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CRI/T/30/96

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX

VS

**SEKHOBE MOTEMEKOANE
LEHANA MOTEMEKOANE**

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 26th April, 2002

The two accused- a father and son-are facing two counts of murder it being alleged that on the 21st day of July 1986 and at or near Likalaneng in the Maseru district the said accused did each or other or both of them unlawfully and intentionally kill Nkhahle Lekhotla on one count and Tseliso Lekhotla on another. The third count related to the unlawful possession of a 7.65 pistol without a firearm certificate. They pleaded not guilty to all these counts.

Before going into the case, it should be noted that it disconcerting to the court to observe that prosecution of this matter has taken almost sixteen years to actualize.

P.W.1 Manthatisi Lekhotla is the wife of Nkhahle Lekhotla – deceased in the first count. She told the court that during the evening of the 21st day of July 1986 she was in her house listening to a play being broadcast on her radio while the her husband – the deceased – was taking a bath in the same house. She then heard dogs barking outside and her husband asked her to go out and see what was taking place. When she opened her door she saw a group of people amongst whom she recognized accused No.1, No.2, Rethabile, Toka, Phiri Motemekoane, Teboho, Fusi, Makopi, Mahlafuna Adoro and others. She saw them because it was a moonlit night and the Accused 1 who was wearing a “*moholu*” blanket, then said “*where is that one?*” and without waiting for a reply, then struck the witness with a stick on the left side of the head. When she rushed into the house, she saw her husband seated on a bag of grain facing away from the doorway holding a child and she says he exhorted her to leave the door which was being pelted with stones by the people standing outside. She says she then saw a flame and heard a gun shot – “*thuu*”. She heard the deceased utter a belching sound but was still grappling the child. She then raised an alarm saying “*oh, Sekhobe has killed my husband.*”

Soon afterwards she says that Tseliso Lekhotla arrived at the scene asking “*what is happening – why are you crying*” and she told him that the accused no.1 had killed her husband. She then ran to Letebele’s house four hundred yards away. Whilst there she soon heard Tseliso Lekhotla crying out “*Jo oe, Lehana, Rethabile, please forgive me why are you killing me.*” She did not however see who were assaulting Tseliso Lekhotla. She explained that the relations between her husband and Accused no.1 were not at all cordial because of the animals trespassing and damaging the crops.

Under cross examination it was put to P.W.1 that her husband Nkhahle had attacked and injured one Tahlo who worked as a gardener for Accused No.1 and that he had also made threats to kill Accused No.1 upon his arrival.

Question: Accused no.1 returned to his home in Likalaneng at dusk?

Answer: He attacked us at about 8 pm.

Question: As he passed your forecourt you were then throwing away dirty water and you said "That devil has arrived".

Answer: No.

Question: Your and your husband then set dogs upon him?

Answer: No. But I have 2 dogs.

Question: As he came out the accused fired in self defence.

Answer: No. Deceased was in the house when shot.

Question: Your husband was all the time sitting passively and looking the other way?

Answer: Yes.

Question: No husband could do that during the pelting barrage of Stones?

Answer: I wondered why he did so.

Question: That was odd?

Answer: It was odd.

Question: The accused never attacked in a group?

Answer: They were about 10 in all.

Question: You did not see any of accused assault Tseliso?

Answer: I heard Tseliso calling out Lehana – the name of accused No.2. I however never saw them belabour him.

This witness informed the court that even after the death of her husband, accused no.1 continued to even to instigate her ultimate removal from the village and that she later went to build her homestead at Ha Ntsi.

Next called was P.W.2 Ntebele Jeke who is the father of deceased Nkhahle and Tseliso Lekhotla. He is also maternally related to Accused No.1 who is his cousin and to accused No.2.

He informed the Court that on the evening of the 21st July 1986, and as he was about to turn in, he heard gun shots and sounds of stones being thrown at his doors and windows. When he peeped, he saw accused no.1 holding a pistol and because there was moonlight, he also saw Accused No.2, Phiri, Teboho, Mahlafuna, and others. He says that his door was extensively damaged as a result. He goes on to say that Tseliso Lekhotla arrived soonafter during the onslaught and that in the dark he then heard Lekhotla cry out “*Ntate Sekhobe, ‘na le ntsekisang – what have I done?’*”

They chased him out of the village and into the darkness. He says he then went to the house of Nkhahle where he found the door also broken and found Nkhahle seated on a bag of mealies and looked dead. He looked as if he had just been washing himself.

He says he later found Tseliso Lekhotla seriously injured on his face and was unable to speak. He was later taken to Likalaneng Clinic.

He says Nkhahle's body was examined when the police arrived and he noticed a bullet wound behind the shoulder blade and the exit wound below the breast. The corpse was then transported to mortuary.

He confirmed the story that after the burial of his sons the accused no.1 instigated and demanded that Nkhahle's wife leave the village of Likalaneng

Under cross examination, he insisted that he could recognize who his attackers were and in fact he found 3 spent shells on his forecourt on the following morning.

The crown then called P.W.3 'Mankhahle Jack who is the wife of P.W.2. She told the court that as she was preparing to go to bed on that day she heard a dog barking and as she was about to open the door she heard three gun shots very nearby and a hail of stones landing upon the door. On peeping out to look, she saw accused no.1, accused no.2 and many other people like Toka, Fusi, Rethabile, Phumo, Mohlalefi Phiri. There was moonlight. She says she asked "*Sekhobe, why are you killing us?*" and when she managed to get out she found them leaving but now chasing

Tseliso Lekhotla who was crying out “*Ntate Sekhobe, u ntsekisang – ntsoarele.*”

She says she then went to the house of Nkhahle where she saw a splintered door and when entering the house, she found Nkhahle dead but seated on a bag of mealies. She went out and cried in bitter melancholy.

Under cross examination, she maintained that though frightened by the shooting and barrage of stones, she could still recognize Accused no.1 and no.2 and other people who were attacking them as she had known these accused long long time. She was not falsely implicating them.

Question: A1 and A2 never attacked your house?

Answer: They attacked us. They are just denying.

Question: They had no cause to attack you?

Answer: That is why I was surprised.

Question: Accused never chased Tseliso

Answer: They chased him.

Question: Tseliso never mentioned Sekhobe as he ran away because Sekhobe was not there.

Answer: He was there. He chased my boy for no good reason.

The next crown witness was P.W.4 Tsitso Motemekoane, the chief of Likalaneng. He told the court that Accused no.1 is his uncle.

He says that on the day in question at about 8 pm he received an urgent report by one Hopolang Kabi whereupon he hurried to Nkhahle's house and found Nkhahle already dead and was wearing only trousers untied and it appeared as if he had just had a bath. He noticed utensils upside down and that the door was broken and splintered but was still on his hinges.

He immediately made a written report to the Marakabei Police who arrived on the following day. He noticed a bullet hole on the shoulder blade (scapula) – he did not observe any frontal injuries.

In his presence, Sergeant Sekantsi found two bullets – one spent the other not.

He says that on that day of the attack he also found Tseliso Lekhotla with *"his head crushed, eyes protruding out of their sockets."* He lay injured at the home of Letebele Mopeli's home. He says Tseliso was later transported to Queen II Hospital on the same night but learned that he had died on the following day.

He says that he also went to the house of P.W.2 where he found windows and a door also broken. There were many stones which seem to have been hurled at the house.

P.W.4 explained that the accused no.1 and deceased Nkhahle used to quarrel frequently over trespassing animals. They are also neighbours in the village. He confirmed that after the burial and mourning of her husband, the wife of Nkhahle left the village of Likalaneng and built a new home at Ha Ntsi.

Under cross examination, he admitted that he had written the letter dated 30th June 1986 to his Senior Chief Molapo Motemekoane in which he was reporting the conflict between the two men and that the deceased was threatening to kill Sekhobe – he admitted though, he had not confronted the two men.

P.W.5 was Inspector Sekantsi No.2545 who told the court that on the 22nd July 1986 whilst he was on duty at Marakabei Police post a report about the death of Nkhahle and his brother came. Upon arrival at the scene, he found Nkhahle dead and completely undressed; he observed a pierced hole below the right scapula and did not see any exit wound. He notice that the doors of the house were smashed and many rocks were lying nearby. He also found a 7.65 bullet shell. He was also led to the house of Ndebele Jack's house where he found that the door was also smashed. He was also led to where Tseliso Lekhotla lay injured.

P.W.6 was Sergeant Khanyapa no.4609 who told the court that in July 1986 she was stationed at Marakabei Police post. During his investigations he met accused No.1 already in custody at Maseru CID. He was also given a hammer, a stone and a *mohloare* stick. He says that Accused no.1 gave him a 7.65 gun which was said to be owned by one Sergeant Ramashamole now

deceased. He says he formally gave accused no.1 and Accused no.2 charges of murder.

The crown then closed its case.

Mr Nathane then called Accused no.1 to give evidence on oath. The accused told the court that he resides at Likalaneng where he runs a small café business. He says he is also a traditional village headman.

He informed the court that the deceased Nkhahle Lekhotla was the son of his niece and was his close neighbour in the village; Tseliso Lekhotla was Nkhahle's younger brother and stayed at the house of his father P.W.2 Ndebele Jack.

He told the court that for a longtime there had existed bad blood between himself and Nkhahle due to fact that Nkhahle was a cattle thief and because Nkhahle used to graze his cattle upon his lands. This conflict had even been referred to senior chief in June 1986.

He says one day that he was given a report by one Paul Mabathoana when he returned from his journey to Leribe. The report was to the effect that the deceased was planning to attack him. He says he reported the matter to the police who did not take any action.

He says that on the evening of the 21st July 1986 he arrived at Likalaneng and called around his cafebusiness where he got another report that one of his boys had been attacked and injured by Nkhahle. After his chief had

assured him of safety, he proceeded to his home and as he passed Nkhahle's kraal, the dogs barked. "I was alone" he says.

He goes on to say that Nkhahle's wife came out throwing away water and said, "*that devil is already here.*" He says Nkhahle then came out rushing towards him. It was then that he the accused, struck Nkhahle's wife with a stick and "then fired a shot" towards them. They both retreated into the house. "*I shot in self-defence*" he says. "*I feared him (deceased) because he was a giant (sehanyata).*" He says the deceased was carrying a stick as he came out.

He explained that the gun actually belonged to one Ramashamole, his police friend, who had left the gun at the shop by mistake when his vehicle had broken down.

He denied that he came to the house of Nkhahle with a group of people who pelted the house with stones. He says he saw a group of people near Nkhahle's house and they started running away when he fired a shot – and they disappeared from his view. He never followed them, nor did he chase or assault Tseliso Lekhotla.

He says he never saw Accused no.2 his son that evening.

He denies firing into the house of P.W.2 nor breaking his doors with stones.

Under cross examination, he says he took the gun from the café after he had received a report that his gardener Tahle Mohajane had been attacked by Nkhahle *"I took the gun to protect my children."*

He says he shot when he saw Nkhahle come out as if to attack him with a stick and he says Nkhahle was still dressed as he approached. He denies ever throwing stones at the door of Nkhahle's house or of Ndebele's. He denies ever pursuing Tseliso Lekhotla that night and inflicting injuries that caused his death.

He says he shot at the deceased Nkhahle in self-defence.

Accused no.2 then gave evidence on oath and informed the court that the relations between his father Accused no.1 and deceased Nkhahle were not cordial because the latter was a notorious cattle thief. On the day in question he says he heard dogs barking near their kraal and upon getting out he saw a group of people walking past. He then heard a loud sound coming from the direction of Nkhahle's house. He then ran back home and did not come out till morning – he did not receive any report from his father accused no.1.

He goes on to say that on the following day he saw many people and police at Nkhahle's house. When he arrived at the scene the police asked him to explain his whereabouts on the previous night; they also asked him to bring along his *"lebetlela"* stick and he was taken to Marakabei police post where he spent two days in police custody.

He denies ever being part of a group of people who attacked Nkhahle's and Ndebele's houses; he never chased Tseliso Lekhotla that night nor was he ever present at the house of Nkhahle when he was shot.

Question: P.W.1 says she identified A1 and yourself in the group of attackers who also were throwing stones.

Answer: I deny. I also deny what P.W.2 and P.W.3 say about me. It is not true I assaulted Tseliso.

Question: Why lie about you?

Answer: P.W.1, P.W.2 and P.W.3 lied about me because they hate us as a family.

The defence then closed its case.

The court then called as a court witness Tahlo Mohajane in terms of the provisions of section 202 of Criminal Procedure and Evidence Act. It reads:

- “202. (1) *The court may at any stage of the criminal trial subpoena or cause to be subpoenaed any person as a witness or examine any person in attendance though not subpoenaed as witness, or recall and re-examine any person already examined.*
- (2) *The court shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case.”*

This witness informed the court he was employed as a garden boy by accused no.1 and that one day the deceased Nkhahle had assaulted him saying he was concealing the whereabouts of Accused No.1. He was hospitalized as a result of this assault.

Another witness called was Tsoeu Jack who also confirmed that deceased Nkhahle had assaulted Tahlo; he went on to say that on the day in question he had heard doors being smashed with stones and upon arrival he had found about seven people – Toka, Rethabile, Tsepo, Fusi and Accused no.2 and Phiri. After they had left, he went in only to find Nkhahle dead; it was as if he had been washing.

He says the same group of people chased Tseliso Lekhotla until they disappeared from view. He says he later found Tseliso seriously injured on the head and the brain matter was visible.

When cross examined, this witness maintained that Accused no.1 and no.2 were at Nkhahle's.

In addressing the court **Ms Mofilikoane**, for the crown, submitted that the crown had proved its case beyond reasonable doubt by showing that both accused along with a group of other persons had acted in concert in attacking the house of Nkhahle on the night in question and that the accused no.1 had admitted shooting. She submitted that under the doctrine of common purpose the "*act of one becomes the act of all*" because they foresaw the reasonable possibility that the dangerous weapons would be used. He cited in support thereof the South African cases of **Rex vs Nsele – 1955 (2) SA**

145; **Rex vs Ndlangisa** 1946 A.D. 1101. She submitted that Accused no.2 is liable for what was done by Accused no.1 and Accused no.2 is liable for acts committed by accused no.1 and other *socii crimini*. She submits that the version of the accused no.1 that he fired at the deceased in self-defence should be rejected as false because when shot the deceased was half-dressed and had not attacked the accused as alleged by the latter. If anything, the accused and his mob had pre-empted everything and intended to lynch the deceased and his family. She submitted that her witnesses had given their evidence honestly and had been corroborated by objective facts.

Mr Nathane, for the two accused argued that the attack upon the deceased was not entirely unprovoked. Prior to this incident bad blood had existed between Nkhahle and the accused and this indeed had prompted chief Tsitso Motemekoane to write to the senior chief to report about the situation. It had furthermore been established that Tahlo had recently been attacked by the deceased Nkhahle who was "*baying for the blood*" of the accused no.1.

He submitted that the accused no.1 should be believed when he stated that the deceased Nkhahle had attacked him and had not, as alleged by his wife, sat passively on a grain bag and was cuddling a baby.

Mr Nathane then described his case as one of "preemptive self-defence."

That there had been bad blood between the accused no.1 and the deceased is not in dispute. What is dispute is whether in shooting the deceased, the accused no.1 acted in self-defence or whether there was no such attack at all by Nkhahle thus rendering his conduct unlawful. In deciding this the court

has to have regard to the crown evidence in determining what a proper finding should be in the circumstances of the case.

The crown evidence under count one is mainly to the effect that when he was shot the deceased was still in the house and had just finished washing himself. This is confirmed by the evidence from other witnesses that when they arrived at the scene that night they found the deceased Nkhahle seated on a grain bag, half-dressed with no shirt but only his trousers; they also observed that the bullet had entered from the back and the exit wound was probably in front. There was also clear evidence that there were many stones lying about and the door of Nkhahle's house was damaged; these facts falsify the version of the accused no.1 that no stones were thrown at the door of Nkhahle. Even his own brother Tsitso also confirmed that the deceased was found dead but seated on a grain bag and that the door of his house was damaged, apparently, with the many stones lying about in the forecourt. It leads to an irresistible conclusion that the accused launched his attack preemptively. It could be true that the deceased had injured Tahlo and that he had threatened to attack accused no.1, but this court finds that the description given by the accused no.1 of what happened at the house of Nkhahle is not only improbable but false beyond all doubt. Why were stones found scattered all over the scene? Why was the deceased found dead seated on a grain bag in his house? Accused no.1 was identified by P.W.1 as being amongst the men who attacked the deceased's house with stones on that night.

Upon his own admission, the accused no.1 took the gun from the café and proceeded to the house of Nkhahle “*to protect his children*”- in the company of many persons who were throwing stones and were armed. He shot into the house of Nkhahle when his own life was not in danger; as it was dark it is probable that he did not in fact see and aim at Nkhahle; but in my view his conduct is rendered unlawful by the fact that he should have subjectively foreseen that in shooting into the house, as he did, fatal or serious injury might occur yet persisted in his act.

His act of shooting was not done in self-defence but was intended to have fatal consequences. In my view Accused no.1 had the necessary legal intention (*dolus eventualis*) when he thus shot. The bullet entered the left scapula (shoulder blade) of the deceased which means that the bullet came from behind; a frontal entry of the bullet would, on the other hand, have meant that the deceased was shot facing the accused at the material time. The accused in shooting as he did into the house subjectively foresaw that fatal results would occur. I find him guilty of murder under count one.

As regards accused no.2 on this count, the crown evidence shows that he and his father accused no.1 were acting in concert along with other persons that night in attacking the houses of Nkhahle and Ndebele Jack. I have rejected as false beyond doubt the story of accused no.2 that he was not present when these incidents occurred. He says he was asleep that night; but he was seen occurred. He was seen by more than two witnesses as being amongst the attacking group. The act of his father is act – he should have known that his father had a gun and foresaw that it was likely to be used with fatal consequences. Where two or more people actively associate themselves with

the commission of joint unlawful enterprise, their liability arises from their “common purpose” and the act of one becomes the act of all and it is not necessary to establish precisely which one of the group committed the unlawful act [Burchell – *South African Criminal Law and Procedure* – Vol.1 p.308] *Dolus eventualis* often constitutes the *mens rea* where there is foresight of the possibility of death occurring (S. v. Khumalo – 199 (4) SA 310 where a crowd attacked the house of a municipal policeman broke windows it was held that *mens rea* of a *socius criminis* depends on whether he foresaw that death was a possibility). It is possible that a participant in a common purpose to be found guilty of culpable homicide if he did not foresee the principal offender’s killing as a possibility but because a reasonable person should have foreseen it (Burchell (supra) p.315-6) I come to the finding that Accused no.2 is guilty of culpable homicide under count one.

As is concerned, I find that the crown evidence reliably shows that he was present amongst the group that attacked the house of Nkhahle on that night. His is a bare denial that he was never at the scene. Several witnesses state that they saw him in the group. I reject as false his denial and accept as true that he was part of the group that attacked Nkhahle’s house that night. Under the doctrine of common purpose, he attacked Nkhahle’s house and made common purpose with his father. He also realized that his father would use the gun he was carrying with fatal results. I find him guilty of culpable homicide.

The accused no.1 and no.2 assisted by their companions acted preemptively, but their conduct was completely unlawful and unjustified even if the deceased had in fact threatened to attack accused no.1; the accused took the law into their own hands and meted out their own justice.

As regards count two, there is no direct evidence implicating both accused with the killing of Tseliso Lekhotla; I am of the view that the fatal injuries sustained by the deceased Tseliso Lekhotla were probably inflicted by one or some of the people in the mob that pursued Tseliso Lekhotla into the night. The pursuers had stones and sticks and the two accused – assuming in their favour that they did not commit the actual assault - should have foreseen that fatal results could occur. I find them both guilty of culpable homicide under count two.

I have found that having seen and heard the crown witnesses, the crown evidence was overwhelming that the accused attacked the houses of Nkhahle and Ndebele Jack. The witness were truthful, frank and credible and on the other hand the versions of both accused were not only improbable but beyond any reasonable doubt false. (**Tsotang Pelea vs Rex** – C. of A. (Cri) No.2 of 2000 per **Ramodibedi J.A.**; **Letlaka vs Rex** – C of A (cri) No.3 of 2000 per **Steyn P.**; **Julius Pone vs D.P.P.** – 1999-2000 LLR (LB) 214).

I do not agree that pre-emptive self-defence is lawful – “*ho e lata letailane*”- To do so would render lawful what in reality and law amounts to self help or taking law into one’s hands. If such were allowed, people would kill each other upon mere threat – real or imagined.

Extenuation

There exists extenuating circumstances in this case. The finding that *dolus eventualis* is a factor that is usually taken as an extenuating circumstance. The long standing bad blood between the deceased and accused no.1 and the threats allegedly made by the deceased all reduce the accused's moral blameworthiness – **Tahleho Letuka v Rex** – 1997 -98 LLR 346; **Mohlalisi v Rex** 1980-84 LAC 110; **Serine v Rex** – 1991-92 LLR 42. **Khanyapa v Rex** 1997-98 LLR 8.

Sentence: Having regard to the personal circumstances of the accused and the fact that they are first offenders, the court is of the view that the accused acted in a most high handed fashion in meting out their own justice on that night. They deserve to be punished.

Accused 1- Count 1 - Six (6) years

Count 2 – Three (3) years


Count 3 – M100.00 or one (1) year suspended for three years.

Accused 2 - Count 1 – Three (3) years

Count 2 – Three (3) years

Count 3 – Not guilty

Sentences in count 1 and 2 to run concurrently



S.N. PEETE

JUDGE

For Crown : Ms Mofilikoane

For Accuseds: Mr Nathane