

IN THE HIGH COURT OF LESOTHO

In the matter between

R E X

and

ERIC MOSIA

Accused

J U D G M E N T

Delivered by the Honourable Chief Justice Mr. Justice
J.L. Kheola on the 14th day of March, 1996

The accused is charged with the murder of Mathabi Mahlasi on the 11th day of May, 1991 and at or near ha Shepheseli in the district of Leribe.

He has pleaded not guilty to the charge.

At the commencement of this trial the defence formally admitted the depositions made at the preparatory examination as well as the post-mortem examination report according to which the cause of death was ruptured cardiac vessel, haemericardium surrounding the heart. Externally the body had a stab wound left side of chest. Internally the pericardial sac was filled with blood. The sac was torn as well as the pleura.

The rest of the admitted evidence relates to the identity of the deceased and the knife used to stab the deceased .

The first witness called by the Crown to give evidence before this Court was one Ntapileng Mahlaba who is the nephew of the accused. At the time of the events which led to the death of the deceased he was just over fourteen years of age. His evidence was to the effect that on the 11th day of May, 1991 he was working at his family shop until late in the evening when he knocked off and left for his home. He was in the company of the accused when he left for his home. However as soon as they left the shop the accused turned and went to the "disco" known as Extension 5. The witness went home alone. When he arrived there he was asked where the accused was. He said that he had gone to the disco. He was ordered to go and fetch him. He complied.

He found the accused at the disco where he was drinking beer and dancing. There were many people there including the deceased. They apparently remained there for some time because they left for home at about midnight. The deceased had left before them. As they moved towards the tarred road they saw people on the other side of it and they identified the deceased by his voice as one of those people. There was moonlight. As they approached they identified the others as Majapelo, Malefetsane and Lillo. They went to those people because the accused said that the deceased had his (accused's) torch. When they came to those people the accused asked for his torch but the witness did not hear the deceased's reply whereupon the accused

got hold of the torch which was still in the hand of the deceased. He pulled it very forcefully. As a result of that forceful pull the deceased fell on his knees. He rose quickly and struck the accused with a fist on the jaw.

It is from this juncture that the evidence of this witness and that of the accused seemed to differ. But the differences were resolved by cross-examination of the witness and the accused. The witness says that after he was punched on the jaw the accused moved backwards still looking at the deceased. As he was retreating he put his hand in the pocket of his trousers. The deceased moved one pace backward and then the two combatants advanced towards each other and met midway. The accused stabbed the deceased on the chest with a knife. The latter uttered these words "This person has finished me". He staggered and fell down. One Lillo hit the accused on the hand with the stick. The latter ran away.

In cross-examination P.W.1 denied that the deceased and Lillo attacked the accused at almost the same time. His story is that Lillo struck the accused with a stick immediately after he stabbed the deceased. He admitted that both the accused and deceased were drunk that night because they drank large quantities of beer.

The second witness called by the Crown to give evidence before this Court is one Lillo Molapo. His evidence does not carry the Crown case any further because he did not see how the

stabbing took place. He was one of the people standing near the road. When the accused came to the deceased he heard the word "torch" being uttered by one person. The accused and deceased were about eight (8) paces behind him. Thereafter he looked back and saw that the deceased was lying on his back and the accused was bending and overlooking him. He went to them and the deceased said "This person has finished me". The accused left. He admitted that they were drunk. He denies that he struck the accused with a stick that night, in fact, he was not carrying a stick.

If I may digress here, his denial cannot be true because he was seen hit accused with a stick by not only P.W.1, but by the accused as well. It may be that his observation was affected by his state of drunkenness.

The version of the accused is that as he was dancing the deceased took his torch from him without his consent. He did not say anything to him when he took his torch because he was afraid. When he left the disco he looked for the deceased but in vain. He found him near the tarred road. He was afraid of going near them and said that he had come to fetch his torch. The deceased came near him but hesitated and asked "What is it?" He (accused) saw the torch in the hand of the deceased. He got hold of it and wrested it from him. As he so wrested it the deceased fell on his knee, but rose very quickly and punched him (accused) on the jaw. He said that after that blow on the jaw Lillo came running and hit him with a stick on the arm because he parried the blow

directed at his head with his arm. He then moved back slightly and took out his knife from the pocket and stabbed the deceased on the chest because the latter was still advancing towards him. He (accused) was still moving backwards. He ran away after stabbing him.

In cross-examination the accused said that the deceased frightened him while they were in the disco because he was talking to one lady and holding a knife. He conceded that it would appear that there was light on that night but he could not remember because he was drunk. Accused made very startling concessions under cross-examination. In his evidence-in-chief he said he was still moving backwards when he stabbed the deceased who rushed at him. He now says he only advanced one pace towards the deceased before he stabbed him. He again said that he does not dispute what P.W.1 said that he (accused) advanced a few steps/paces and met the deceased half way. The reason for his failure dispute that evidence is because he was drunk. He again said that for the same reason he could not dispute that Lillo struck him after he had stabbed the deceased on the chest with a knife.

It seems to me that after the accused has made the above concessions in cross-examination the facts of this case have now become common cause. They are substantially as stated by P.W.1. They are that the accused wrested his torch from the deceased. The latter fell on his knee because of the force used in the wresting of the torch. He rose and punched the accused on the

jaw. The latter moved backwards and took out his knife. He and deceased advanced towards each other and met half way. Accused stabbed him on the chest.

This is obviously not a case of self-defence because the accused had ample time to escape but instead he advanced towards the deceased and fatally stabbed him on the chest which is a very vital and delicate part of the body.

It seems to me that this is a case of Provocation coupled with Drunkenness. I shall first deal with provocation. In section 4 (a) of Criminal Law (Homicide Amendment) Proclamation No.42 of 1959 provocation is defined as follows:

"1. The word "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.

(b) For the purposes of this section the expression "an ordinary person" means an ordinary person of the class of the community to which the accused belongs."

Section 3 (1) (a) and (b) of the above proclamation read as follows:-

"(1) A person who -

(a) unlawfully kills another under circumstances which but for the provisions of this section would constitute murder; and

(b) does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool,
is guilty of culpable homicide only."

The crucial issue to be decided by the Court is whether the accused was provoked when the deceased punched him on the jaw when he lawfully wrested his torch from him. Although the accused did not say that he was provoked by the unlawful attack upon him by the deceased, it is obvious from his reaction. He was the lawful owner of the torch and had every right wrest it from the deceased. The act of the deceased was an unlawful act which was likely to deprive the accused of the power of self-control and to induce him to assault the deceased. I, therefore, find that the accused stabbed and caused the death of the deceased in the heat of passion caused by sudden provocation.

Section 2(4) of Criminal Liability of Intoxicated Persons Proclamation No.60 of 1938 reads as follows:


"Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the particular offence charged."

It is common cause that the accused was drunk. I have formed the opinion that the liquor had affected his mind the

extent that he could not form the requisite or special intention for murder.

For the reasons stated above I find the accused guilty of culpable homicide.

My Assessors agree.


J.L. KHEOLA
CHIEF JUSTICE

14th March, 1996.

For Accused - Mr. Teele
For Crown - Miss Nku.

SENTENCE:

In passing sentence I took into consideration that the accused is a first offender and that he has a wife and a small baby; that he was drunk when he committed the offence; that there was a long delay in the prosecution of this case.

However, I also took into account that the killing of people by stabbing them with knives is rampant. At the moment I am hearing two other cases in which a knife was used with fatal effects. I think that deterrent sentences must be imposed.

For the reasons stated above the accused is sentenced to five (5) years' imprisonment of which two are suspended for three years on condition that during the period of suspension the accused is not convicted of any offence involving violence to another person committed during the period of suspension.


J. L. KHEOLA
CHIEF JUSTICE

14th March, 1996.