

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

SAMUEL M. PAPALI

Accused

J U D G M E N T

Delivered by the Honourable Chief Justice Mr. Justice
J.L. Kheola on the 29th day of March, 1996

The accused is charged with two counts of murder. In Count 1 it is alleged that upon or about the 13th day of January, 1991, and at or near Liphiring in the district of Mohale's Hoek, the said accused did unlawfully and intentionally kill Matsoake Fuku.

In the second count it is alleged that upon or about the 13th day of January, 1991, and at or near Liphiring in the district of Mohale's Hoek, the said accused did unlawfully and intentionally kill Tseliso Leche.

The accused pleaded not guilty to both charges.

The defence formally admitted all the depositions made by the Crown witnesses at the preparatory examination except the

deposition of P.W.9 Matthys Smith.

Police Woman Nkholi was P.W.1 at the preparatory examination. On the 13th day of January, 1991 she was stationed at the Liphiring Police Station. The accused is also a policeman who was stationed there. On the day in question two employees of Frasers Furnishers arrived at the Liphiring police station. One of them was Tseliso whom she knew very well. They were travelling in a Frasers Furnisher's vehicle. They arrived there at about 2.30 p.m. The two men spoke to her and wanted to know the whereabouts of the accused. She showed them the room of the accused which was about twenty paces from the charge office. They proceeded to accused's room and entered. The witness also left the charge office and went to her room. While she was in her room the accused came in followed by the two men. He asked where trooper Paleo was. She told him that he was not there. He returned to his room followed by the two men.

The witness says that she went out of her room and heard one of the men (she later learnt that his name was Matsoake) say:

"Pay, we have come to you." Accused replied
and said:

"Men! This property is mine. I have paid,
here are the papers."

The Matsoake said:

"You have not finished paying. Do not give us trouble."

The accused again went out of his room and went to Trp. Paleo's room. The two men were still following him. He knocked at the door and asked her:

"Has Paleo not yet arrived?"

She told him that he had not yet arrived. The accused went back to his room. The two men followed him. Matsoake said:

"Don't give us trouble, man! How could you feel if someone gave you trouble in your work? We are doing our job. We take the property or you pay."

Accused replied and said:

"As far as this property is concerned, it is mine. There is no Fraser's property in here."

Matsoake said:

"We are taking it."

Accused spoke angrily and said"

"If it is yours take it."

Police woman Nkholi says that she then saw the two men coming out of the accused's room carrying a hi-fi-set. They helped each other to load the hi-fi-set on the vehicle. Then the accused said to her:

"You see what they are doing in my room?"

The accused ran to his room Matsoake returned to the accused's room and came out carrying two sound boxes. As he was passing near her she warned him:

"Do not take this property, this person will kill you."

Matsoake said:

"Even if he kills us it does not matter because we shall be dying in the course of our employment. It is our job."

She warned Matsoake that the accused would kill them because she heard the sound of rounds being loaded into a rifle.

The accused hurriedly came out of his room carrying a rifle. Matsoake said:

"Shoot, man."

The accused fired and the bullet hit the deceased on the chest. He fell down. He fired the second shot while the deceased had already fallen down. The witness did not see where the second bullet landed. She says that thereafter she went into her room and peeped through the window. She did not see Tseliso. She shouted at the accused and warned him not to kill. She saw the accused go round the Fraser's vehicle and immediately after that she heard three gun reports in quick succession.

Thereafter she heard the accused's voice in the charge office; he was sending a radio message to Mohale's Hoek police saying that they should come and collect Fraser's people. He said he had already killed two people who had invaded him. The police from Mohale's Hoek eventually came and found the two bodies of the deceased.

The second witness is one Qhautse Masike. On the day in question he was watering his horse at a dam near the charge office. He saw a man come out of the charge office running. The accused was chasing him. He aimed a rifle at the fleeing man and fired one shot. The man fell down. He fired the second shot. He later saw the accused walk up and down in front of the charge office. The police from Mohale's Hoek eventually arrived.

Sec. Lt. Matela testified that on the 13th day of January, 1991 he attended the scene of a crime at Liphiring police

station. He arrived there at about 5.00p.m. He found the accused in front of the charge office. There were two dead bodies of male persons and a Frasers Furniture van. The accused gave him explanation and fetched an SSR rifle from his room. It was loaded with thirteen rounds of ammunition. He found five used empty shells at the scene of the crime. He also inspected the two bodies he found there and noted all the injuries they had.

According to medical evidence Tseliso Leche's cause of death was haemopneumothorax due to shattered mediastinal organs. Matsoake Faku's cause of death was brain laceration and bilateral hemopneumothorax due to lacerated lungs.

The evidence of Matthys Smith is that in 1991 he was the manager of Frasers Furnishers stationed at Mohale's Hoek. As manager he dealt with sales, accounts and collection of debts. He handed in an invoice No.132033 dated the 8th day of December, 1988 which shows that the accused entered into a hire purchase agreement. He was to pay a monthly instalment of M110.00. Smith says that at the time of the killing of the deceased the accused was still owing his company an amount of about M2 000.00. He had no documents to substantiate his allegation.

In his defence the accused says that he bought the hi-fi-set under a hire purchase agreement. As soon as it was delivered he found out that it was defective. He immediately reported to the seller. They told him that they would repair it. He continued to pay the instalments but the hi-fi-set was not repaired. When

he was left with only two instalments the Manager of Frasers of Frasers Furnishers came to his place. He told the manager that because of the defects he has decided to discontinue the payment of the instalment and that he regarded the remaining instalment as a discount. The manager said that he would report his story to the management. He also suggested that he must reduce his story in writing.

On the 18th December, 1990 the accused wrote a letter to Frasers Furnishers in which he clearly stated that he regarded his account with them as closed. (See exhibit "D"). He did not receive any reply to his letter. He therefore remained convinced that his conclusion had been accepted by the seller.

On the 12th January, 1991 he had gone on patrol and came back on the 13th January, 1991. It was after his arrival that the two deceased came into his room. They told him that they had come to fetch the hi-fi-set. He explained that the previous month the manager had come to his place and they came to a conclusion that he had finished paying for the property. He regarded the property as his. The deceased could not accept that explanation. They told him that they could not leave without either the property or the money. He went to the room of his colleague one Trooper Paleo to solicit help from him. Unfortunately Paleo was not in his room. He went to Policewoman Nkholi who did not know the whereabouts of Paleo. He went back to his room. The deceased were following him all the time and said that he was wasting. They said that they were taking the

property.

The accused says that he told them that he could not release his property to strangers. He was suspicious that they did not come from Frasers Furnishers because they refused to identify themselves. Because they could not reach an agreement the deceased took the hi-fi-set to their vehicle. He went back to policewoman Nkholi and asked her to speak to them. She did but they did not listen to her. He got angry. He returned to his room trying to control himself. One of them returned to the room and came out carrying two sound boxes. When he came to his room and saw the empty space where the hi-fi-set used to be kept he was greatly incensed by that sight. He lost his power of self control and went out with his rifle. When he approached their vehicle one of the deceased said something he did not hear and appeared to be coming towards him. He started shooting in their direction and remembers seeing them fall to the ground. He felt very humiliated and despised by the deceased. He was extremely angry. He could not control his anger which was growing all the time. After that he noticed that he was going up and down outside the charge office. He eventually calmed down and went into the charge office and made a radio message to Mohale's Hoek police station informing the police what he had done.

It seems to me that the defence raised by the accused is that of provocation.

The law which governs provocation in homicide cases is the

Criminal Law (Homicide Amendment) Proclamation NO.42 of 1959.
Sections 3 (1) and (2) and 4 (a) 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.

2. The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.

4. (a) 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 and 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."

The first issue to be determined by the Court is whether the accused was really provoked when he killed the deceased. It is common cause that what the deceased were doing was altogether wrongful and unlawful. No man is allowed to take the law into his own hands and repossess the goods he has sold to another person if the latter fails to pay the full price. The accused bought the hi-fi-set in question under a hire purchase agreement. If the seller believed that the accused was not up to date with the payment of his monthly instalments, he ought to institute civil proceedings in a court of law and obtain a judgment against the accused. He could then execute such a judgment by issuing a proper writ of execution which would be executed by a proper officer of the court.

What the deceased did amounted to self help and was altogether unlawful. The accused had every right to resist that unlawful act.

I have given a detailed account of the evidence of policewoman Nkholi who observed what happened from the time the deceased arrived until they were shot dead. There is no doubt that they behaved in an extremely provocative manner. They followed the accused up and down the premises of the police station. They made it quite clear to him that they would take the hi-fi-set unless he paid the money they alleged was the balance. They refused to pay the slightest attention to the explanation given by the accused. They kept on saying that he was wasting their time. They refused to look at the papers he had.

Policewoman Nkholi attempted to intervene but the deceased could not listen to her. The accused was very desperate and went up and down the compound looking for Trooper Paleo but he was nowhere to be found. The deceased were so defiant that they told policewoman Nkholi that they did not care if they died in the course of carrying out their work. After they had defiantly taken the hi-fi-set and the sound boxes and loaded them on the van, the accused ran into his room and came out holding a rifle. One of the deceased arrogantly confronted him and said: "Shoot, man."

Mr. Mda, counsel for the defence, submitted that without elaborating on fine details of the evidence, the upshot of the matter is that at the time the accused was firing shots at the deceased, he was beside himself with anger, he had completely lost control of himself; thus he did the act in the heat of passion.

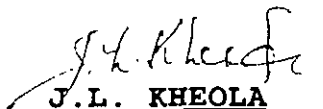
He further submitted that under our law once sudden provocation has been proved and that the accused acted in the heat of passion, he is guilty of culpable homicide. It is immaterial that during his rage the accused inflicted many wounds (**Rex v. Sehlabaka Matasane** CR/T/20/88 (unreported))

Even if the killing is intentional the accused would be found guilty of culpable homicide only if he caused death in the heat of passion caused by sudden provocation and before there is time for his passion to cool (**Rex v. Matasane (supra)**).

I agree with the above submissions. I have formed the opinion that the wrongful and unlawful act by the deceased of taking the property in question was a provocative act which extremely provoked the accused. The provisions of the Criminal (Homicide Amendment) Proclamation No.42 of 1959 are applicable in the present case.

I find the accused guilty of culpable homicide.

My assessor agrees.


J.L. KHEOLA
CHIEF JUSTICE

29th March, 1996

For Crown - Mr. Qhomane
For Accused - Mr Mda.

Sentence:

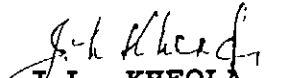
In passing sentence I took into account that the accused is a first offender: that he pleaded guilty to culpable homicide as a sign of remorse and that he did not want to waste the Court's time.

He has a young son of nine years of age and is the single custodian of that child because he is separated from his wife.

I agree that the deceased acted wrongfully and unlawfully when they resorted to self help. They provoked the accused. Be that as it may the accused is a member of the disciplined force. He has been trained in the use of a firearm. He knows that a firearm is a lethal weapon. Although he was provoked he knew what he was doing.

The accused is sentenced to four (4) years' imprisonment on each count of which two (2) years of each count is suspended for three (3) years on condition that during the period of suspension the accused is not convicted of culpable homicide.

Sentences shall run concurrently. Order: The Hifi set should be returned to the accused.


J.L. KHEOLA
CHIEF JUSTICE

1st April, 1996.

For Accused - Mr. Mda
For Crown - Mr. Qhomane.