CRI/T/97/99

IN THE HIGH COURT OF LESOTHO

In the Matter between:

R E X

and

LETOOANE LETOOANE **Accused**

JUDGMENT

Delivered by the Honourable Chief Justice Mr Justice J.L. Kheola
on the 21st August, 2001

The accused is charged with the crime of murder; it being alleged that upon or about the 1st April, 1998 at or near Mohlakeng in the district of Thaba-Tseka, the said accused did unlawfully and intentionally kill one Zakia Ndabe (deceased).

When the charge was put to him, the accused pleaded not guilty.

P.W.1 Lucky Mathata testified that on the 1st April, 1998 he was looking after his father's cattle at Khohlong. The deceased was also looking after his cattle. Although they were both at Khohlong they were some short distance from each other. At one stage the deceased and his cattle were near the accused's field. He then saw accused going to where the deceased was. When he arrived there he tried to drive the cattle of the

deceased but the latter obstructed them. The accused said that the cattle had trespassed on his field. The struggle or fight for the possession of the cattle went on for some time until the accused fired at the deceased with a gun. P.W.1 says that the first shot missed its target. The second shot hit the deceased on the neck. Accused drove away the cattle after the deceased had fallen down as a result of the gun shot on the neck.

P.W.1 says that he went to where the deceased had fallen down and held him. Deceased did not say anything to him. The deceased was facing away from the accused when the second shot was fired.

Under cross-examination P.W.1 admitted that there was a fight between the accused and the deceased. He says that the deceased was holding a stick but he never saw him hit the accused with it. He also admitted that two of the deceased's dogs were very close to the accused and put his life in danger because they were barking at him. However, he did not see them actually biting the accused.

P.W.2 Ranthatisi Mokone testified that on the day in question he was looking after the cattle and was far from the deceased and could not hear what they were saying. Before then he had seen the accused leaving his home and running to where the deceased was tending his cattle which were grazing in the field of the accused. When he arrived there he drove the cattle. The deceased obstructed them and set his dogs on the accused. He also struck him with a stick but he did not see where it actually hit him. Accused

fired a shot in the air. When the second shot was fired the deceased fell down.

Most of the facts in this case are common cause. The only issue which has to be decided by the Court is whether in their fight for the possession of the cattle that were allegedly grazing on the accused's field, the accused did not exceed the bounds of legitimate self-defence.

The facts which are common cause may be summarized as follows: On the 1st April, 1998 the deceased and other herdboys were looking after their parents' cattle at a place called Khohlong. The accused had a field in that area and there were crops, such as barley, growing on that field. The deceased's cattle trespassed on the accused's field and grazed there destroying accused's crops. The accused was at his home when he saw the cattle grazing on his field. He shouted at the deceased and ordered him to remove his cattle from his field.

The accused says that there was no response from the deceased. He rushed to the field intending to seize the cattle and impound them for the damage caused. The deceased rolled his blanket around his arm and waved his hand to invite the accused to come. Before he reached the field the deceased drove the cattle out of the first field into the second one and they grazed the barley in that field.

When the accused arrived at the field he drove the cattle out of the field intending

to impound them. The deceased did not allow him to do that. He obstructed their movement and drove them in the opposite direction. He threw a stone at the accused but the latter evaded it. He then called his dogs and set two of them on the accused. They were small dogs which did not pose any serious danger to the accused. He said that his cattle could not be impounded by an uncircumcised boy (leqai). He asked the accused if he wanted to die like his (accused's) brother. He answered in the affirmative.

At this stage the deceased had passed the cattle and was attacking the accused at very close range. He hit him with a timber stick on the right shoulder, on the right forearm, and on the left elbow. As the fighting went on the deceased called his third dog which was bigger than the first two small dogs. As the big dog approached the deceased continued to hit the accused with his stick several times on the shoulder and on the arms.

Accused says that he then realised that his life was going to be in danger because of the presence of the big dog. He pulled his hand gun from its holster on his waist. He fired one bullet into the air as a warning shot in an attempt to scare away the big dog and the deceased. However that was in vain because the deceased continued to advance towards him.

If I may be allowed to digress at this stage, I must point out that the accused is telling a lie that the deceased continued to advance towards him. He was apparently walking away from the accused because when the second shot was fired, it hit him on

the back of the neck. That clearly shows that the deceased was no longer facing the accused and was no longer advancing towards him. The accused wants this Court to believe that the deceased was walking backwards when he advanced towards him. That was the last thing the deceased could have done during such a hot confrontation with the accused. What seems to be clear is that after the first shot was fired, the deceased retreated and faced away from the accused.

It cannot be said that when the deceased was retreating and exposing his back to the accused, he was still posing a serious threat to the accused. According to the Crown evidence, when the accused fired the second shot the deceased was already about three or four faces from the former. He was obviously no longer posing a serious danger to the accused under which he was entitled to defend himself by shooting the deceased.

The evidence of the accused regarding the firing of the second shot is most incomprehensible. It seems to me that he deliberately made it incomprehensible in order to create an imaginary confusion which he alleges existed at the relevant time. He says that he was going round about in order to release himself from the small dogs which were dragging him by his blankets. The deceased was about two paces from him. He realised that his life was in danger. His intention was to shoot the big dog that was approaching. The small dogs were then merely barking at him. He says he did not see how the deceased jumped over the big dog. He was coming to him. He did not see how he met the bullet that was aimed at the big dog. Under cross-examination he said the deceased

collided with the big dog. He did not see if he fell down when he collided with the big dog. He did not see if he fell down when he collided with it and he does not know if they were facing each other.

The accused has been telling the Court a lot of lies. He saw very well that the deceased was retreating when he heard the first gun report and shot him deliberately because he was retaliating after he had been hit several times with the stick. He deliberately aimed at the back of the deceased's neck. It is very clear that the accused had some basic skill in the use of a firearm. He accurately fired the first bullet into the air. That bullet did not cause any harm to anybody because the accused aimed it very accurately. That bullet had the desired objective of scaring the deceased and his dogs. The deceased was actually scared and attempted to either run away or walk away from the accused. The fact that he had his back towards the accused means that he was leaving the scene of the fighting.

He is not telling the truth that he was aiming at the big dog when he fired the second bullet. He is trying to give the impression that the deceased fell at the time he was firing the second bullet. He says that he was tripped by the big dog. He was hit by the bullet intended for the big dog.

The evidence given by all the Crown witnesses is that the deceased was standing at a distance of about three or four paces from the accused. He fell down when the

second bullet was fired at him. He was standing well on his feet before they heard the second gun report and he fell down. The accused's version that he fell as a result of being tripped by his dog is a lie. He shot the deceased at the back of the neck and caused him to fall.

According to medical evidence which appears in the post-mortem examination report; the deceased had a gun shot would at the back of the neck. It was the entry wound which involved the cervical spine and spinal cord. It was a deep penetrating wound. There was no exit would, the post-mortem examination report is Exhibit "B" and was admitted by the defence, without the calling of the doctor who compiled it, to give oral evidence.

Accused testified that the two small dogs bit him on the legs but he sustained to injury because he was wearing a pair of trousers and a track-suit. It is altogether impossible that the teeth of the two dogs could not penetrate the two pairs of trousers and cause some injury on the legs. The truth is that the dogs never bit him but merely bit his blankets and dragged him with them.

According to medical evidence on the injuries of the accused is that he had: (1) painful shoulder (Right), (2) painful right elbow, (3) small lacerations on the right lower arm. There was no dog bite on the legs.

Mr. Mokoko, counsel for the defence, submitted that where self-defence is raised the onus is on the Crown. He referred to **Lehoqo v. Rex** 1981 (1) LLR 163 in which it was held that where self-defence is raised the Crown must negative this beyond a reasonable doubt. The Crown does not discharge this onus if the version of the accused though improbable might be reasonably possibly true.

It is also trite law that no onus rests on the accused to convince the Court of the truth of any explanation which he gives, if he gives an explanation even if that explanation is improbable, the Court is not entitled to convict unless it is satisfied beyond a reasonable doubt that it is false. If there is any reasonable possibility of his explanation being true he is entitled to his acquittal. (See **R. v. Difford** 1937 A.D. 370; BR. V. M. **1946** A..D. 1023 at p. 1027).

In the present case the accused's story was proved by the Crown to be false beyond any reasonable doubt. He repeated several times under cross-examination that after the deceased had collided with the big dog he did not "see if he fell down". He did "not recall if he fell down". " I do not know if he fell down when he collided with the big dog". When he expressed this utter ignorance of whether the deceased fell, he had forgotten that in his evidence-in-chief he said that after he fired the second shot the deceased "fell down next to him in the field". It was clear to me that the accursed tried very hard to create the imaginary confusion which he talked about when he fired the second shot.

I have come to the conclusion that the accused intentionally and unlawfully killed the deceased by shooting him on the back of the neck when the latter was no longer posing any danger to his life. He shot the most vulnerable and delicate part of the deceased's body. He, therefore, immoderately exceeded the bounds of self-defence because at the relevant time the deceased was no longer posing any danger to his life. He shot him from behind. Even if the deceased was the original aggressor, at the time he was fatally shot he was no longer the aggressor. It is true that in **The Minister of Railways and Habours v. Bunn** 1914 A.D. 273 it was held that men faced 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. Allowance must be made for the circumstances of their position. I have taken into account the circumstances of the present case and have come to the conclusion that the accused grossly exceeded the bounds of self-defence.

It was the duty of the accused to abandon the impounding of the cattle as soon as he realised that the deceased was strongly and violently resisting such impounding. He had to return to his village and to seek the assistance of his chief who would have detailed his messengers to go and assess the damage caused to the accused's crops. The deceased or his parents would have to pay damages. The deceased would also be criminally charged with resisting the lawful impounding of his cattle. There was no need for the accused to fight with the deceased in order to impound the cattle.

I have come to the conclusion that the Crown has proved its case beyond a reasonable doubt that the accused immoderately exceeded the bounds of self-defence.

I find him guilty of murder with extenuating circumstances in the form of extreme provocation and some elements of self-defence. These were clear from the evidence and in the judgment.

J.L. Kheola.

J.L. KHEOLA
CHIEF JUSTICE

21ST AUGUST, 2001

MITIGATION OF SENTENCE

In mitigation of sentence Mr. Mokoko referred to the extreme provocation caused by the deceased who deliberately grazed his cattle on the crops of the accused on his field.

The accused was defending himself though the Court has found that he exceeded the bounds of self-defence.

He has five children whose ages range from 1 year 7 months to eighteen years. Two of them are at the high sshools. Accused is the sole breadwinner of his family. His wife is unemployed.

C.T.: There was no need for the use of a gun on a man who was already retreating.

Sentence: Six (6) years' imprisonment.

J.L. KHEOLA
CHIEF JUSTICE

21ST AUGUST, 2001

For Crown: Miss Makoko
For Defence : Mr Mokoko