

# IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

**CRI/T/37/2011**

In the matter between:-

**REX**

**CROWN**

**AND**

**CLEMENT SEKONYELA**

**ACCUSED**

## **JUDGMENT**

**Coram** : Hon. Mahase J.  
**Date of hearing** : Various dates  
**Date of Judgment** : 14<sup>th</sup> November, 2012

### *Summary*

*Criminal Procedure – Charge of Murder – Essential Elements constituting same – whether in the circumstances of this case the accused crown has proved beyond a reasonable doubt a charge of murder against the accused.*

### ANNOTATIONS

#### CITED CASES:

- **R. v. Khati CRI/T/98/2002 (unreported)**
- **S. v. Burger 1975 9(H) S.A. 877 at 878**
- **S. v. Ngubane 1985 (3) S. A. 677 at 684**
- **S. v. Jonker (S.A. 15/03) (2006) NASC4**
- **R. v. Sentle Monpo CRI/T/09/2005 (Dated 17<sup>th</sup>/08/2006**
- **S. v. Van As 1976(2) S.A. 921 page 927 - 928**

## STATUTES

- **Criminal Procedure and Evidence Act No. 9 of 1981**

## BOOKS

- **Criminal Law, 2<sup>nd</sup> Edition – by Snyman pages 421 – 423, 428**
- **South African criminal law and Procedure – by JRL Milton 3<sup>rd</sup> Edition page 365.**
- **Negligence, Fault and Criminal Liability (1991) 108 SALT pp. 365-373, 431 at 433.**

- [1] The accused is charged with having committed the crime of murder. The crown alleges that on the day in question, viz the 23rd September 2006 the accused did unlawfully and intentionally kill one Têhla Lekonyana.
- [2] The incident allegedly occurred at or near Roadside bar at Morija in the district of Maseru.
- [3] The accused has pleaded not guilty to this charge. In support of its case against the accused, the crown has adduced evidence of two witnesses; to wit; PW1 – Fissane Leanya and PW2 – Têpo Moleleki.
- [4] The other evidence, to wit a firearm certificate and the statement of an identifying witness, a post mortem report as well as the weapon; - a gun allegedly used to commit this crime were admitted by consent as exhibits in terms of the provisions of section 273(1) of the **Criminal Procedure and Evidence Act No. 9 of 1981.**

- [5] The contents of the firearm certificate in relation to the gun in question as well as those of the statement of the identifying witness and the post mortem report were then read into the court record in order to form part of the evidence herein. They were respectively marked exhibits A, B, D. The medical report with regard to the accused was also so admitted and its contents were read into the court record and it was marked exhibit "C".
- [6] The brief facts of this case are that on the day in question the deceased and some other villagers were at the tavern which is owned by the accused. They were buying and drinking beer. The owner of the tavern, the accused and his wife were selling beer to those people who were at that tavern.
- [7] The deceased had been in the company of one Ntšepeli Thoso among others. Whilst they were there, the accused had opted to go into one of the rooms of his tavern to take a few hours rest. His wife had remained behind selling beer to those people who were at that tavern including the deceased.
- [8] At around midnight, the deceased and Ntšepeli as well as PW1 decided to leave that tavern for their homes. As they were near the door way, the accused emerged from outside going back or entering the tavern.
- [9] It was at that stage that the deceased spoke to the accused as they were friends and jokingly said that he had taught accused how to play soccer and that he was now going to teach him boxing.
- [10] The deceased then started to punch the accused with fists injuring him on the eye. The accused said to deceased that he would kill him. He then went into

one of the rooms of his tavern. He then came back arrival with a gun with which he shot at the deceased. At first he had only threatened to shoot the deceased by holding that gun for deceased to see it. The deceased raised up his hands pleading with the accused for forgiveness. He also tried in vain to hide himself behind PW1 and Ntšepeli.

- [11] He was shot on the chest wherein he fell down. PW1 had tried to hold onto the deceased so as to prevent him from falling down but all in vain. The deceased died instantly. Subsequent to that, the accused surrenderd himself to Morija Police. According to the evidence of PW1, his observation is that being a friend of the accused, the deceased was playing with the accused when he punched him with fists. The fact that both the accused and the deceased were great friends is a matter of common cause.
- [12] Also of common cause is the fact that on the day in question and prior to this unfortunate incident, there was never any misunderstanding nor a fight between the accused and the deceased. They were friends.
- [13] The accused does not deny having shot the deceased. His version is that when he fired that shot, his intention was only to scare-off the deceased so that the deceased could leave his place after the deceased had punched him on the eye causing him an injury.
- [14] He handed to court, a medical report, exhibit “C” as proof of the injury on his eye which had been caused to him by the deceased. This evidence has not been denied by the crown.

[15] In other words, the accused denies that he had had the legal intention to kill the deceased. He says he was aware that the deceased and those other people who were at his tavern on that day were intoxicated from beer drinking. He also admitted that he and the deceased were friends and that they had not at any time before this unfortunate incident had a quarrel or a misunderstanding of any kind. He therefore had no reason at all to kill the deceased. He had no ill feeling towards the deceased even after the deceased had punched him with a fist on the eye.

[16] Indeed, the medical report – exhibit C indicates that the accused had sustained an eye injury and that considerate force was used to inflict same.

[17] The crown has, on the other hand argued that for the mere reason that the accused went out to get his gun which he then cocked and directed it at the deceased and shot him on the chest fatally is enough reason to come to the conclusion that the accused had the requisite legal intention to kill the deceased.

[18] The crown argues that the above actions of the accused coupled with words the accused had uttered earlier that he would kill the deceased, are enough for this court to draw an inference that when he shot the deceased as he did, the accused foresaw the possibility of fatally injuring the deceased but he nevertheless reconciled himself with the eventuality.

[19] The crown argued that this is more so when taking into account the fact that in his own words, the accused is fully acquainted with the use of guns. The crown is basing its above argument or submission on the evidence of the

accused that, he (accused) knows that a gun which is cocked is dangerous even to the person in whose possession that gun is.

- With the greatest respect, and while the accused may have so conceded as above, this kind of argument overlooks the fact, or the evidence which is common cause and which the crown has ably and sufficiently summarized and dealt with at paragraphs 11 of its heads of argument; namely that the accused's unchallenged evidence is that he was hard hit by the deceased on the eye to an extent that he (accused) nearly fell down had it not been due to the help of the deceased.
- Also, equally important and closely related to the evidence just referred to above is the evidence adduced on behalf of the accused and which unchallenged evidence the crown has very ably captured at paragraph 9 and 10 of its written submissions.

[20] This now brings this court to deal with issues raised at paragraph 5 of the accused's written submissions; namely

- Whether all the essential elements of murder have been satisfied, to wit; unlawful and intentional killing of a human being;
- Whether the evidence adduced by and or on behalf of the crown against the accused carries enough weight to persuade this court to find the accused guilty as charged.

- [21] In other words, can it be said, in the circumstances of this case that the crown has proved its case against the accused beyond a reasonable doubt?
- [22] As indicated above, it is the submission of the crown that the accused's intention could also be inferred from the utterances he made before shooting the deceased.
- [23] In support of its argument the crown relies on the unreported case of R. v. Khati T̂sita CRI/T/98/2002 dated the 19<sup>th</sup> October 2004 per Molai J (as was then was) where the court had this to say:

*“Intention is not something that can be seen, heard or reached by any of our five (5) senses. It is something to be inferred from the words or acts of the accused person”.*

- [24] The crown also submitted that the vulnerable area of the body where he (accused) shot the deceased herein clearly demonstrates a murderous intent.
- [25] The law:- it is trite that in law, murder is an intention and unlawful killing of another human being, thus the killing must be unlawful and there should be no justification for such killing. Refer to submissions made on behalf of the accused – at paragraph 6 of same.
- [26] Basing its argument on the book of C.R. Snyman: Criminal Law, 2<sup>nd</sup> Edition page 421 – 423; the defence argues that the form of mens rea required is intention. That in the instant case there has been no intention proofed to show that indeed the accused had the legal intention to kill the deceased.

[27] It is argued therefore that in the absence of such intention, then the killing of the deceased by the accused is culpable homicide and not murder. The accused has indeed testified that he had no intention at all to kill his boyhood friend and that the gun he had fired accidentally as he only meant to scare off the deceased.

[28] In short, it is the defence argument that since the said element of intention is lacking to warrant a conviction of murder, the murder charge should be reduced to culpable homicide.

[29] Indeed, there is no doubt in the mind of this court that the accused has not had the legal intention to kill the deceased. At the most he was negligent in shooting the deceased as he did.

[30] There is no evidence, direct or circumstantial indicating that the accused had, prior to this fatal shooting incident, formed an intention to kill the deceased. The evidence that the accused acted as he did with an intention of scarring the deceased away from his tavern after the deceased had punched him on the eye remains unchallenged. In the circumstances the inference to be drawn here is that the accused had no intention to fatally shoot at the deceased; and there was no foreseeability of death in his conduct.

[31] In the premises the accused is found guilty of culpable homicide.



**M. Mahase**

**Judge**

For Crown - Adv. M. Tlali

For Accused - Adv. L.J. Ramakhula