

CRI/T/9/95IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

AND

LEJAKA LESOMA

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 April, 1996.

The accused is charged with the murder of Nkotoane Tlali on or about 1st day of January, 1994 and at or near Koung in the district of Qacha's Nek.

He pleaded not guilty to the charge.

The defence admitted the depositions made at the preparatory examination by the following witnesses: P.W.7 Lebone Tlali, P.W.8 No.6694 Trooper Monyau, P.W.9 No.6701 Detective Trooper Thoobakae and P.W.10 No.1892 Detective Warrant Officer Maluke.

The post-mortem examination report was also admitted by the defence. It is marked Exhibit "A". It reveals that death of the deceased was due to a stab wound which cut both the left yugular

vein and the left carotid artery completely, causing massive internal bleeding. Externally there was a wound of about 2.5 cm long on his left side of the neck with a depth of about eight centimetres.

The most important deposition admitted by the defence is that of P.W.8 Trooper Monyau. It is important because it gives a detailed account of what happened before the deceased was stabbed and how the stabbing actually took place. It is the evidence adduced by the Crown to prove or to support its case. By admitting that piece of evidence the defence accepts that it is true. In other words, the evidence of P.W.8 is not disputed by both the Crown and the defence. It will not be acceptable when the Crown turns around and says that the evidence of P.W.8 should be rejected because it conflicts with the evidence of other Crown witnesses.

A preparatory examination is not a trial. It is merely a procedure whereby the Director of Public Prosecutions is informed of the nature of the evidence available in order to enable him to decide whether to prosecute the accused or to decline to do so. The paramount consideration is that the duty of the prosecution is not to secure a conviction but to assist the court in ascertaining the truth (*R. v. Riekert*, 1954 (4) S.A. 254 (S.W.A.) 261), so that if there is a witness who is not required by the prosecution he should be made available to the defence (See Swift's Law of Criminal Procedure, 2nd ed. by Harcourt, pp. 251-252).

In the present case the evidence of P.W.8 was to the effect that on the 1st day of January, 1994 he was stationed at Sehlabathebe Police Post as a member of the Royal Lesotho Mounted Police. The accused was stationed at the same police post. On the day in question he was at the restaurant of one Thabo Hoodi. He left the restaurant for a while and went to the home of one Selebeli Mahula. He returned to the restaurant at about 1.00p.m. When he was about twenty-four paces away from the restaurant he met the deceased and his two brothers, namely Jakote Tlali and Kaitholla Tlali. He heard the deceased saying, "Policemen kill us all". Since he was used to the deceased he asked him what was wrong. He said that the accused had patted him on the head and demanded that he must give him his beer.

Trooper Monyau says that at the same time he saw that the accused was going inside police post premises. The deceased and Kaitholla Tlali were struggling to follow the accused. He joined Jakote Tlali to restrain the two from following the accused. They managed to bring them back to the restaurant. P.W.8 says that the utterances of the deceased and his brother gave him the impression that they were struggling to follow the accused with a view to fight him.

He went into the restaurant leaving the deceased and Kaitholla outside. After about thirty minutes Jakote went to him and reported that the accused was coming. He went out and confirmed that the accused was approaching the restaurant. As his senior, he called him and warned him against any fighting.

Accused said that he was coming to the shop. While he was still speaking to the accused, Kaitholla charged at the accused holding a stone. He tried to hit the accused with it. P.W.8 says that the accused used him as a shield by rushing behind him. Kaitholla was warning the accused that he could not act so contemptuously to his elder brother.

At that time he (P.W.8) was still holding the deceased by the hand. The latter was struggling in an attempt to free himself so that he could advance to the accused and fight him. He looked at the accused and noticed that he had produced a bayonet with which he was attacking Kaitholla. The latter managed to dodge the blows. Eventually the deceased succeeded to free himself from P.W.8's grip and moved towards the accused and when he came to him he (accused) stabbed him with the bayonet. The accused ran away and was chased by the deceased and his brothers. On the way the deceased fell down and died before he was taken to the hospital.

At the trial the Crown called five witnesses. P.W.1 Kaitholla Tlali is the younger brother of the deceased. On the 1st day of January, 1994 he went to Hooti's restaurant in the company of the deceased and others. On their arrival there he sat near the counter while the rest sat at a table. While they were still drinking beer the accused came and stood near the window which was near the table at which the others sat. He did not know how the quarrel between the accused and the deceased started. He only heard when the deceased asked the accused how

he could hit him on the head when he did not even know him. During the scuffle the owner of the restaurant came and spoke with the accused who left immediately and ran to the police post. (It was later during this trial estimated by both parties that the police post is about half a kilometre from the restaurant).

After the departure of the accused the deceased suggested that they should leave the restaurant because the accused might come back with a dangerous weapon. They accepted the suggestion. As soon as they got out they met Trp. Monyau who asked them what was the matter. They explained to him what had happened and their fear of what might happen. Monyau said that they should go back; he would speak to accused as his colleague. They complied.

Even before they could enter the restaurant the witness says that he saw the accused coming back in a great hurry. He was actually running. He drew the attention of Trooper Monyau to the fact that the accused was coming and that he was in a fighting mood. As they were standing outside the restaurant the accused came and passed him (witness) and went straight to the deceased and stabbed him on the left collar bone with a bayonet. Jakote tried to stop the accused but he was also stabbed on the arm. After the stabbing of the deceased they all chased the accused and threw stones at him. He outran them. The deceased ran for only a short distance before he fell down.

Under cross-examination Kaitholla denied that he attacked

the accused before he stabbed the deceased. He says that he threw only one stone at the accused and missed him. They also chased him. He denied that during the scuffle in the restaurant the accused was already in possession of the bayonet. He says that he could have seen it because the accused was wearing a trousers and a short skipper. It is true that the accused came back quickly. (He estimates that it was within five or ten minutes after his departure. He denied that the stone he threw at the accused hit him on the solar plexus and forced him to bent down in pain. He denied that when he stood up he blindly waved the bayonet and accidentally stabbed Jakote on the arm.

P.W.4 Mahlomola Tlali says that on the 1st day of January, 1994 he was drinking beer at Hooti's restaurant. He was in the company of the deceased and other people. The accused came later and joined them. He told him (accused) that he had seen a flock of sheep alleged to be his. Accused said it was true that the flock was his. P.W.4 remarked that it was surprising because he (accused) had been there for a short time but the flock was so large that it was as if he had been there for a long time. The accused said if God made him remain there for a longer time, people like the deceased would respect him. When he referred to the deceased he patted him on the head. The deceased took exception to that and said that he should not pat him on the head as he was not even speaking to him and did not even know him. The accused did not take him seriously and patted him again. A quarrel broke out. The deceased rose and pushed the accused towards the window. After he and others had stopped the fight

the accused left and went to the police post.

Some time later P.W.4 went out of the restaurant in order to pass water. He saw the accused jump at the deceased and stabbed him around the neck with something. He rushed back into the restaurant and took a sjambok from one Tebalo. When he came out the accused was already far from them. They chased him. He outran them. The deceased later died.

P.W.5 Jakote Tlali is one of the people who were sitting at the table in the company of Mahlomola, Tebalo and the deceased. His version of what happened in the restaurant is different from that of P.W.4. According to him the accused came to where they were sitting and said to the deceased, "Give me liquor." He patted deceased on the head. Deceased said: "Why do you pat me on the head? I do not know you. There is liquor over there for sale." The accused again patted him on the head and said; "Why do you refuse to give me liquor?"

The deceased rose and punched him on the chest. He fell down. When he rose, there was a scuffle but he (P.W.5) and others managed to separate the combatants. The accused went out. Although the deceased had suggested that they should leave because he was afraid that the accused was going to fetch a gun, they did not do so because Trooper Monyau said that the accused would not do anything in his presence. They had just reached the forecourt of the restaurant when they saw the accused. He was coming in a great hurry. Trp. Monyau again assured them that he

would not do anything in his presence. When the accused came to them he passed them, rushed at the deceased and stabbed him on the left collar bone with a bayonet. P.W.5 says that when he asked him why he stabbed the deceased, accused stabbed him on the forearm with the same weapon. They chased him until he came to the police post. He was taken to the local clinic and then to Machabeng Hospital because the wound on the forearm was bleeding heavily.

This witness did not hear the conversation between the accused and P.W.4. It is rather strange because according to P.W.4 the patting of the deceased on the head was for an entirely different reason.

The details of the defence story has already been put to all the Crown witnesses. The accused testified that on the 1st day of January, 1994 he went to Mafikalisiu on patrol. He was not wearing uniform but a pair of denim trousers, a woollen hat and a skipper which was a long one and was hanging over the trousers. He was armed with a bayonet. It was wrapped in a paper and then put under the trousers and covered with the skipper. It could not be seen by anybody. He did not use the sheath because it hurts the thigh.

On his way back to his station he called at the restaurant of Hooti. He admits that he had a quarrel with the deceased. The cause of the quarrel was not because he demanded that the deceased should buy beer for him. In the course of his

conversation with Mahlomola Tlali about his (accused's) flock of sheep, he patted the deceased on the head to point him out as a person he would beat or outdo in the keeping of sheep if he remained in that place for a longer time. The deceased took exception to that and ordered the accused to desist from doing that because he (deceased) did not even know him. The accused ignored that warning and patted him again. He rose and punched him between the eyes and felled him. A scuffle followed but the other people intervened and the accused left.

The accused says that he went to his place in order to change his clothes that had been soiled when he fell down. When he arrived there he changed his clothes and looked for something to eat. He discovered that he did not have eggs. He decided to go to a café located on the other side of Hooti's café. He had to pass near Hooti's café in order to reach his destination. As he approached the restaurant he saw Trp Monyau and the deceased outside. Kaitholla was going towards the toilet but turned and swore at the accused and said, "Policemen, kill us all". Accused noticed that there was a struggle between Trp. Monyau and the deceased. The latter was trying to free himself and come to the accused. The accused says that he ignored Kaitholla and passed him. After that Kaitholla hurled a stone at him but missed. The accused turned and faced him; they fought with fists. Jakote Tlali joined the fight and punched the accused.

The accused retreated and came to the wall of the restaurant. He took out the bayonet from his waist. At this

time the deceased freed himself from the grip of Trooper Monyau and came to the accused. As he approached, Kaitholla hit the accused with a stone on the solar plexus. Because of the pain he bent a little and when he stood upright again the deceased was already very close to him. He tried to scare him away with the bayonet but in vain. He stabbed him on the left clavicle. Jakote grabbed the hand holding the bayonet and as they struggled for its possession the accused stabbed him on the elbow. After that they gave him way and he escaped.

It is trite law that in criminal cases the onus is on the Crown to prove its case beyond a reasonable doubt. This is commonly known as the criminal standard. It has been expounded in numerous cases. A frequently quoted passage is from the judgment of Greenberg, J in *R. v. Difford* 1937 A.D. 370 at p. 373 where the learned Judge says:

"..... no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, he is entitled to his acquittal."

The question which has to be decided by the Court is whether the story of the accused is reasonably possibly true. Unfortunately the Crown evidence is so contradictory that it is difficult for the Court to believe it. There is no doubt in my mind that the behaviour of the accused in the restaurant was very

provocative to the deceased. There was no reason why he repeated to pat the deceased on the head even after the latter had clearly taken a strong exception to that act. It was an act of despising and humiliating the deceased in the presence of his younger brothers. The punching of the accused by the deceased was perfectly justified and was a good lesson to him. It was obvious that he was angry when he left for the police station.

According to all the Crown witnesses, except Trp Monyau, the accused was running when he went to the police station and immediately came back still running or walking very fast. Upon his arrival he proceeded straight to the deceased and stabbed him on the left clavicle. They said that they only reacted after the deceased had been stabbed and threw stones at the accused and chased him. This story was so unbelievable that the Court even asked one of them why they were standing there like fixed poles when it was clear that the accused was coming to attack them. There was no satisfactory answer. One would say they were probably so petrified with fear that they could not move. The reason being that they thought the accused rushed to his house in order to arm himself with a firearm or any other dangerous weapon.

Their assertion that there was never any fight before the stabbing of the deceased is strongly contradicted by an independent witness, Trooper Monyau. According to him Kaitholla Tlali was the aggressor. He attacked the accused by throwing stones at him even before the latter had done anything except to

approach the restaurant. The fight between Kaitholla and the accused was so fierce that at one stage Trooper Monyau saw that the accused was waving a bayonet in an attempt to stab Kaitholla who was the aggressor. At that time the deceased, whom he (Trooper Monyau) was restraining freed himself from his clutches and rushed to the accused. He got stabbed when he came to the accused.

The evidence of Trooper Monyau dismisses the assertion by the other Crown witnesses that there was no fight before the deceased was stabbed. He is a Crown witness whose deposition was put in evidence and admitted by the defence. His evidence substantially confirms the defence of the accused. It confirms it on the issue of the time the accused spent at his place after he left the restaurant. According to Trooper Monyau the accused remained at his place for about thirty minutes. The other Crown witnesses say that he hardly spent any time at all. He ran to his house and came back immediately. In other words, he entered his house and took the bayonet and came back immediately. The accused denies this allegation and says that he spent about thirty minutes because he had to change his clothes, he went to his office and filled the occurrence book inasmuch as he was returning from a patrol.

The accused further alleges that when he approached Hooti's restaurant he was actually proceeding to another café to buy eggs. It is common cause that there is such a café. He goes on to say that one of the stones that were thrown at him by

Kaitholla hit him on the solar plexus. He momentarily bent down because of the pain and when he stood up straight again the deceased was already close to him. He stabbed him with the bayonet. He could not be expected to turn and run away because that would expose him to a very serious danger. A stone in the hand of a Mosotho man is a very dangerous weapon. They can throw it with extreme precision at a particular target.

He has raised the defence of self defence. In my view the only weapon the accused had at the relevant time was a bayonet. As it was held in **Ex parte Minister van Justice: In re S. v. Van Wyk**, 1967 (1) S.A. 488 (A) and in **S. v. Smart** 1971 (3) S.A. 75(RAD) the correct approach is to take all the factors into account in deciding whether in the circumstances of the particular case the means used by the accused were reasonable and hence justified, or whether he exceeded the bounds of reasonable private defence.

In the present case the means used were reasonable because that was the only weapon he had when the unlawful attack started. He inflicted only one fatal wound which incapacitated the deceased and enabled the accused to escape. He did not exceed the bounds of reasonable private defence.

It is well known that nowadays policemen go about armed because they often have to defend themselves in the execution of their normal duties. Some suspects are so violent that they do not hesitate to attack a policeman. There was therefore, nothing

accused denies this allegation and says that he spent about thirty minutes because he had to change his clothes, he went to his office and filled the occurrence book inasmuch as he was

suspicious about the accused carrying a bayonet.

For the reasons stated above I have come to the conclusion that the Crown has failed to prove its case beyond a reasonable doubt, in that there is a reasonable possibility that the story of the accused might be true.

I find the accused not guilty and I discharge him.


J.L. KHEOLA
CHIEF JUSTICE.

29th April, 1996.

For Crown - Miss Nku
For Accused - Ntlhoki.