - pointing at Mohau; and later he heard accused say to deceased "Follow me." After the two men left the bar, he heard a gun report; and soon thereafter, P.W.2 came in rushing saying accused had shot the deceased. P.W.3 says when he got outside, he saw the accused standing by and was saying "stand aside, next."

Under cross examination, P.W.3 he says he did not see the deceased snatch accused's cap and wipe his nose with it. He says it is probable that at the preparatory examination before the magistrate, he could have said that the accused pointed at the deceased saying that the deceased had threatened to kill him.

P.W.4, Tumelo Selonyane, told the court that he is related to the accused as a brother. On the 19th September 1997 he was at the Caltex bar in the company of many people.

Deceased later came in and sat down. The accused also arrived wearing BNP hat, and deceased remarked "What kind of hat are you wearing? Let me fit it on!" The deceased then removed it from the accused's head and donned it and then returned it to the accused. After this, the deceased went to greet P.W.1, his uncle, who had called him to greetings.

He says it was noisy in the bar, but he saw when accused and deceased went out through the door. Shortly after they had gone out, he heard a gun shot and people rushed out in panic. He heard someone say "Semakale is shooting Mohau."

When he got out, he saw the accused standing by holding a gun and the deceased was lying prostrate. He says he heard when the accused said "Next".

Under cross examination, he says he did not hear any alternation between the two men in the bar and that the deceased never spat into accused's hat before he donned it.

P.W.5 Motseare Mota told the court that he was staying in the living quarters at the backyard of the Caltex garage. That day he was from doing some piece job at Sebothoane and returned home between 8 and 9 pm. Soon upon his arrival, he heard a gun report, and when he got outside to investigate he found two people: one prostrate and one standing a distance away. When he approached, he discovered that the prostrate man was Mohau Lefosa and the accused was standing by holding a gun. He says he asked "Men, what is happening." Deceased then spoke "Semakale, why

are you shooting me?" The accused replied, "I can repeat you again! Next." The people then retreated.

He continues to say that he went to the front of the Caltex building to look for any policeman he could find. He found Chaba and gave him a report. He identified the gun before court as similar to that he saw, in accused's hands. Deceased carried nothing in his hands.

Under cross examination, he says he found Chaba at the front of Caltex and not in the public bar and that when they returned to the scene, the accused had disappeared.

P.W.6 Detective Trooper Chaba informed the court that he had seen the accused earlier that evening at a card game in the public bar. At about 8 pm. Motseare Mota arrived and asked him to come quickly as there had been a shooting. At the scene they found Mohau Lefosa lying prostrate; the accused was nowhere to be seen. Ntjolota P.W.3 explained what had happened. He then looked for the accused and found him between the public and the private bar. Accused then made an explanation and also handed over a 7.65 pistol. Upon releasing the magazine, P.W.6 says he found it had one live bullet. The accused failed to produce the certificate for the said firearm. He states that he also found a 7.65 shell which could have dropped by when the gun was fired.

He took the accused to the Charge Office and after charging him with the crime of attempted murder he put him into the cell and proceeded to the Motebang Hospital where the deceased had been conveyed. At the hospital he found that Mohau Lefosa

had already passed away . He examined the corpse and discovered a gun shot wound below the left breast. Back at the Charge Office he then charged the accused with murder.

He then formally handed in the gun and the shell as "Ex.1" collectively. During cross examination he explained that he did not hand in the live bullet because it had not been used in the commission of the crime.

Before the crown closed its case, the defence made admissions of the depositions of P.W.2 Policeman Khanare, P.W.4 Major Telukhunoana and his ballistic report and the autopsy report, according to which death of the deceased was due to haemorrhagic shock caused by a bullet penetrating through the abdominal aorta.

The defence then closed its case .

The case against the accused is clearly a circumstantial one and the following are the salient facts of the crown case-

1. On the 19th September 1997 the deceased was at the private bar at the Caltex Garage Hlotse in the Leribe district.
2. The accused arrived later that evening wearing a woolen hat with party colours of the Basotho National Party.

3. The deceased then was seen removing the woolen hat from the accused and donning it and returning it to the accused.
4. Later an altercation erupted between the deceased and the accused who was complaining about deceased's behaviour to him.
5. The accused was heard to say "Follow me" and the deceased followed despite attempts of other men who sought to prevent him.
6. A short while after their exit a gun report was heard.
7. Ntjolota who was outside did however not witness the actual shooting because a wall obscured his view.
8. The accused was found standing near the prostrate Mohau Lefosa and was holding a gun.
9. The deceased was heard saying "Semakale ... u nthunyetsang?" and the accused retorted saying- "I can repeat you again" and then said "Next".

This was the circumstantial evidence adduced on behalf of the crown and there is no eye witness to the shooting. The defence having closed its case without putting the accused into the witness box, the test now is whether the crown has proved beyond reasonable doubt that it was the accused who shot the deceased and did so intentionally thus causing his death.

In my view, the uncontroverted facts which I have listed above establish a strong **prima facie** case that it was the accused, and no one else, who shot the deceased. He was seen altercating with the deceased, and was heard inviting the deceased to follow him out; a gun shot was soon heard; in my view the deceased could not have uttered the words "Semakale, why do you shoot me" if accused had not shot the deceased. The accused could not utter the words "I can repeat you again" if he had not shot the deceased. He was seen by more than one witness holding a gun and standing near the prostrate deceased. The accused has elected not to give any evidence. Even though the accused had no onus to prove his innocence, the circumstantial evidence against him was very strong despite certain discrepancies between the versions at the preparatory examination and before this court. In the case of **S. v. Theron**, 1968 (4) SA 61 it was held that the failure of the accused to testify becomes important only if there is strong circumstantial evidence against the accused. The strong **prima facie** proof becomes conclusive proof. Each case depends upon its own particular circumstances: The conclusion is irresistible in this case that, despite no direct evidence, it was the accused who shot the deceased. I come to a conclusion that the crown witnesses - despite some discrepancies here and there, - were truthful, frank and objective. On the other hand, the accused elected to keep his silence (**Tsotang Pelea vs Rex** - C of A (CRI) No.2 of 2000 - per **Ramodibedi J.A.**)

The next step to consider is whether the shooting was unlawful in that it was not justified by defences such as self-defence. In this case, it is clear that the accused might have been angered by the deceased; it is also probable that the accused had consumed liquor on that particular evening. There has been no evidence that the deceased went out carrying anything but a can of beer; we do not know what

happened outside - except to say it has been proved that the accused shot the deceased, not in self-defence but because he had been angered by the conduct of the deceased. He was probably angry when he used the gun he had on him, but I hold that the shooting was totally unjustified and therefore unlawful.

The next inquiry is whether the accused had the necessary intention to kill the deceased. The accused has not given evidence. He could have consumed liquor on that day and acted under provocation. He was however still in control of his actions; he invited the deceased to follow him to the outside. He shot at him at the upper region of the body and the results were fatal. In my view, he had a legal intention - **dolus eventualis** - to kill the deceased. He uttered words showing that he in fact gloated over what he had just done. I have no hesitation to find that he had a legal intention to kill the deceased and foresaw subjectively that shooting the deceased in the manner he did could have fatal results.

Provocation which was meted to the accused did not warrant the violent reaction which culminated in the death of the deceased. Whilst the accused's tempers may have flared, as a result of political arguments of that evening, I do not believe that the accused's life was at any stage endangered or imperilled. He had come to the public bar wearing a political party hat and was already having a probably loaded gun in his possession. He seems to have been ready to use it at the slightest of provocations. He invited the deceased out. He used a gun which, though looking rather haggard, old and weather - beaten, is still a lethal weapon. I find him guilty of murder. My assessors agree with this finding.

Extenuating circumstances

I however find that extenuating circumstances do exist in a subjective sense. These are those circumstances which are not too remote and which reduce the moral blameworthiness of the accused in the commission of the crime (Section 296 (1) - Criminal Procedure and Evidence Act 1981; **R. v. Rapule Makhetha** - 1991 - 96 (2) LLR 1326). In this case, the killing was not premeditated; the intention was **dolus eventualis**; there existed some degree of provocation and intoxication which however did not reduce murder to culpable homicide. My assessor also agree.

The accused is also found guilty under the second count. The court has already found that the accused shot the deceased with it and handed it over to Detective Trooper Chaba and that he failed to produce the firearm certificate for it.

Sentence

In passing sentence the court considers the following circumstances-

- (a) the absence of premeditation
- (b) provocation and intoxication
- (c) absence of previous convictions.

This court has always been stressing upon the sanctity of human life and that human life can only be violated in special circumstances prescribed by law; human life thus cannot and must never be taken over triviality or slightest of excuses. Though

unpremediated or unplanned the killing of the deceased in this case was "callous", to say the least and indeed a fist fight could have perhaps settled the scores! The accused was however ready to resort to a lethal weapon with fatal consequences. He deliberately shot the deceased - albeit on the spur of the moment. He could not and cannot justify his drastic act - hence his silence before this court.

Nonetheless, the accused has deprived the deceased his life in unwarranting circumstances and over a triviality. He used a gun deliberately in careless disregard to the life of another being. He has deprived a family its son, his wife a husband, his children a father and breadwinner and his colleagues a friend. For that, it is my most unpleasant duty to impose sentence, which in all circumstances of the case, should meet the interests of the accused and of the society.

Sentence: Count 1:- 7 years

Count 2:- 6 months wholly suspended for three years on condition that the accused is not convicted of a similar offence during the period of suspension. The pistol is forfeited to the Crown.

Both sentences to run concurrently.


S.N. PERTE

JUDGE

Crown Counsel : Ms Dlangamandla

For Accused : Mr Klass