CRI/T/155/07

IN THE HIGH COURT OF LESOTHO

In the Matter Between:-

REX

And

CHIEF SEKONYELA

JUDGMENT

Coram : Hon. Majara J.

Date of hearing : 15th February 2012

Date of judgment : 24th April 2012

Summary

Criminal law – murder – essential elements – effect of failure to cross-examine and to testify in own defence where prima facie case established – verdict of guilty returned – whether extenuating factors present – effect of section 296 of Criminal Procedure and Evidence Act of 1981-

ANNOTATIONS

BOOKS

1. JRL Milton, South African Criminal Law and Procedure, Volume II Common Law Crimes, 3rd Edition
2. Hoffmann & Zeffertt, The South African Law of Evidence, 4th Edition, Butterworths

STATUTES

Criminal Procedure and Evidence Act No. 7 of 1981

CASES

R v Mthetwa 1972 (3) SA (AD) 766

Masupha Sole v Rex LAC 2000 - 2004 612

Maqeba v R LAC 1994-2000 604

[1] The accused in this matter stands charged with the crime of murder it being alleged that on or around the 21st July 2006 and at or near Thabong in the district of Maseru, he unlawfully and intentionally killed one 'Makatleho Sekonyela. The accused pleaded not guilty to the charge and the Crown called six (6) witnesses to testify to prove its case. The defence admitted four statements and the doctor's post mortem report.

[2] I find it apposite to state from the outset that this is one of the most unfortunate murder cases I have had to deal with in my career as a Judge because

not only was the alleged offence committed by a man against his mother, but in terms of the evidence, he did so in the presence and in full view of the deceased's daughter namely, his sister and several other people all of whom had been with the family for a considerable period of time.

[3] I might also add that judgment in this matter was supposed to have been delivered on the 1st March 2012 but unfortunately on that date, the accused whose bail had been extended by this Court at the start of these proceedings, absconded and remained at large. He was eventually arrested some time in April but during that time the Court was on recess for the Easter holidays.

[4] The facts in this matter are by and large common cause and can be briefly summarized as follows; on the date of the incident, the deceased, one of her two daughters and PW4 who was then the family driver, had just boarded a vehicle and were about to leave for ha 'Majane where the deceased, a widowed business woman ran a shop and a liquor restaurant. After she had closed the passenger door, the accused appeared from among the scraps in the family yard, approached the vehicle and without much ado, shot at his mother through the passenger window and the front windshield with a firearm. He fired three (3) shots. After the shooting, he fled the premises. Most of the people that testified witnessed the shooting. Two days later, PW2 the accused' paternal uncle, accompanied him to the Pitso Ground police station where he was arrested and given the charge of murder.

[5] It is also common cause as also evinced by the contents of the post mortem report that the cause of death was haemorraging. The report also states that the deceased sustained several wounds from the gunshots. The evidence of PW6, a ballistics expert was to the effect that the number of wounds that were found on the

deceased's body are consistent with the firearm ammunition that was handed over to him for ballistics examination. He added that these would entail entry and exit wounds. The witness also confirmed that the bullets that were found both at the scene and on the deceased's body were discharged from the same firearm that the accused used to shoot his mother with namely, a Brenneke short gun. He added that this type of firearm is normally used to take the most dangerous game such as the wild boar, lion, tiger, leopard and the Cape buffalo.

[6] In their cross-examination of the witnesses, the defence did not dispute that the accused is the person that shot and killed his mother on that fateful day. It was suggested to some of the witnesses that the accused did this because he suspected and/or believed that his mother was responsible for the deaths of his father and brother respectively. Further that on the day of the incident, the deceased had told the accused that she would make him suffer the same fate as they had.

[7] I must however hasten to point out that this suggestion was not seriously pursued by the defence safe for me to add that it was disputed by PW2 who as I said, is the accused' uncle, the brother of his late father during cross-examination. The witness told the Court that the people that had killed his brother were his transport business rivals and that two of them had been found only the main perpetrator passed away before his case could be prosecuted. He disputed that it was the deceased in this matter that killed her husband and added that he had no idea as to who could have killed the accused' s brother. I might also add that disturbingly indeed, the two deceased reportedly also died as a result of having been shot by unknown people.

[8] At the close of the Crown's case, the defence elected not to call the accused to the stand. It is at that stage that the Court was informed by **Mr. Molati**, Counsel

for the defence that the accused had pleaded not guilty mindful and in the light of the provisions of the **Criminal Procedure and Evidence Act**[1].

The relevant provision reads as follows in so far as it is relevant herein:-

> *"If a person charged with any offence before any court pleads guilty to that offence or to an offence of which he might be found guilty on that charge, and the prosecutor accepts that plea the court may-*
>
> > *if it is the High Court, and the person has pleaded guilty **to any offence other than murder**, bring in a verdict without hearing any evidence;"*

[9] My understanding of the position of the defence is that had it not been because of the fact that the accused herein faces the charge of murder, they would have pleaded guilty. This is more so because they did not really dispute that it is the accused that shot and killed his mother the deceased herein, and that she died as a result of the injuries that she sustained. Further, as I have shown, there really was no defence that was put before the Court.

[10] It is against this background that the Court has to make a finding whether the prosecution has successfully discharged its onus and proved its case beyond a reasonable doubt. On the basis of the evidence that was placed before this Court most of which was that of eye witnesses, and which as I have stated was not disputed and/or gainsaid, it is the finding of this court that the Crown has successfully established all the essential elements of the offence, namely unlawfulness, intention and the killing of another living person **JRL Milton, South African Criminal Law and Procedure,**[2]. It is my finding that the evidence has shown beyond a reasonable doubt that the accused had the intention to kill the deceased.

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[1] **No. 7 of 1981; Section 240 (1)**

[2] **Volume II, Common law Crimes; 3rd Edition p 309**

[11] It is also trite that failure by an accused to testify when the Crown has discharged its onus of establishing a prima facie case upon which a reasonable man might convict, can be used as a factor against him **Hoffmann & Zeffertt,**[3]

[12] Thus in the case of **S v Mthetwa**[4] the Court made the following remarks:-

> *"Where, however, there is direct prima facie evidence implicating he accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability."*

[13] It is on the strength of these authorities and for the reason that the uncontroverted evidence of the Crown is overwhelming against the accused, that the Court finds that the Crown has ably discharged its onus of proof beyond a reasonable doubt and that the accused should be found guilty of murder as charged. I accordingly so find. My assessors agree with me on this verdict.

SENTENCE

[14] Having heard submissions from both sides with regard to mitigating and aggravating factors respectively, and having made reference to the authorities that were quoted, the Court has taken the following factors into consideration for purposes of sentencing the accused; the accused is a first offender with no record of previous convictions; at the time of the incident he was only twenty (20) years old which is a very tender age; the delay in the prosecution of the matter which

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[3] **the South African Law of Evidence 4th Edition, Butterworths p598**
[4] **1972 (3) SA p 766**

was heard six (6) years after the incident took place; the accused' apparent show of remorse by not disputing the evidence of the eye-witnesses to the shooting; that he has a family of his own who stand to be affected by the sentence that will be imposed on him.

[15] On the other hand, the Court has also taken into account the fact that the offence of murder is one of the most serious ones in this jurisdiction which attracts capital punishment; the cold-blooded manner in which the accused executed the murder in that he fired at his defence-less mother at close range three times and this despite attempts by his younger sister to shield her from the onslaught which in the opinion of the Court shows that he intended her subsequent death; the fact that the murder was committed in the presence of the deceased's daughters who were still minors at that time, have since becomes orphaned and have had to fend for themselves in these tough times and the trauma that was caused to them; the need to protect all citizens alike against those who willy-nilly choose to take human life without any justifiable cause.

[16] Further, the Court has considered the following; the absence of provocation especially when account is taken of the fact that there is no evidence that was placed before the Court to establish same but for what was suggested to the Crown witnesses during cross- examination by the defence Counsel. It is trite law that this does not constitute evidence as has been stated in a plethora of decided cases both in Lesotho and beyond its borders. See in this regard the case of **Masupha Sole v Rex**[5] where the Court of Appeal stated that where the accused merely puts his defence to the Crown witnesses through his lawyer without giving his own evidence, it is insufficient. Thus, it is my opinion that the sentiments that were

[5] **2000 - 2004 LAC 612 at 652**

expressed by Steyn JA in the case of **Maqeba v R**[6] does not apply because the accused in this case did not testify before the Court to establish his belief as suggested during cross-examination of the Crown witnesses that the deceased was the one that had caused the death of his late father and brother respectively and had allegedly admitted it to him.

[17] Lastly the Court has taken into account the sanctity of human life and its corresponding duty to send out a strong message that everyone is bound to show respect for same and that those who do not, will be accordingly punished. If indeed the right to life is sacrosanct, then those who kill have to be severely dealt with both as a deterrent and in my opinion retributive factor. This is what society expects.

[18] Having weighed all these factors and in trying to strike a proper balance thereof, it is the finding of this Court that the punishment that will fit the accused' crime is for him to be send to prison for a period of twenty (20) years.

N. MAJARA
JUDGE

For the Crown : Mr. T. Mokuku

For the defence : Mr. Molati

[6] **LAC 1990-1994 p 604**