

# **IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CRI/T/127/13**

In the matter between:

**REX**

**CROWN**

**AND**

**TELU-TSEBENG RALIKHUTE**

**ACCUSED**

Neutral Citation: Rex v Telu-Tsebeng Ralikhute CRI/T/127/13 [2021] LSHC 17

**CORAM:**

**MOKHESI J**

**DATE OF HEARING:**

**24<sup>TH</sup> ,29<sup>TH</sup> SEPTEMBER 2020, 19<sup>TH</sup>**

**OCTOBER 2020, 23<sup>RD</sup> NOVEMBER 2020**

**DATE OF JUDGMENT:**

**09<sup>TH</sup> MARCH 2021**

## **SUMMARY**

**CRIMINAL LAW: *Accused charged with murder- crown witnesses inconsistent on the critical aspect of the case- accused given the benefit of doubt and acquitted.***

**ANNOTATIONS:**

**STATUTES:**

*Criminal Procedure and Evidence Act 1981*

**CASES:**

*S v Chabalala) 2003 (1) SACR 134*

*S v 2000 (1) SACR 453 (SCA)*

*R v Difford 1937 AD 370*

*R v M 1946 AD 1023*

*S v Oosthuisen 1982 (3) SA 571 (T)*

- [1] The accused is facing a charge of murder, it being alleged that on or about the 2<sup>nd</sup> day of April 2010, at or near Ha-Moroke in the district of Berea, the said accused person acting unlawfully and with intent to kill, did assault Tlali Mafole and inflict knife wounds upon him, as a result of which the said Tlali Mafole died at Berea Government Hospital on the 07<sup>th</sup> day of April 2010.
- [2] Crown's case was anchored on the testimony of five witnesses, *viz*: Palesa Monyane (PW1), Thato Sehloho (PW2), Sebeo Ralikhute (PW3), Makara Leroi (PW4), No. 49078 Detective Inspector Nthejane (PW5) and admissions. The only admitted material is the post mortem examination report in which the forensic pathologist Dr. Mpholo recorded that the deceased was stabbed on the left side of the chest, resulting in a deep wound which extended into the left lung, causing internal bleeding and leakage of air into pleural space, causing haemopneumothorax. The incident happened at the public bar during the Easter weekend on the 2<sup>nd</sup> April 2010.
- [3] Palesa Monyane (PW1) told the court that she hails from the same village of Ha- Mosiuoa as the accused, and that on the fateful day, she together with PW2 were at the public bar at Ha-Mosili village. They were there for the sole purpose of drinking beer. While they were there, accused and his cousin Sebeo Ralikhute(PW3) arrived. Accused bought himself and PW1 beer. Accused put his bottle of beer next to PW1 and went outside. The deceased, who was in the vicinity, came into the bar and took the beer bottle which the accused had placed under the watch of PW1 and went outside with it. PW1 followed the deceased and wrested the beer bottle from the deceased and handed it over to the accused.

[4] At the moment PW1 handed over the beer bottle to the accused, the deceased hit the accused with the stick and the fight ensued. She informed patrons who in the shop/bar that the deceased was hitting the accused for his beer. She said there was commotion as a result of the fight. In that commotion the deceased went to the makeshift urinal to urinate, and that, as he was urinating- as the fight between the patrons from Ha-Moroke and Ha Mosiuoa was ongoing- the accused approached the deceased and stabbed him with a knife. After being stabbed the deceased uttered the words ‘Telu-Tsebeng has finished me!’.” She testified that at the time she was not yet drunk even though she had been drinking beer.

[5] Under cross-examination PW1 informed the court that she had consumed three quarts of beer. She told the court that when the deceased was stabbed the fight between the patrons from the two villages never stopped until the patrons from Ha-Mosiuoa were chased away. It was put to PW1 that it was improbable for a person to stop and urinate in the course of an ongoing fight. Her answer was that the deceased was too drunk. Under cross-examination, Pw1 vacillated between saying the accused stabbed the deceased while the latter was urinating, and that the accused stabbed the deceased when the latter was fleeing. This is how cross examination unfolded on this issue:

*“DC: I put it to you that during that ongoing fight which ended up with pursuing the other villager of the accused, accused is the one who fell near where they pee. The accused person is the one who fell when he was being pursued by the deceased*

*PW1: He did not fall*

*DC: How can you be sure that you are taking this court into confidence, yet you said that you normally get drunk by having 3-4 bottles of beer. That day you drank these many bottles. How can you be sure that you really saw the incident, what really happened that day?*

*PW1: I wasn't drunk my Lord.*

*DC: I put it to you that what transpired there was that, the accused stabbed Tlali in self-defense when Tlali and others were pursuing him during the fight that was going on?*

*PW1: Yes*

*DC: I put it to you that the very same incident of stabbing happened exactly on the spot where yourself was alleging that the accused went to stab the deceased?*

*PW1: Yes."*

- [6] PW2, Thato Sehloho, who was in the company of PW1 when the accused and his cousin arrived at the bar. She testified that after the accused had bought beer and went outside, PW1 came back rushing into the bar asking for help to separate the deceased and the accused as they were fighting. PW2 went outside and saw the deceased on the ground, with the accused standing next to him. The deceased was trying to get up as he was on his knees. The accused stabbed the deceased with a knife on the side which the witness could not recall.

[7] Under cross-examination PW2 repeated what she said in her evidence in chief that she saw the accused standing next to the deceased who at the time was on the ground. Asked whether she saw any other person other than the two men who were fighting, PW2 answered that she only saw the deceased and the accused. It was put to PW2, as it was to PW1, that the accused acted in self-defense as he was being pursued by the deceased. PW2 disagreed with this version of events. Even though PW2 had initially said she only saw the deceased and the accused outside, she later answered that other patrons from Ha-Mosiuoa whose names were not known to her were present though they were outside the bar. She denied that there was a fight between the patrons from Ha-Mosiuoa and Ha-Mosili as was said by PW1.

[8] As already said, Sebeo Ralikhute, PW3, is related to the accused. They are cousins. He confirmed that on the fateful day they were at the bar when PW1 hurriedly entered the bar and informed them that there was a fight between the deceased and the accused outside. He immediately went outside where he saw the accused and the deceased wrestling over the *lebetlela* stick. He intervened and ordered them to stop their fight, and they obliged. PW3 went on to urinate and smoke cigarette next to “a big poplar tree”. While there he noticed the accused charge at the deceased who was near the urinal. The accused, according to him stabbed the deceased two times until the latter fell to the ground. He said at that time he noticed that the people from his village were no longer there. He was told that they had been chased away. As he remained behind with the deceased he was warned to leave as he was going to be attacked. He left and along the way he met PW1 and PW2. He was not yet drunk as he had just arrived.

[9] Under cross-examination PW3 told the court that when he went outside after being told that accused and the deceased were fighting, he saw people sitting under what he called the 'net'. He could not identify the people as it was getting darker and therefore not visible. Under cross-examination he said he knew that his fellow villagers, Lejone and Hlaoli were injured. Asked what caused their injuries, PW3 said they were injured when being chased after the deceased was stabbed. He gathered this information after the fact. PW3 said the deceased was running away when the accused stabbed on the back. PW3 was now changing his version that the deceased was stabbed while standing to say he was stabbed while fleeing. This is how he responded to the question under cross-examination.

*“D.C. You mentioned that that the deceased was stabbed by the accused at the place where they pee. From which part was the accused coming from?”*

*PW3: Pardon*

*D.C. You said that the accused stabbed the deceased at the place where they pee. So, I am saying from which place could you describe to this honourable court, where was the accused coming from?”*

*PW3: He was coming from the back of the shop*

*DC. Was the deceased standing when being stabbed?*

*PW3. The deceased was still standing*

*DC. Can you describe how he attacked him, was it from behind or was it a confrontation from the front?*

*PW3. The deceased was running away and the accused stabbed him from the back.”*

[10] Makara Leroi, PW4, hails from the rival village of Ha-Mosili. He knew both the deceased and accused. At around 10:00 a.m. he passed by the bar where the incident took place, and at that time the deceased was already drinking beer. The deceased had asked him to buy one bottle of beer for him, which he did. He went on his journey and returned to the bar at around between 1800hrs and 1900hrs. He was standing by the counter when he saw the deceased went outside. He saw PW1 hurriedly returning into shop saying there was a fight outside. Upon going outside, he was met by the deceased who was holding his stomach saying he had been stabbed by the accused. The deceased sat down, and he supported him. He confirmed that the deceased “was very drunk.” He took the deceased to hospital.

[11] Under cross-examination PW4 said that there were many people in the forefront of the shop, and that there was commotion. As it was dark, he did not see who was fighting.



- [12] PW5, No. 49078 Detective Inspector Nthejane effected arrest of the accused. He was also present when the postmortem examination was conducted. His cross-examination did not yield anything of significance.
- [13] At the close of the Crown case, the accused applied to be discharged in terms of **S. 175(3) of the Criminal Procedure and Evidence Act 1981**. That application was refused as the court was of the view that there was a *prima facie* case of murder against him. In the result the accused elected to testify in own defense and called one Hlaoli Ntho as his only witness.
- [14] Accused confirmed all that was said by other witnesses that the incident took place at the shop-*cum*-bar. When he arrived at the bar, he bought beer for PW1 and PW3 and went outside to smoke. As he was smoking, the deceased and PW1 went outside, the former was holding a quart of Black label beer and the two were seemingly arguing. PW1 ended up snatching the said bottle of beer from the deceased and tried to hand it over to him(accused), but he refused accept it saying he did not drink that kind of beer. The deceased attacked him telling him in the process that “people of Ha-Mosiuoa were going to be beaten.” Accused says he was shown one Tekano who was coming on horseback, by Thabiso Mosehle. Mosehle told him that people of Ha-Mosiuoa were going to be attacked that day and that Tekano was bringing weapons for that purpose. As the accused was desirous of going back into the shop to get his change he could not do so as the deceased belaboured him with the stick. Accused fell to the ground, and at that time the fight had broken out between the patrons from the rival villages of Ha-Mosiuoa and Ha-Moroke. The accused tried to defend himself and to parry the blows away. The fight had gotten out of control as the accused was being attacked by one Tekano

who was holding a knife in one of his hands. The accused tried to flee for his safety, but he tripped over and fell near the urinal. The deceased belaboured him with the stick assisted by the said Tekano. The accused says PW3 came to his rescue by fighting off his attackers. He did not see the weapon PW3 was using to stave off the attack.

[15] Accused told the court that, in that commotion, in order to defend himself as he was down on the ground, he took out the knife. He told the court that “I must have stabbed someone my Lord”, and that “I was not aware as to whom I was stabbing”. He told the court that the fight did not stop, and that he fled to the nearby donga. The following day he and Hlaoli (DW2) went to report the occurrence to their village chief and were given “letters for us to go to the hospital.” Accused said he sustained injuries on the head and hands. Accused maintained that he was not aware that the person he stabbed was the deceased. He denied ever charging at the deceased.

[16] Under cross-examination accused denied that the deceased was at the urinal to urinate. The accused in one breath seemed to say he saw and did not see whom he stabbed with the knife. He however, admitted that when PW3 was being cross-examined it was put to him that he stabbed the deceased while the he (accused) was on the ground. But after acknowledging this he denied that he knew who he stabbed with a knife.

[17] DW2, Hlaoli Ntho’s testimony was unhelpful to the defense case as he narrated what happened to him personally. But like some crown witnesses he said that there were many people at the shop. He said while micturating at the urinal, somebody stabbed him on the arm and shoulder, but he could not see

who it was. He realized that his fellow villagers were fleeing from the place. He only met the accused along the way on their way back home. DW2 denied ever going to hospital with the accused as he said.

[18] **EVALUATION OF EVIDENCE:**

I now turn to consider the mosaic of the evidence as whole by determining the respective cases' strengths, merits and demerits, and their probabilities (**S v Chabalala**) 2003 (1) SACR 134 at para 15. PW1, Palesa Monyane , testified that the fight between the accused and the deceased broke out after the latter took the accused's beer and went outside with it to give to patrons who were outside the bar. But this aspect contradicts with the version of Thato Sehloho (PW2) who told the court that actually the deceased took PW1's and not accused's beer. In fact, this version was confirmed by the accused when testifying that he saw the deceased and PW1 wrestling over a bottle of beer which after the latter had succeeded wresting from the deceased's grip, tried to hand it over to the accused. Accused refused to take it saying he did not drink Black label beer. This contradiction of PW1 and PW2's evidence is not material. PW1 said after the deceased had hit the accused with the stick, she rushed inside the shop to raise alarm that there was a fight outside. She said "the people from Ha-Moroke came out of the shop and were beating Telu-Tsebeng and the fight started. That is when Tlali was peeing, Telu-Tsebeng arrived and stabbed him with a knife and ran away".

[19] Crown witnesses' evidence shows a lot of inconsistencies as regards how the deceased was stabbed: PW1 says the deceased was stabbed while micturating and that he fell to the ground after being stabbed: PW2 on the one hand says she saw the accused on his knees raising his hands when the accused stabbed

him on the side. She also said she saw the deceased being stabbed while on his knees, but this is contradictory to PW1's version of events that the deceased was stabbed while standing. Pw2' evidence on this aspect is also contradictory to that of PW3, Sebeo Ralikhute. PW3 told the court that as the deceased was near the urinal when the accused charged at him and stabbed him twice with a knife. PW3 later changed this version under cross examination to say the deceased was stabbed while fleeing.

[20] PW3, Sebeo Ralikhute was supposedly much intimate with the events which led to the stabbing of the accused. He testified that after separating the two men who were wrestling over the *lebetlela* stick, he went to urinate at a nearby poplar tree, and that while there, he saw the accused charge at the deceased and stabbed him two times. He said the deceased was near the urinal. He did not say why he was near the urinal. After stabbing the deceased, accused fled. It will be observed that PW3's evidence that the deceased was stabbed twice is inconsistent with the proven fact that he was stabbed once.

[21] PW3 gave an initial impression that the accused charged at the deceased who was standstill, but under cross examination, he changed tag to say that the deceased was running away when the accused stabbed him in the back. I do not think that from where PW3 was, he could see clearly what was happening. This is confirmed by what he says when giving evidence in chief that, after seeing the accused charge at the deceased "I went closer and found that the deceased had fallen and was helpless. I found that people from my village were no more there." It is interesting to observe that this witness had to move closer only to find that the deceased had fallen to the ground. Why could he not see from where he was, if from that position, he could see that it was the

accused who stabbed the deceased? This witness was not even aware that consequent to this stabbing there was a fight between the people from where the deceased was and the people from the accused's village. It is as if it was a shock to his system when he returned from his smoking spot to find that his fellow villagers had vanished without a warning. There is a reason why he had to step closer only to find that the deceased had fallen. It was not visible as confirmed by crown witnesses. This scenario puts the reliability of PW3's observations into question.

[22] The accused testified that as he was fleeing from Tekano who charged at him, when he dripped over and fell next to the urinal whereupon the deceased belabored him with the stick. It was put to Crown witnesses on the accused's behalf that he stabbed the deceased while he was on the ground, and that the deceased was standing, but when he testified in his own defence he said he pulled out his knife while he was on the ground. He managed to get up and stabbed one of his attackers whose identity he did not know. The accused is obviously changing the version put on his behalf to crown witnesses, and this can only be attributable to this being an afterthought. He realized the implausibility of his version that he could stab a person who was standing on the chest while he himself was on the ground. He was patching up his story as he went along. I also found the accused to have selective awareness: in one breadth he was aware that he stabbed the deceased, and in another, he was unaware of the identity of the person he stabbed with a knife. He told the court that he was injured to the extent that he went to hospital with DW2. However, DW2 denied that the accused ever went to hospital with him. Clearly, the conspectus of all these discrepancies paints a picture that the accused is a dishonest witness.

[23] PW4, Makara Leroi's evidence does not assist the court in anyway as he did not see what happened or what led to the deceased's stabbing. What he did was to only take the deceased to hospital. He however, like other state witnesses told the court the deceased was very drunk. I found him to be a credible and reliable witness.

[24] It is trite that in criminal proceedings the prosecution bears the onus of proving the case against the accused beyond a reasonable doubt, and that there is no onus on him to convince the court that the explanations he gives is true (**S v 2000 (1) SACR 453 (SCA)**). Indeed, in **R v Difford 1937 AD 370 at 373** Watermeyer AJA in well-known dicta said:

*“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 false.”*

In **R v M 1946 AD 1023** Davies AJA at 1027 said:

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

[25] Applying these principles to the facts of this case I conclude that the crown's evidence does not prove beyond a reasonable doubt that the accused is guilty of murder. In the preceding discussion I dealt with the crown witnesses' inconsistencies on the crucial issue of how the deceased was stabbed. It does not appear to me that the witnesses saw what happened; PW1 says the deceased was stabbed while urinating, contradicting what PW2 says that the deceased was stabbed while on the ground trying to get up. Thrown into the mix is the evidence of PW3 who testified that the accused charged at the deceased who was next to the urinal and stabbed him twice. I have already said that this evidence is inconsistent with one wound which the deceased sustained. On that fateful day, visibility was poor hence why PW3 could not identify the patrons who were sitting under what he called the "net". He was not even aware that the fight had erupted between his fellow villagers and their rivals from another village such that he had to be warned to leave as he was about to be under attack. After the deceased was stabbed, he even "... went closer and found that the deceased had fallen and was helpless. I found that people from my village were no more there." So, clearly PW3's power of observation was substantially handicapped by poor visibility as a result of darkness. Interestingly, under cross-examination, he said the deceased was stabbed while running away, contrary to what he said in his testimony in chief that the accused charged at the deceased who was at the time near the urinal standing still. The accused may have lied about how he ended up stabbing the deceased, but as said earlier, in criminal matters, the onus is on the Crown to prove its case against the accused beyond a reasonable doubt. The crown witnesses' inconsistencies regarding how the accused got to stab the deceased, leaves a lot to be desired. And this is the critical aspect of the case where the Crown had to prove that the accused did not act in self-defence as he

alleges. The I am guided in this approach to inconsistencies of witnesses' evidence by the decision in **S v Oosthuisen 1982 (3) SA 571 (T)** at 576 G-H , where the court said:

*“.....it is stated that not every error made by the witness affects his credibility ; in each case the trier of fact has to take into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence. No fault can be found with his conclusion that what inconsistencies and differences there were, were 'of relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction'”.*

In my considered view, the accused is entitled to the benefit of doubt given the materiality of inconsistencies between Crown witnesses' evidence to this case.

[26] The result is that the accused is found not guilty and is acquitted.

My Assessors agree.

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**MOKHESI J**

**FOR THE CROWN:**

**ADV. TLALI**

**FOR THE DEFENCE:**

**ADV. FIHLO**

**Assisted by ADV. MOTLOLI**