

# **IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CRI/T/16/06**

In the matter between:

**REX**

**CROWN**

VS

**MATLALI MAKHELE  
PUSELETSO MAKHELE  
KHOROANE MAKHELE**

**1<sup>ST</sup> ACCUSED  
2<sup>ND</sup> ACCUSED  
3<sup>RD</sup> ACCUSED**

## **SUMMARY**

*Criminal law – Murder – Evidence of single witness –  
Application for discharge – Section 175 (3) of CP&E – Prima  
facie case established – Application for discharge dismissed.*

**RULING IN TERMS OF SECTION 175 (3) OF THE CRIMINAL  
PROCEDURE AND EVIDENCE (CP&E) ACT, 1981**

**Delivered by the Honourable Madam Justice L. Chaka-  
Makhooane on the 8<sup>th</sup> day of December, 2010.**

- [1] This is an application for the discharge of the three (3) accused persons (A1, A2 and A3) who are charged with the murder of their elder brother, Libete Makhele (“the deceased”) on the 15<sup>th</sup> October, 1998 at Semonkong, Ha Elia in the district of Maseru. The accused pleaded not guilty to the charge.
- [2] The crown led the evidence of one witness, Hlajoane Makhele (PW1), and admitted the statements of Chief Mosiuoa Khasu, D/Tpr. Setlai, D/Tpr. Tobi, Insp. Mashaile and a post-mortem report, which were all handed in and were made part of the record. These documents were marked Exhibits A, B, C, D and F respectively. The statement of ‘Matli Makhele was withdrawn.

- [3] At the end of the crown's case, the defence invoked Section 175 (3) of the **Criminal Procedure and Evidence Act** No. 7 of 1981 (CP&E) and applied for the discharge of the accused. The defence alleges that the crown has failed to establish a *prima facie* case against the accused upon which a reasonable court may convict.
- [4] It is PW1's evidence that the accused are his uncles (*borangoane*) while the deceased is his father. He lived with the deceased after his mother had deserted their home. Sometime in 1998, he found the accused at his home and as he approached the deceased, he saw that he was crying.
- [5] During the night when PW1 was at the fire with one Meea Makhele, the deceased informed them that the accused were fighting him over his inheritance which had at one time been allocated to him by his grand father. The Makhele clan then

gathered for a meeting which finally proceeded to chief Mosiuoa's place. PW1 did not know what transpired there.

**[6]** PW1 related that sometime in October, 1998 while the deceased was cooking porridge in the evening, he saw A2 enter their house and when he looked back, A2 hit the deceased with a stick twice on the side of the head. The deceased fell down. A1 then entered the house and stabbed the deceased several times behind the right arm and when PW1 attempted to leave, the accused ordered him to sit down. A2 stopped using his stick and began stabbing the deceased with a knife. A3 stood at the door while these unfortunate events were taking place.

**[7]** A1 and A2 asked PW1 where the deceased kept his firearm. PW1 had no idea. The accused then informed PW1 that they were going to search for the firearm. They further ordered PW1 to say that the deceased had pointed the firearm at him. The

deceased managed to crawl and informed one Seponono who was the deceased's uncle (*rangoane*) and PW1's grandfather, that they had finished him.

**[8]** PW1 further testified that when A1 and A2 came back into the room, they realized that the deceased was still alive they again stabbed him repeatedly on the body. A2 had stopped using the stick. The deceased was stabbed until he appeared to be dead. Surprisingly, not much has been mentioned about Seponono, PW1's grandfather after that.

**[9]** PW1 in his testimony showed that the accused placed the firearm next to the deceased's body then A1 instructed PW1 to inform the authorities that he was the one who had killed the deceased because the deceased had pointed a firearm at him. A1 further informed PW1 that he would get a light sentence due to his young age. PW1 was eighteen (18) years old then.

**[10]** PW1 informed the court that he agreed to all these instructions because he feared that he would be killed. After the accused had assured themselves that the deceased was indeed dead, they all proceeded to the chief's place where PW1 informed the chief that he had killed the deceased. The chief then went to PW1's home to examine the dead body.

**[11]** An alarm was raised and the villagers were informed about the incident, wherein-after they gathered at PW1's home for the whole night. The chief took PW1 to the police station the following morning. PW1 testified that he confessed to the police that he had killed the deceased after the deceased had pointed a firearm at him.

**[12]** It was PW1's further evidence that he had had a cordial relationship with the deceased. He further mentioned that the accused did not contribute towards the funeral arrangements. This point was however, tainted during cross-examination.

**[13]** There are other notable issues which transpired during the cross-examination of PW1's evidence. Firstly, it emerged that PW1 had approached three (3) different authorities, being the chief, the police and the Magistrates' Court respectively and informed them that he had killed the deceased.

**[14]** The defence argued that it was at these institutions where PW1 should have disclosed that he had been threatened by the accused. It was submitted that PW1's failure to reveal the threats casted doubt on the truthfulness of his testimony. It was only in 2003, five (5) years later that PW1 implicated the accused.

**[15]** Secondly, PW1 admitted that he came forward to tell his tale after he had an unpleasant experience in prison. It was at this stage that the court learnt that PW1 had been charged and detained in relation to the murder of the deceased. The

defence submitted that PW1 incriminated the accused only because he could not stand the hardships of jail.

**[16]** The third issue concerns the fact that, though PW1's evidence had suggested that the deceased had explained that the accused were fighting him over the inheritance, PW1's grandmother, who was the rightful owner of the estate, was still alive. Therefore, the defence ruled out the possibility that the inheritance could be at the centre of their row. However, under cross-examination PW1 insisted that the deceased had said the fight over the inheritance actually started with his grandmother.

**[17]** Fourthly, the defence further challenged the credibility of PW1's testimony, particularly where he denied that he was ever charged with the deceased's murder at the Magistrate's Court. It was submitted that for this reason, utmost caution should be applied to PW1's evidence.



**[18]** Moreover, the defence proposed that since the crown has relied on the evidence of a single witness, the testimony of PW1 should be approached with extreme delicacy. It should however, be noted that at this stage, the defence has not presented formal evidence to challenge PW1's testimony. See **Mamolahlehi Mohale v Rex C of A (CRI) 11/2008** (unreported).

**[19]** I now turn to deal with the admitted evidence. Exhibit "A" is the statement of chief Mosiuoa who mentioned that when he received the report that PW1 had killed the deceased, his first reaction was to doubt PW1's ability to fight the deceased to death, particularly given his young age.

**[20]** Chief Mosiuoa further stated that he went to the crime scene to confirm the report. The police came the following day to examine the deceased's body and when it was undressed, several stab wounds were observed. The chief added that

when the police searched the deceased, a gun was found on him.

**[21]** Exhibit “B” is a report from D/Trp. Setlai who revealed that on the 1<sup>st</sup> September, 2003 he charged and arrested the accused in connection with the murder of the deceased. On the other hand, D/Trp. Tobi’s report, marked Exhibit “C”, showed that on the 16<sup>th</sup> October, 1998 he attended the crime scene and found the deceased lying dead in his house.

**[22]** D/Trp Tobi declared that he saw the following external wounds on the deceased’s body; three (3) at the back of the head, three (3) at the back of the neck and eleven (11) open wounds at the back of the body. The officer further found a baby brown pistol in the deceased’s pocket.

**[23]** The post-mortem report Exhibit “F” showed that the cause of the deceased’s death was multiple stab wounds on his body. The statement of ‘Matli Makhele, which would have been marked Exhibit “E”, was withdrawn by the crown.

**[24]** Insp. Mashaile explained in his report (Exhibit “D”) that he was on duty when the Makhele family members arrived at the police station and PW1 was reported to have killed the deceased. PW1 also handed to him a brown knife and a black stick with black and white wires on the handle. He was then charged and arrested in connection with the deceased’s murder.

**[25]** It is now convenient to turn to the application for discharge. The defence is adamant that the accused are entitled to be discharged in terms of Section 175 (3) of the Act which provides:

*“If at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged in the charge, or any other offence of which he might be convicted there on, the court may return a verdict of not guilty.”*

[26] The question to be determined is whether the Crown has adduced enough evidence or put differently, whether it has established a *prima facie* case upon which a reasonable court might convict the accused. See **Matsobane Putsoa and Others v Rex 1974 – 75 LLR 201.**

[27] Lehohla J (as he then was) in **Rex v Teboho Mabollane 1999 -2001 LLR 305** quoted with approval the case of **Rex v Ramokatsane 1978 (1) LLR 70** where Cotran CJ at **73 -74** had this to say:

*“Furthermore, the courts, it has been said, should not at this stage embark upon a final assessment of credibility and should leave that matter in abeyance until the defence have closed their case and then weigh the two together. In Lesotho, however, our system is such that the Judge (though he sits with*

*assessors is not bound to accept their opinion) is the final arbiter on law and fact so that he is justified, if he feels that the credibility of the witnesses has been irretrievably shattered, in saying to himself that he is bound to acquit no matter what the accused might say in his defence short of admitting the offence.”*

**[28]** The court is not bound to deal with or concern itself with the question of credibility of witnesses at this stage. The test to be applied is rather a lenient one of whether or not a *prima facie* case has been established.

**[39]** *In casu* the Crown has established a *prima facie* case against the accused and they have a case to answer.

---

**L. CHAKA-MAKHOOANE**  
**JUDGE**

**For Crown : Ms. Mokitimi**  
**For Accused : Mr. Mofilikoane**