

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

AND

HABOFANOE LETSEKA

Accused.

JUDGMENT

Delivered by the Honourable Chief Justice Mr Justice  
J.L. Kheola on the 10th day of March, 1997.

The accused is charged with the murder of Kotsane Lebeko on or about the 23rd day of May, 1991, at or near Ha Lebeko, Mphaki area in the district of Quthing.

He pleaded not guilty to the charge.

According to medical evidence death of the deceased was due to a rupture and profuse bleeding of the left external carotid artery; multiple subdural haematomas. There were multiple cuts on the occipital, frontal and left parietal regions of the scalp.

It is common cause that on the afternoon of the 23rd day of May, 1991 the accused and the deceased met at ha Lebeko in the Mphaki area in the district of Quthing and fought with each

other. The deceased sustained the injuries described above which led to his death four days later at Quthing Government Hospital.

P.W.1 Secathele Moshoazo testified that on the 23rd May, 1993 he went to the café of one Jankie for the purpose of buying candles and soap. When he got out of the café he saw that the accused and the deceased were fighting. They were about 200 metres from the café. He recognized them from that distance because he had earlier seen them. He did not raise any alarm but ran to where they were fighting. Asked why he did not raise an alarm, he said he did not know any of the people in the café which was located in a different village from his.

When he came to the scene of the fight the accused struck the deceased with a stick and it broke into two pieces. After that the accused took a stone and hit the deceased on the head with it. He picked up the second stone and again hit him on the head with it. At that stage the deceased had already fallen down and the accused was pressing him to the ground with his knee of his (deceased's) chest. The witness says that he pleaded with the accused to stop assaulting the deceased. He rose as if he was heeding the plea but picked up another stone and returned to the deceased who was still lying on the ground and hit him on the head with it. He then left.

P.W.1 says that when he approached the scene of the fight the accused and the deceased were still holding with each other. But when he actually arrived there the accused had already

overpowered the deceased and was on top of him. After the departure of the accused, P.W.1 says that he saw school children and sent them to one Setemere who own a motor vehicle to come and convey the deceased. Before Setemere came one Tsatsi arrived and they raised the deceased from the ground and they went to the road. Setemere eventually came and the deceased was taken to the clinic.

Under cross-examination P.W.1 said that the deceased was also fighting because as they were holding each other he (deceased) was trying to hit the accused until the latter overpowered him and felled him. He explained that at the time they were still holding each other the accused had a stick in his hand. He hit the deceased with it causing him to fall to the ground. He did not see how many times he hit him before he fell. He recognized the stick as that of the deceased. It was a thin walking stick. He does not know how and when the accused got possession of the stick. He saw when he arrived at the scene of the fight that the accused had a small wound on the forehead but he did not ask him who he sustained that injury because he was confused. He denied that the stick broke when the deceased was assaulting the accused. He admitted that he did not see how the fight started because they were already fighting when he first saw them.

P.W.3 Setemere Mokonyana testified that on the day in question he was at his shop at about 4.00p.m. He saw the accused running from Mopedi's area and saying: "You set dogs on my sheep

and I told you that I would kill you." He was swearing and saying: "Satan, I will kill it and all the Bakoena people." Afterwards school children came and said that the deceased was seeking his help because the accused had assaulted him. P.W.3 says that he drove his van to where the children had told him the deceased was. He found the deceased, P.W.1 and one Tsatsi (P.W.4) along the road to Mphaki. They were no longer at the scene of the fighting. The deceased was able to walk supported by P.W.1 and P.W.4. He was taken to the clinic. On the following morning he received a report that the deceased was no longer able to talk. He took him to Quthing Government Hospital. On the previous day when he first met deceased and took him to the clinic he noticed that his head was covered with blood and there were several wounds on the head. He did not count them.

The evidence of P.W.4 Tsatsi Sephaka is that on the day in question he was in the company of the accused at Litoro Restaurant. They were drinking beer. The deceased was seen passing outside near the door of the restaurant. The accused called him and invited him to join them and drink beer with them. He came in but did not go to where the accused and P.W.4 were sitting. He went to the counter and immediately went out. The accused went to the door and told the deceased that he invited him to drink with them so that they could talk. The deceased appeared to be not happy during the whole episode.

P.W.4 says that after the departure of the deceased he asked the accused why the deceased was unhappy. He explained that the

deceased had killed his sheep but had refused to compensate him. It turnout that in fact it was the deceased's children who had killed the sheep by setting dogs on it. Another thing is that the deceased's herdboys had fought with the son of the accused and the accused was very unhappy about that.

It is clear that the two men obviously had a grudge against each other and the accused was aware of that fact. His invitation of the deceased to drink beer with him was nothing but a smokescreen. He clearly wanted to confront the deceased and to find out why he was refusing to compensate him for the loss of his sheep. There was no reason why the accused did not go to court to claim compensation for the loss of his sheep because it had become clear that the deceased was not prepared to pay such compensation.

P.W.4 says that when he left the restaurant he heard noise coming from the direction of the road; he went there and found the deceased lying on the ground and having wounds on the head. He raised him and supported him to walk. When they came to the pass they met P.E.3's vehicle and the deceased was carried to the clinic. This witness alleges that P.W.1 was so drunk that he was unable to help him raise the deceased and to support him when they walked to the road. This allegation cannot be true because this allegedly hopelessly drunken man was able to send school children to the village and asked P.W.3 to bring his vehicle. P.W.3 says that when he arrived at the pass he saw that P.W.1 and P.W.4 were holding the deceased and supporting him.

The evidence of the accused is that the evidence of P.W.1 is true that he invited the deceased to join them and drink with them. He declined the offer and left for his home. Thereafter the accused also left for his home. When he approached a culvert along Mphaki road he saw the deceased. Without uttering a single word the (deceased) threw a stone at him and hit him on the left side of the forehead. The accused says that he took a stone and threw it at the deceased. From there they pelted each other with stones. In the meantime the deceased was still avoiding the stones and coming towards him until he finally came to him and delivered two blows with the stick he was holding. The accused warded off those two blows with his forearm. When the second blow was delivered he managed to catch the stick and wrested it from the deceased.

Having wrested the stick from the deceased the accused hit him twice on the head with it. The deceased fell down. The accused says that he dropped the stick and left. The stick had broken into two pieces when he hit the deceased so that what he actually dropped when he left was one half of the stick.

Miss Mokitimi, counsel for the Crown, conceded that the Crown had failed to prove the crime of murder because the Crown has no evidence to show how the fight started. The story of the accused may reasonable possibly be true as to how the fight started, but she submitted that according to the evidence of P.W.1 the accused overpowered the deceased when he struck him with a stick and felled him. If he had stopped hitting him at

that stage, then he would be justified to say that he was defending himself and the defence of self-defence would probably succeed.

The evidence of P.W.1 that after the deceased had fallen down the accused continued to him with stones is challenged on the ground that he was drunk and that according to the accused he never came to them during the fight and never spoke to him. I have already said that P.W.1 was not so drunk that he did not see what was happening around him. I find this accusation to be unfair and unfounded because it was never put to P.W.1 during his cross-examination that he was drunk. To show that P.W.1 was not drunk at all is the fact that when he found the accused and the deceased fighting he not only intervened but sent school children to go and call Setemere. He says that he supported the deceased they went to the road where the deceased was to be conveyed in a motor vehicle. This is confirmed by the owner of the vehicle that when he arrived the deceased was supported by P.W.1 and P.W.3.

The extent of the injuries described by the doctor in the post-mortem examination report tends to corroborate the evidence of P.W.1. The rupture and profuse bleeding of the external carotid artery, multiple subdural haematomas and multiple cuts on the occipital, frontal and left parietal regions of the scalp are not consistent with only two blows with a stick on the head. The above injuries show beyond any reasonable doubt that after the deceased had fallen the accused inflicted further injuries

which contributed to his death. There is no other way in which the deceased could sustained such injuries unless had fallen down. The Court is not speculating that after the deceased had fallen down the accused continued to assault him but it is relying on the evidence of P.W.1 whom I found to be reliable and trustworthy because where he did not see what happened he admitted without any hesitation. For instance, he was asked how many times the accused hit the deceased with a stick before he fell down. He answered without any hesitation that he did not see.

The crux of the matter in this case is whether the accused exceeded the bound of reasonable self-defence. If he did he can either be found guilty of murder or culpable homicide depending on whether he moderately or immoderately exceeded the bounds of reasonable self-defence. In *S. v. Ngomane* 1979 (3) S.A. 859 (A.D.) at p. 863H Trollip, A.J. concluded:

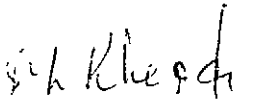
"Although he acted in self-defence, he ought reasonable to have realised that he was acting too precipitately and using excessive force and that, by stabbing the deceased with such a lethal weapon on the upper part of the body, he might unnecessarily kill him".

In the present case the Crown has conceded that the first two blows inflicted with a stick which caused the accused to fall



were an act of self-defence. However after the deceased had fallen down it was no longer an act of self-defence to hit him with stones on the head. He ought to have realised that he might unnecessarily kill him. I am of the view that the force used by the accused to hit the deceased three times with stones on the head was not immoderate. I find him guilty of culpable homicide.


My assessors agree.

  
J.L. KHEOLA  
CHIEF JUSTICE

10th March, 1997.

SENTENCE:-

Four (4) years" imprisonment or R2 000.00.

  
J.L. KHEOLA  
CHIEF JUSTICE

10th March, 1997.

For Crown - Miss Mokitimi  
For Accused - Mr. Lebusa.