

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

MAOKE MAOKE  
TOKA MOTHEBE

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla on the  
20th day of November, 1996

You have pleaded not guilty to the charge of murder that was preferred against the two of you.

I have listened to the evidence which sought to show what happened on the day of events namely 15th January, 1992 at Ha Chaka where the deceased sustained some head injuries to which he succumbed a day or two later.

The crown has led evidence of two witnesses; the ladies that you saw here; and thereafter the evidence of the Doctor was read into the machine so was that of PW1 at the preparatory examination and of PW8.

The oral evidence that I have heard has convinced me thoroughly that the deceased was the first attacker and he put you under the necessity to defend yourselves.

The way I understood it, the deceased had a scuffle with a man who was armed i.e. accused 2. The deceased was not armed but he lunged with a fist blow at a man who was armed. Even if the man who was armed was better equipped for a fight than the deceased was, the man who was armed was entitled to defend himself against the deceased's blow or more plausibly the latter's wanton and unlawful attack. It would have been imprudent of accused 2 to disarm himself in order to be on equal terms with the deceased who foolishly attacked in bare hands a man who was armed with a stick.

Here the scenario is that the deceased having delivered this fist blow in the region of accused 2's face accused 2 ducked and as would be expected because he was armed anyway, he delivered a stick blow at the deceased. The stick blow landed on the hand of the deceased. The deceased did not relent. He once more attacked this man who was armed with a stick. He attacked him with bare hands. He delivered a fist blow and in the process accused 2 delivered another blow which was warded off by means of the

deceased's sweeping arm movement. In the process accused 1 who was not far away observed and heard - or rather - the witnesses heard and no doubt accused 1 observed when the crowd who had gathered there seeing that accused 2 was faring better than the deceased wanted to take sides in favour of the deceased. In the process accused 1 went for the defence of his relative namely accused 2. I accept the evidence of Pw1 who indicated that accused 1 delivered just one blow on the deceased's head and felled him to the ground. Thus it appears only one blow to the head is responsible for the deceased's death.

It would seem the blow was a severe one. But even so it seems to me to be unwarranted to require accused 1 to have administered that blow with well-measured force to avoid fatal consequences. One has to bear in mind that this occurred in the heat of a fight affording no opportunity for a choice of means or fine measure of application of force. To require him to do so would amount to indifference to the oft repeated caution against adopting an arm chair attitude or approach in assessing and adjudicating on matters of this nature. Suffice it to say that accused 1 was entitled to act in defence of a relative who was now being mobbed by a crowd which had started grabbing sticks from on-lookers and making utterances which made it plain that accused 2 was to be lynched because he was a stranger in that locality. I see no indication whatsoever of any of the accused exceeding the limits of self-defence.

The scenario as painted shows that once the deceased who had invited what befell him fell to the ground, the accused desisted from further assaulting him. I do not think the accused need have done more to show that they were acting in self-defence.

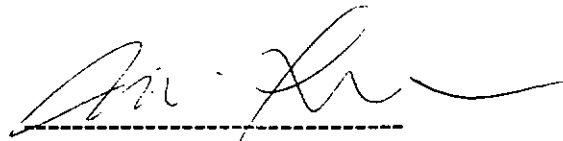
It should be borne in mind that the events outlined above took place at the chief's place, in front of the chief where an inquiry was being made as to the cause of an earlier fight in which one Julius feeling piqued that his ex-girl friend had transferred her favours to accused 2, picked a fight with accused 2. Needless to say that fight was brought to a stop before any harm could befall either of the combatants. I disagree with any suggestion advanced in cross-examination of PW1 and PW8 that they were dishonest. To me they appeared to be truthful witnesses who indeed sought to hide nothing either in favour or disfavour of the crown or the defence. What remained was that no *prima facie* case seemed to have been established at the close of the crown case. The move proposed by the defence counsel to put the accused to their defence by giving evidence when they bear no *onus* to prove their innocence was in my humble view deplorably ill-conceived. An attempt by the defence counsel was in my view pointless to seek to prove that PW2 in collaboration with both accused sought to concoct a false story that it was accused 2 who had effected the fatal injury to the deceased. This was the sort of cross-examination which apart from being purposeless would foreshadow a situation where the accused if called upon to testify would find themselves rebutting nothing of relevance to the case before Court. Worse still the entire exercise consistently with the tenor of the cross-examination would only help

show the accused in bad light that they conspired to concoct a false story with whoever. Indeed while at first PW2 said the head blow was effected by accused 2 she later gave a plausible explanation when the Court brought to her attention that Pw1 said the blow was effected by accused 1. PW2's plausible explanation accompanied by credible demonstration of her own role in trying to physically prevent the mob from attacking accused 2 is that she had her back to the deceased when the latter was struck and seeing that accused 2 was near the deceased she presumed it was he who had struck the deceased whereas Pw1 was facing all these combatants and thus PW2 conceded that Pw1's observation is more worthy of credit than her own. Even if PW2 insisted that it was accused 2 who had struck the fatal blow while Pw1 said it was accused 1 who did so, in the light of the fact that there was no question of common purpose in this case, both accused would be entitled to an acquittal for it would be a perversion of Justice for the Court to say seeing that it is not clear who of the two accused is the culprit both should just as well be convicted.

That in spite of this state of affairs it was sought to put the accused to their defence is beyond me. Moreso because the version of the crown was not inconsistent with the innocence of the accused or at worst the least irrational role to imagine they played in the face of first unprovoked and unlawful attack by the deceased and next the belligerent mobbing of accused 2 by the hostile crowd of young men who paid scant regard to the fact that matters were then in the hands of a chief and his elders in that village.

In the circumstances the Court took it upon itself on the basis of evidence outlined above to save the accused the agony of a protracted trial and finding them not guilty acquitted and discharged them even though their counsel had failed to apply for their discharge at the close of the crown case.

As said the accused are found not guilty.



JUDGE

20th November, 1996

For Crown : Mr. Ramafole

For Defence: Mr. Maieane