IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CRI/T/480/2013**

In the matter between:

REX **CROWN**

And

SEMPE BIYO **ACCUSED**

JUDGEMENT

Coram : **Hon. Mr. Justice T.E Monapathi**

Date of Hearing : **23rd March, 2021**

Date of judgement : **19th April, 2021**

Neutral citation: REX v BIYO (CRI/T/480/2013) [2021] LSHC CRI 49 (19 April 2021)

SUMMARY

INTRODUCTION

1. The Accused who is a male adult Mosotho of 69 years of age is charged with contravening Section 40 (1) of the Penal Code ACT NO 6 of 2010 in that upon or about the 10th day of November 2012 at Maphotong Matebeng in the District of Qacha`s Nek, the said Accused did unlawfully and intentionally fire a gun at one Makoko Hulane and inflicted upon him a gun wound that resulted in his death and the said Accused did commit the crime of murder and the said Accused did thereby contravene the provision of the Code as aforesaid.
2. Accused pleaded not guilty to the charge. The Crown did not accept the plea. Crown elected to lead the evidence of the three (3) witnesses namely Dumisane Hulane (PW1), Zola Hulane (PW2) and their Uncle Makoko (Hulane). And lastly was the evidence of D/P/C Thulo.
3. Most substantially it was common cause that between the Accused and the family of the Deceased (including PW1, PW2 and PW3) then was some fire plantation around lingering history of sour relationship that stemmed from ownership of the village of Maphotong, Deceased and Accused were apparently fellow villagers.
4. As it is common in this Country there will be a dispute about a family or people claiming ownership of a plantation as being belonging to someone or being an inheritance in the family on the one hand and on the other hand as being a Community plantation. Or one extreme, on the other hand, would be when someone had planted trees on a piece of land which is unallocated hence the notion that the plantation is a community plantation, or it belongs to the Chief. Some of the most fluid situation may belong to what the Deceased and the Hulane family quarrelled over. But what is evidence is that the Accused thought and felt that the trees belonged to the

community plantation which he ought to protect by virtue of being a community councillor. If not by way of ownership but by control is what on a balance of probabilities seemed to be the situation.

5. Matter of common cause was as follows. Firstly, it was not disputed that the Accused cut some trees and piled them on his compound at Maphotong village.

Secondly it was not disputed that the Decesead who was accompanied by his two brothers namely Zola Hulane and Dumisane Hulane (the brothers) went to Accused`s compound at that Maphotong village and took away the harvested trees from the disputed plantation.

Thirdly Accused had not been at his home at the time when Deceased and his brothers arrived driving a span of oxen and took away the trees (wood).

Fourthly Accused`s wife who was at home phoned the Accused and informed him of Deceased and his brother`s presence and that they were taking away the trees and drove in in a certain direction where eventually Deceased and the brothers converged fatefully.

Fifthly Accused met the brothers or the way and pleaded with them not to take the looted free to the place but to the lead Chief so that the Chief could intervene. Crown however emphasized that the Accused`s attack was to drive back the cattle in the opposite direction. Accused had left his vehicle a short distance away.

Sixthly Accused testified and showed that the Deceased and his brothers were intent on proceeding or (were not Co-operative) and ignored Accused`s plea and instead pelted him with stones. And there was no doubt that the Accused could have made the effort to want to drive back the cattle.

Seventhly of the attacking brothers, it was the Deceased who was in front advancing towards the Accused.

Eighthly Accused who happened to be a short distance away from his vehicle, as aforesaid, said he pleaded with brothers to go to the Chief`s place, then returned to his vehicle. When he returned with a gun and he fired two waning shots into the air, apparently to scare his attackers but all in vein. Meaning that the Accused attackers were not about to retreat.

Ninthly Accused fired once to the Deceased and fatally hit him on the side of one of the ears and the latter fell on his face. He died.

6. It was critical to determine whether if the Crown`s version of the facts could prevail as against the Accused`s version of events. I challenged Adv. Mathe for the Crown to show any pointer as to how the Crown`s version ought to have disbelieved. And furthermore, on what basis the Accused`s version ought to be disbelieved. It proved difficult for the Crown to pass the muster. For the Crown what was done could it safely be said that the Crown had proved its case beyond a reasonable doubt. Again, I had opined that just on the basis of what was common cause the Accused could beyond a reasonable doubt be said to have proved that he acted in self-defence.
7. Furthermore, looking at two instances that the Deceased and his brothers went to collect trees, already gathered, at the home of the Accused and that actively the Deceased prevented the Accused from to stopping the cattle and in order go to the Chief as suggested by the Accused this constituted provocation as Mr. Nthabi submitted. I respectfully agreed.
8. Accused`s Counsel argued that the salient question to be determined by the Court is whether the defence of self-defence could in the circumstances be available to the Accused. Counsel, in that direction elected the two events above as demonstrating that the Accused acted in defence of property and self-defence. The latter came into open when Accused was attacked with

stones and the brothers acted in unison. I would emphasize that it was a number of men as against the Accused who was acting alone.

9. Following from above and in support Counsel referred to the **Case of Ratsebe V REX, Criminal (Appeal NO 9 of 2003) LESOTHO APPEAL CASES 2000 – 2004** where it is said:

> *"Whether appellant`s action amounted to self-defence in murder or culpable homicide. Liability for-Mens rea-Appellant firing at an aggressive attacker and, in so doing, fatally injuring a companion of the aggressor-whether murder or culpable homicide committed. It was held with regard to the charge of attempted murder, that from circumstances of the aggressive and abusive conduct of the two men towards the young appellant at night, and the attempt of the one aggressor to disarm him, the appellant was justifiably threatened for his life, and that, when he fired the one shot, he acted in self-defence without any opportunity for a warning shot and without exceeding the legal bounds of such defence. Consequently, the appellant should have been acquitted of attempted murder."*

In addition, Accused`s Counsel emphasized, as he submitted that the Accused`s warning shots failed to scare away his attackers who kept on advancing, he had no option but Accused was left to act as he did. I have already said that on the facts I took the Accused`s version as the most credible one. I would remark that the few witnesses who were relatives were the only witnesses in that area of the village when one wishes that, that there could be none witnesses but quantify that the way the places or villagers were not explained to the count. We have to *make do wite* available evidence.

10. I accordingly agued (as was submitted) that the Accused`s warning shots failed to scare his attackers who kept on advancing and had had no option

but to act as he did. In addition, I observed that from the very commencement of the case the defence have kept its defence as secret. And the Accused`s defence was put to the Crown witnesses whose evidence was feebly and glibly disputed.

11. In this case, as I believed the Accused`s Counsel self-defence it was not at all much as was in **CHABELI V REX, CRIMINAL APPEAL NO 9 OF 2007**, where the Court said:

> *"…that on the evidence the appellant had exceeded the bounds of self-defence against the deceased`s aggression"*

12. In the circumstances I concluded and found that the Accused is not guilty, and he is discharged.

    My Assessor agreed.

T. E. MONAPATHI

_____

JUDGE