

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CR/T/0130/2017

In the Matter Between:-

REX

CROWN

AND

MOTHABENG KHASOANE

ACCUSED

JUDGMENT

CORAM	:	MOKHESI J
DATES OF HEARING 2019	:	15TH and 17TH OCTOBER
DATE OF JUDGMENT	:	22ND NOVEMBER 2019

CASE SUMMARY: *Criminal law- accused charged with the crime of murder- pleads private defence after initially being the aggressor- situations where the defence can successfully be raised after the accused was the initial aggressor, articulated- Held in this case though being initially the aggressor, the accused was entitled to defend himself when the deceased exceeded the bounds of self- defence- Accused accordingly acquitted of murder.*

ANNOTATIONS:

BOOKS: Jonathan Burchell and John Milton, *Principles of Criminal Law* 2nd Ed.

M. P Mofokeng *Criminal Law and Procedure* (1997, Morija Book Depot)

CASES : *Rex v Raphaelana Matsoso CRI/T/56/1968*

Rex v Lepoqo Seoehla Molapo 1997-98 LLR 208

PER MOKHESI J

[1] The accused is charged with the crime of murder, which is alleged to have occurred in contravention of the provisions of section 40(1) of the **Penal Code Act No. 6 of 2010**, it is being alleged that, on or about the 12th September 2015 and at or near Ribaneng Khohlong in the district of Mafeteng, the said accused did unlawfully and intentionally kill one Mokoma Moruti by hitting him with stick.

[2] In terms of section 273 of the **Criminal Procedure and Evidence Act 1981** the following formal admissions were made:-

- a) LMPS 12 police form which recorded the description of the lebetlela stick which was seized by the police.
- b) Identifying statement of Maphiri Tumelo Selebalo – who identified the corpse of the deceased on the 15/09/2015 before post mortem examination could be performed.
- c) Identifying statement of Pita Mokoma- who identified the corpse of the deceased before post mortem examination could be performed.
- d) Post mortem Report (H25) – It indicates that post mortem examination on the corpse of the deceased was undertaken on the 15th September 2015. In this post mortem report the pathologist recorded that he formed an opinion that death occurred three days prior to the examination of the corpse; that death was as a result of severe head injury; he remarked that the deceased was traumatized on the head because of the severe head injury that led him to fall into a coma resulting in death. On the schedule of observations the pathologist recorded the following:

External Appearance

“Victim with dry blood in both ears, swollen right jaw and fracture on the right parietal bone and marks around the neck and multiple abrasions on the chest.”

Skull and its contents

“Fracture of the right parietal region, dry blood in both ears and swollen right jaw.”

Mouth, pharynx and oesophagus

“Dry blood on the tongue and teeth.”

[3] The crown led evidence of three witnesses at the trial, namely Lebona Kelepa, 'Malei Kelepa and Detective Sergeant Mokone. On the day the deceased met his untimely death it was in the morning. PW 1 Lebona Kelepa was on his way to the mill when he saw the accused. Upon seeing the accused in the bushes, he immediately thought that the latter was hunting rabbits. Shortly after spotting the accused, he heard someone screaming for help, and that after a short while he was called upon to chase the person who was running next to the graveyard. The person who was calling upon him to give a chase was the accused. He testified that the person whom he was called upon to chase, as he was running, fell into the donga. It is at that point when the accused caught up with him, and hit him with the stick while in the donga. As the accused caught up with the man who was fleeing, the latter asked for forgiveness. PW 1 testified that the accused hit the deceased once while in the donga. As the deceased had fallen into the donga, the accused put his stick down and went down into the donga to retrieve the deceased so that they could go to the chief's place.

[4] As the accused was ushering the deceased out of the donga, the deceased pulled out the knife and attempted to stab the accused. Accused being aware of this attempt hit the deceased on the head with the stick, and at the same time the accused managed to wrest the knife from the deceased. After the knife was wrestled from the deceased's possession the latter ran away, and as he was running he tripped over the maize stalks and fell. The accused caught up with him and beat him with the stick and stones. Pw1 proceeded ahead and told a woman he found at the mill about what he had just witnessed. PW 1 testified that he was terrified at seeing the way the accused's "stick" was "thrown unto" the deceased. On

account of this ferocity of blows, he thought that the deceased would not make it. He said the accused hit the deceased on the head, hands and all over the body.

[5] For PW 1 to say the accused hit the deceased while the latter was in the donga, I find this version of events inherently improbable, given that the accused even had to put his stick down and climbed down the donga to retrieve the deceased. This shows that the deceased could not be easily reached without climbing down the donga. I therefore find it improbable that the accused would hit the deceased while in the donga.

[6] Under cross-examination PW 1 agreed that the accused was acting in self-defence when he hit the deceased, after the latter had pulled the knife and attempted to stab the accused. He further repeated what he said in chief that after the accused had pulled the deceased out of the donga, the latter asked for forgiveness which the accused assured him of and directed that they go to the Chief's place. In general I found pw1 to be a credible witness.

[7] PW 2 'Malei Kelepa testified that he was lying in bed when he heard children saying "there are people chasing one another." He ignored these children. He after a while decided to go outside, and that, that is when he heard the accused's voice which he knew very well saying "I am saying we have to go to the Chief's place now you are fighting, stabbing me with a knife!". He went back into the house to put on his shoes. After putting on his shoes, he went to the nearby forest where he found the accused beating the deceased with the stick. He said because the accused was too furious, he could not come to the assistance of the deceased but instead opted to turn back to the village to raise alarm. The deceased was lying down. He said the accused was beating the deceased on the head with the stick. PW 2 went back to the village and woke up other villagers to inform them about what he had just witnessed. A short while later the accused arrived and informed him that he was going to hand himself over to the Chief about beating the deceased. PW 2 testified that when he together with other villagers attended the scene they discovered that the deceased had already died. The police were accordingly informed about the incident, and they attended the scene of crime.

[8] Detective Sergeant Mokone who was part of the investigating team attended the scene of crime. He found the corpse of the deceased lying on the ground covered in bushes. He examined the corpse; its skull was fractured, as well as the jaws; the deceased had an open wound on the back of the head; an open wound on the mouth, and four wounds on the chin; an open wound towards left eye; bruises on the right side of the face; two wounds near the ear of the right side; bruises on the chest and stomach area. Cross-examination of PW 3 was aimed at establishing that his testimony on the external injuries is inconsistent with the pathologist report, and this is what transpired.

“Q: As part of your evidence you are saying that you had occasion to find that the deceased had fractured skull and jaws as well?

A: It is so

Q: But according to medical record which I do not oppose the doctor found only the fractured skull?

A: I am talking about what I found

Q: I also like to tell you that according to post mortem report the jaws were found only to be swollen not fractured?

A: I found the jaws fractured when examining the body

Q: Am I correct that you found four open wounds on the deceased’ chin?

A: It is so

Q: But again according to the doctor he did not find those four open wounds, but one abrasion?

A: When examining the body I saw open wounds

Q: Are you aware that before the murder there was some chasing?

A: I was not aware that before the murder there was some chasing

Q: The accused says I must tell you that at some point in time the deceased fell that's why he had abrasions not that he assaulted him?

A: That was his explanation that he assaulted the deceased.

.....

Q: In your evidence in chief you told the court that you found that the deceased had wounds on the left eye and the ear?

A: I don't know what the doctor found."

[9] Clearly PW 3's evidence on the extent of external injuries on the deceased is inconsistent with that of the pathologist who examined the deceased barely three days after the latter's demise, in my view, surely the wounds would clearly have been visible. It is surprising that PW 3 would observe an open wound on the back of the head when the pathologist observed none. I therefore, find pw3's observations as regards the extent of external injuries unreliable.

[10] The accused testified in his defence as a sole witness for the defence. He testified that the deceased was in a known romantic relationship with his wife. He had tried on previous occasions to have the deceased's parents mediate but to no avail. On the day in question while on his way to work in the company of one Retšelisitsoe, the accused bumped into the deceased and his wife, in the veld, locked in romantic hug, with the latter's shirt pulled above the breasts. Upon realizing that the accused saw them, the deceased fled. The accused called upon the deceased to stop, but he continued to run. The accused chased after him and he stopped. He says the deceased asked for forgiveness, whereupon he told the former that he would forgive him, but they should first go to the chief to intervene. As they were calmly walking and the deceased was in front, the deceased pulled out a knife and attacked him. The accused tried to parry the blow using his stick. The deceased charged at him but he retreated. As the accused retreated, the deceased ran away and fell into the donga. When the deceased came out of the donga he again charged at the accused and as there was a contour he could not retreat any further. He stood his ground and hit the deceased with the stick on the right side of the head once. As the deceased was still charging at him he again hit

him on right cheek with the stick, once. After being hit on the cheek the deceased ran away, and tripped over maize stalks and fell. The accused says after the deceased had fallen down he did not approach him, but instead went to report to the chief that he found the deceased with his wife.

[11] To the extent that the accused seems to suggest, contrary to PW 1's evidence, that after retrieving the deceased from the donga they walked calmly headed to the chief's place, this version falls to be rejected as untrue. It is an uncontroverted evidence of PW 1 that as the accused was chasing the deceased, the latter fell into a donga, and that the accused arrived, put the stick he was carrying down, climbed down the donga to retrieve him. As the accused ushered the deceased out of the donga the latter attacked the former with the knife, and the former defended himself by hitting the deceased with the stick on the head, and the deceased fled and was brought down by maize stalks. It is untrue that the accused had walked calmly with the deceased to the chief's place.

[12] It is trite that in criminal matters, a duty is cast on the crown to prove its case against the accused beyond a reasonable doubt. The accused's version can only be rejected if it is false beyond a reasonable doubt. If, on the flip side, the accused's version is reasonably possibly true, he is entitled to be acquitted. The lack of truthfulness or improbability of the accused's version cannot and should not be the basis for his/her conviction, he/she can only be convicted if his version is so improbable that it cannot reasonably possibly be true. This position was aptly stated by Ramodibedi J (as he then was) in ***Rex v Lepogo Sehoehla Molapo 1997 – 98 LLR 208 at 237:-***

“Now the law as I have always perceived it to be is not whether the accused's explanation is true but whether it may possibly be true. That is the real test. Conversely the test is not whether the court subjectively disbelieves the accused. Indeed the court does not even have to reject the case for the crown in order to acquit the accused. That remains so even where the case for the crown is overwhelming against the accused. The court must still determine whether the defence case is so demonstrably false or inherently so improbable as

to be rejected as false. It is also pertinent to bear in mind that in embarking upon this exercise it is wrong approach to reject the accused's explanation merely because the court is satisfied as to the reliability of the witness for the crown. It is only after the merits and the demerits of the two sides have been analysed and weighted together with the probabilities of the case that a court would be justified in reaching a conclusion one way or the other regarding the question whether the crown has proved its case beyond a reasonable doubt. Authorities in this regard are indeed legion.

See for example *S v Singh* 1975 (1) SA 227 at 228 per Leon J (now Judge of our Court of Appeal)

S v Kubeka 1982 (1) SA 534 at 537

S v Jafta 1988 (2) S.A 84

S v Munyai 1986 (4) SA at 714

Indeed in *R v Difford* 1937 AD 370 at 373 Watermeyer AJA succinctly stated the law in the following words:

‘It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be 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.’

Davies AJA reaffirmed the legal position in *R v M* 1946 AD 1023 at 1027 in the following words:

‘...The court does not have to believe the defence story, still less in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.’ ”

[13] The accused's defence is one of private defence. It is however important to recall that the accused is the one who initiated the attack on the deceased upon

finding the latter with his wife in a romantic act. The accused most likely fuelled by anger, decided to chase after him. The fact that the accused made this finding does not clothe his conduct of chasing the deceased with lawfulness. It was unlawful for the accused to have chased the deceased. It is trite that a person cannot invoke the defence of private defence where the attacked person respond to the unlawful attack of the person who initiated it, however, there are exceptions to this rule, and these were stated as follows:

“The general rule is thus that the person who initiates the unlawful attack cannot invoke private defence in responding to the defence of the victim. However, there are exceptions to this rule. First, where the defence exceeds the bounds allowed by the law, the right of private defence, cancelled by the original unlawful attack is, as it were, reinstated by the excessive defence by the original victim.

The other case is where the original aggressor withdraws from the attack thus, as it were, terminating the unlawfulness of his original attack and restoring his right to act in private self-defence. A defence initiated at this stage by the victim might well not be lawful (since it would involve retaliation rather than defence). The aggressor would be entitled to defend himself from the defence.”

(Jonathan Burchell and John Milton, *Principles of Criminal Law* 2nd Ed. Juta p.p. 143 – 144). In *Rex v Raphalana Matsoso (unreported) CRI/T/56/1968* as reported in *Criminal and Procedure through cases by M.P Mofokeng (1997, Sesuto Book Depot)* at p. 57, C.J Jacobs had this to say:

“Although originally the aggressor, the accused had been overpowered by the deceased and probably realized that he had bitten off more than he could chew. He no doubt panicked at that stage and thought that his knife should be resorted to. I do not say that an aggressor who is losing the fight which he had started can never kill to protect himself but I think the law expects of such a man to be more careful before he resorts to such action...”

[14] With the above principles in mind I revert to the facts of this case. When the accused accidentally bumped into his wife and the deceased engaged in romantic hug and with her T-shirt pulled up exposing her breasts, this clearly provoked him into action. He approached the two lovers and when his presence was noticed, the deceased feigned an attack and sped away. The accused gave a chase. As much as he felt provoked it was clearly wrong for the accused to have chased the deceased with the intention of catching him, only God knows what his intentions for wanting to catch him were. Accused gave a chance and as a result of this, out of utter panick and fear, the deceased fell into the donga. The accused caught up with the deceased while the latter was stranded in the donga. The accused put the stick he was carrying down. He says his intention for wanting to catch the deceased was so that he could present him before the chief, for the latter to mediate the issue of the deceased having an adulterous relationship with his wife. I find this expressed motive fantastic. It is hard to imagine a man catching another man in a sexual act with his wife wanting to catch his wife's lover only for the sole purpose of presenting him to the chief. However, be that as it may, the resolution of this case turns on whether the deceased exceeded the bounds of self-defence thereby entitling the accused to defend himself by hitting him with the stick once on the right side of the head and once on the right jaw. First of all, the version of the accused that the deceased attacked him while they were walking calmly towards the chief's place where mediation was to be sought, is false. This version of PW 1 that after the deceased had fallen into the donga, the accused put the stick he was carrying down and climbed down the donga to retrieve the former is the correct one. It was during the ushering of the deceased out of the donga that the deceased pulled out a knife and attempted to stab the accused, and that is when the need for accused to defend himself arose.

[15] Although the accused was initially the aggressor, when the deceased charged at him carrying a knife the deceased exceeded the bound of private self-defence. A knife is a lethal weapon, and the accused faced with the situation which posed danger to his life was entitled to defend himself. The allegations that the accused continued to belabor the deceased while he lay on the ground after tripping over maize stalks, as a result of which the deceased's skull was fractured is supported

by post mortem evidence. But the fact that the deceased's skull could have been fractured as a result of the pounding by the accused does not exclude the possibility that it was fractured as a result of a single potent blow of the stick as the accused was defending himself against the knife attack. It is reasonably possibly true that the deceased's skull was fractured by the single strike with a lebetlela stick when the accused defended himself against the deceased's knife attack. Lebetlela stick is quite a potent weapon, and a single blow delivered with a necessary force can cause skull fracture. In my considered view the crown has failed to discharge the *onus* that accused is guilty of murder.

[16] In the result:

- a) Accused is found not guilty of murder and is acquitted.

My assessors agree.

MOKHESI J

FOR THE CROWN: ADV. M. MAPESELA from ATTORNEY GENERAL'S CHAMBERS

FOR THE DEFENCE: ADV. CHONDILE INSTRUCTED BY K. NDEBELE ATTORNEYS

