C OF A (CRI) NO. 8 OF 2003

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

SEIKETELO MABILIKOE
Appellant

And

REX
Respondent

Held at Maseru

CORAM:

Grosskopf, JA
Melunsky, JA
Smalberger, JA

Summary

Criminal law – dying declaration – approach of court – admissibility of – whether deceased had a firm expectation of death – whether deceased could have mistakenly identified assailant – alibi defence raised – appellant's guilt proved beyond reasonable doubt.

JUDGMENT

Melunsky, JA

[1] In the early hours of the morning of 18 April 1998, three or four men on horseback arrived at the village of Ha Nyolo. The village consists of a number of dwellings (called "rondavels" by Detective Trooper Ramochela, P.W.8 in the court ***a quo***) which are in close proximity to a kraal. The deceased and his mother (P.W.1 in the court ***a quo***) lived in the village but the deceased slept in a separate rondavel. On the morning in question P.W.1 was awakened by the barking of dogs. She saw the deceased in the vicinity of the kraal. He was talking to two of the horsemen who had dismounted. She heard the sound of gunshots and the voice of one of the men who said "let's go, I finished him." As they rode off one of the horsemen fired a few shots at the house of Mathakane Mosenye (P.W.2 in the court ***a quo***). The deceased managed to return to his rondavel where he later died.

[2] The appellant was charged with the murder of the deceased. He appeared in the High Court before Monapathi J and assessors. He pleaded not guilty but was convicted and sentenced to ten years imprisonment. He appeals to this Court against his conviction only.

[3] From the report of Dr. Ramokepa, who carried out the post-mortem examination, the deceased died as a result of a gunshot wound to the right breast which penetrated the lungs and liver and caused excessive internal bleeding. A bullet, which had been lodged in the lumbar region, was removed and handed to P.W.8.

[4] The evidence implicating the appellant was based entirely on statements made by the deceased after he was mortally wounded. P.W.1's testimony that she identified the appellant as one of the assailants emerged for the first time in cross-examination, was in conflict with her evidence-in-chief and was rightly disregarded by the trial court. The appellant was the only witness for the defence. He denied that he shot the deceased or that he was present at Ha Nyolo at the relevant time and claimed that he was asleep at his own home some fifteen kilometers away. The court ***a quo*** held that the deceased's statements amounted to dying declarations which were admissible and that therefore it

> *"was safe to convict the (appellant) of murder as charged."*

The trial judge added that the appellant

"shot the deceased recklessly and indirectly intended his death."

[5] Before referring to the evidence, it is necessary to point out that the trial judge did not properly weigh up the evidence of the Crown witnesses against that of the appellant, as I shall indicate in due course. Moreover he did not make observations in relation to the appellant's credibility. These omissions make the task of an appeal court more difficult than it should be where factual issues are involved and where credibility findings could be decisive.

[6] I turn now to deal with the facts. A number of witnesses gave evidence for the Crown. Most of these lived in the village where the shooting occurred. They were awakened by the tumult and commotion caused by the arrival of the horsemen. The witnesses entered the deceased's hut at different times. The deceased was lying on a mattress. He was clearly in excruciating pain and suffered for an hour or more before he succumbed to his injuries. There was no medical attention available. Six of the witnesses heard the deceased saying, and, indeed, repeating, that it was the appellant who had shot him. Some of them heard him ask for poison and complain that his stomach was burning: many felt the hard

protrusion of the bullet where it had lodged in the deceased's body. Somewhat surprisingly, however, and in conflict with the medical evidence, most of the witnesses testified that the deceased had a wound on the left, and not the right, breast.

[7] In the circumstances of this case there is no need to repeat the evidence given before the High Court. Most of the evidence is adequately summarised in the judgment of the trial judge and it was not suggested before us that his resumé contained any significant errors or omissions. I will, however, briefly mention some of the statements allegedly made by the deceased to the Crown witnesses before his death. It may be noted that the deceased called his assailant "Seiketelo" or "Seiketelo of Letsema" and it is not disputed that these appellations were references to the appellant.

[8] P.W.1 testified that when she entered her son's hut, after he had been injured, she called him and he replied that Seiketelo had shot him. She asked him who Seiketelo was and the deceased said "he is the one of Ntsema" meaning the appellant (Ntsema is probably an error in transcription). P.W2's evidence was very similar, save that she said the appellant explained that Seiketelo was

"Seiketelo of Letsema staying at Sefateng"

[9] P.W.3, Bofihla Lekulana, told the trial court that the deceased exclaimed "Seiketelo why do you shoot me" or words to that effect and that he added.

> *"Gentlemen will you please dig a hole at the kidney area there is something burning inside me."*

[10] Mokone Kopano (P.W.5 in the High Court) testified that the deceased said and repeated in his presence that "Seiketelo has finished me." P.W.6, Reentseng Tali, said that the deceased was crying and uttered these words:

"Seiketelo why do you kill me"

and that he added "Seiketelo has finished me." Puseletso Rampeo (P.W.7 in the court ***a quo***) testified that the deceased said that Seiketelo had killed him cruelly and, in a response to a question by another person, he said that he, the deceased, would not be able to ride on a horse

"because that person had already finished him".

[11] Before directing my attention to the evidence of the appellant, it is

important to note that in a case such as the present, and, indeed, when the question of an alleged dying declaration is in issue, there are in fact three separate enquiries that need to be considered – whether the alleged statements of the deceased are admissible; the weight to be given to those statements; and the credibility of the witnesses who claim to have heard what the deceased said. The second and third enquiries, in particular, cannot be regarded in isolation: they have to be considered in relation to all of the evidence before the court, including, of course, the evidence of the defence. And even the question of admissibility of the statement as a dying declaration may involve issues of credibility.

[12] This is a convenient stage to mention that the appellant does not attack the credibility of the Crown witnesses. This concession was correctly made. The witnesses are the inhabitants of a small rural village who could not have conspired to implicate the appellant. They had no motive to do so and they corroborated each other in most material respects. Moreover it is apparent from the judgment that the court ***a quo*** found the witnesses to be truthful and reliable. From all of this it follows that we should accept that the deceased did in fact make the statements which the witnesses heard.

[13] The main argument put forward on the appellant's behalf concerned the admissibility of the deceased's statements. In terms of s 226 of the Criminal Procedure and Evidence Act 9 of 1981, a statement made by a person upon the apprehension of death is admissible or inadmissible according to the principles of English Law that were in force before 4 October 1966. The rules governing the admissibility of dying declarations are well-known and do not require to be repeated in this judgment as the admissibility of the declarations in this matter were challenged on appeal on one ground only, namely, that the deceased did not have a settled and firm expectation of death when he made them.

[14] It was submitted for the appellant that the fact that the deceased asked for poison was reasonably capable of meaning that he wished to commit suicide and that, as a corollary, he did not realise that he was dying. It was also submitted that the fact that the deceased said that he was finished could, to a Sesotho speaker, mean that he had suffered some serious injury.

[15] In considering whether the deceased had a firm expectation that he would not survive, it is necessary to have regard to the deceased's words in their entirety and not to compartmentalise phrases and view them in

isolation. It is also important to have regard to the context in which he spoke and to the circumstances that prevailed at the time. Although the deceased managed to reach his hut and lie down, he was in obvious pain: he knew that he had been shot and he must have realised that his injuries were serious. No medical treatment was available. On a number of occasions the deceased said that he was finished and that the appellant had killed him. When P.W.2 asked the deceased if he could mount a horse to go to Matamong, obviously to receive medical treatment, he replied that he could not because he was already finished. It is unrealistic to argue that the words "finished" or "killed", or their Sesotho equivalent, could have any meanings other than their literal ones, especially in the context in which they were spoken. Moreover the trial judge, a Sesotho speaker, and his assessors understood them in that sense. The fact that the deceased asked for poison to be administered to him, in the context in which he used these words, simply meant that he wanted to hasten his death, which he regarded as imminent, and that he did not want to prolong his suffering. The interpretation which the appellant's counsel seeks to place on the deceased's request is not a reasonable one and is inconsistent with what the deceased had in mind.

[16] It follows, therefore that the deceased's statements are admissible as dying declarations. The next question relates to the weight to be attached to his statements. On the appellant's behalf it was contended that the deceased might have been mistaken in his identification of the appellant. In **R v Andrews** (1987) 1 AC (HL (Sc)). 281, which was a case dealing with the admissibility of statements under the **res gestae** exception to hearsay evidence, **Lord Ackner** pointed out at 301 F, that a trial court, in dealing with the weight to be given to a hearsay statement must bear in mind the possibility of error in the facts narrated in the statement. In the present case the possibility of the deceased having mistakenly identified the appellant is so remote that it can be discarded. While the confrontation between the two young men took place before dawn, it occurred in moonlight. What is more the deceased and the appellant were well-known to each other, they grew up together and looked after cattle together. Before the shooting the deceased spoke to his assailant for some time. Recognition of the appellant would have been relatively easy from the voice of the appellant and the content of the conversation.

[17] This is an appropriate stage to consider the evidence of the appellant. As I have mentioned, his defence was an alibi – that he was asleep at home

at the relevant time. It is of course quite clear that an accused bears no onus to establish the truth of his alibi: the onus is on the Crown throughout to prove the accused's guilt beyond reasonable doubt. But this does not mean that a court is obliged to accept the accused's ***ipse dixit*** . In deciding whether there is reasonable doubt it is necessary to evaluate all of the evidence, including the accused's explanation.

[18] In his evidence – in – chief the appellant told the trial court that he was sleeping at home "during the night in question". The same version was put to the Crown witnesses by the defence counsel. It transpired, however, that on 3rd May more than two weeks after the shooting the appellant was confronted by a policeman at a shop at Thaba-Tseka. This, according to the appellant, took place on the Wednesday following the Saturday of the shooting. Subsequently he said that the policeman asked him about the events that occurred on a Saturday but the appellant did not know which Saturday he was referring to. The significance of this evidence is that the appellant's original defence, that he was at home asleep on the night of 18 April, differed from his evidence as he could not say where he was on the night in question. He was eventually constrained to say that he never went out at night and that he always slept at home. This, too, was somewhat

inconsistent with his earlier evidence to the effect that he "sometimes" stayed at home or at the cattle post.

[19] What remains is to weigh up what the deceased said against the testimony of the appellant in the context of all the other evidence in the case. The trial Court did not do this adequately and, moreover, took into account, against the appellant, that the deceased's injury

> *"was reported immediately to the chief and also to the accused's father (as reported) who told the accused to report at the home of the deceased or at the chief's place."*

The Court went on to say that this occurred immediately after the shooting and that the accused did not comply therewith. There was, however, no evidence to establish that the appellant was told to report to either place. This much was conceded by counsel for the Crown.

[20] It is a matter of considerable difficulty to weigh up a hearsay statement, such as a dying declaration, against direct evidence. One of the difficulties is that the maker of the dying declaration is not subjected to cross-examination and another is that a trial Court is deprived of the opportunity of observing his demeanour in the witness box. It is therefore important to approach the question of credibility in a case such as the present with great caution. In this matter, however, we are satisfied that it is safe for us to hold that the deceased's declaration should be accepted and the

appellant's evidence rejected for the following reasons:

1. There was no possibility that the deceased could have been mistaken.

2. Despite a suggestion to the contrary by the appellant's counsel, there is nothing to indicate that the deceased would have concocted his statements with a view to deliberately implicating the appellant. The circumstances were such that this possibility may safely be excluded.

3. A submission on the appellant's behalf that the deceased's mind and memory might have been affected by the injury and the ensuing pain cannot be accepted. The deceased did not sustain any cerebral injury and although he was in great pain he knew that he had been shot and that the offending bullet still remained in his body. He answered questions logically and lucidly and was clearly capable of rational thought.

4. There was no question in the deceased's mind as to the identity of his assailant. This is apparent from the fact that he had no hesitation in repeatedly narrating that the appellant was the person who had "finished" him.

The appellant's evidence, on the other hand, was far from satisfactory. I have dealt with the inconsistencies in his testimony concerning his alleged alibi. The truth of the matter is that the appellant was unable to explain

with any conviction why the deceased would have falsely implicated him and he resorted to relying on an alibi which eventually proved to be unsustainable.

[21] Despite the trial Court's misdirection (mentioned in para 19 above) we are satisfied that the appellant's guilt has been proved beyond reasonable doubt. The appellant is indeed fortunate that the trial Court held that he was only reckless and that his actions were "indirectly" responsible for the deceased's death. ***Prima facie*** he seems to have acted with the direct intention of causing the deceased's death. However there is no need to deal further with this aspect as no argument was addressed to us in this regard and there is no cross-appeal on sentence.

[22] In the result the appeal is dismissed.

L S MELUNSY
JUDGE OF APPEAL

I agree

F H GROSSKOPF
JUDGE OF APPEAL

I agree

J W SMALBERGER
JUDGE OF APPEAL

Delivered at Maseru this 20th day of October 2004

For Appellant : Mr. Mda

For Respondent : Ms Shale