

**CRI/T/0056/2018**

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**In the matter between:-**

**REX**

**vs**

**PITSO MOHAJANE**

**CORAM : HON. T. MATOOANE A.J.**

**DATE OF JUDGMENT: 24<sup>TH</sup> FEBRUARY 2022**

**JUDGMENT**

**Natural Citation:- Rex vs Pitso Mohajane (CRI/T/0056/2018) LSHC 35**

This is a case of murder against the accused Pitso Mohajane a male adult Nazareth at Ha Nkhema about the unlawful and intentional killing of **Christopher Anowaza** a Nigerian male on the 2<sup>nd</sup> January 2017.

The accused pleaded not guilty to the charge and the plea was not accepted by the Crown.

PW1 **Selebalo Masokela** testified that, the accused, the deceased and himself worked in adjoining or nearby stalls at Lepoqong Taxi Rank in Maseru. His evidence was that he did not witness the actual death of the deceased. He only heard noise outside the business stalls. He heard that the deceased had been stabbed to death by the accused. He saw the accused going to the Pitso Ground Police Station accompanied by Moruti who operated a stall nearby. He never saw the deceased again. There was no cross examination by the defence.

The Crown and the defence agreed to admit the evidence of certain witnesses as follows: PW2 **Kelechi Ashilony**. Who identified the deceased body at hospital before the Post-mortem performed.

Post-mortem report by **Doctor Phakoana** which was done on 6<sup>th</sup> January 2017. Which describes the caused of death as the perforation of the right ventricle of the heart due to a stab wound on the left side chest.

PW3 is No,10495 **Detective Lance Sergeant Seeko** a Police Officer Stationed at Pitso Ground. Who went to the mortuary at 9.30am on 2<sup>nd</sup> January 2017. At the mortuary he examined the body of the deceased. The body had a wound on the left side of the chest next to the left breast.

PW4 No. 9211 **Lance Sergeant Tsehlana** a member of the LMPS, stationed Pitso Ground who met the accused at around 8.30 am at the Pitso Ground Police station. Where he surrendered himself and handed over a brown okapi knife. The accused gave an explanation and was given a charge. The knife was handed in as Exhibit 1 and admitted by the defence.

Lastly, the Crown handed in a statement made by the accused at Magistrate Court before **His Worship Mr Mojaje** on the 2<sup>nd</sup> January 2017. The statement was admitted as freely and voluntarily made and without undue influence. The only objection was that the statement was not confession as it was equivocal as opposed to an unequivocal admission of guilt unequivocal.

In this statement, accused stated clearly that “*he made a mistake which was not intentional.*” However, admitted that he stabbed the deceased. See **Rex vs Becker 1929 AD 121.**

The Crown then closed its case. The accused gave evidence on his behalf. He testified that on that 1<sup>st</sup> day of January 2017, in the morning hours, he was at his home at Nazareth. He was in the company of his wife.

The wife received a number of phone calls which she kept on dropping. Meaning she cut the calls without answering.

The accused inquired about, the identify of the called, but the wife stated that she did not know the caller. The accused then asked why she was not taking the calls. The wife replied that she had no airtime. The accused then gave the wife his phone and asked her to return the call, which she did.

Its then that he heard the voice of the deceased who addressed the wife by her maiden names and wanted them to meet. The wife kept on asking the caller who he was. She then dropped the call and pretended as if the airtime on the phone has expired. The husband told her that there was still airtime in the phone. Finally, the wife admitted she had a love affair with the deceased.

The accused then phoned the wife's parents informing them about the new developments. Seeking their intervention. He was informed that they were unable to attend immediately because of an ancestral ceremony that was going on at their home.

The following day, the accused came back to Maseru and went to his workplace at Lepoqong Taxi Rank. He opened his stall at 8.00 am as usual. Shortly thereafter he was called out of his stall by the deceased and they met outside near their stalls which were adjourning.

The deceased told him that he had called his wife in order to send her to a client of his, who resided in Nazareth.

The accused told the deceased not to waste his time and tell him the truth. The deceased insisted on his version.

The accused told the deceased that he was no longer interested in the story and turned away towards his stall.

He testified that the deceased then grabbed him in a rough manner and insisted that they continue their conversation.

The accused then struck the deceased with a first. The deceased retaliated by punching back. The accused fight ensued between the parties whereby fists blows were exchanged between the parties. The accused finally fatally stabbed the deceased during their scuffle.

After the stabbing, the deceased walked away towards the taxi rank. The accused then went the Police station to hand himself over.

The accused was cross-examined by the Crown on whether he had intention to kill the deceased after discovering the love affair. The accused replied that the fact that he had already reported the matter to the wife's family, quelled his anger as he

hoped that the matter could be solved. That is why he did not approach the deceased or confront him.

It is clear from the foregoing that there was no evidence of how the stabbing happened. The Crown did not call any witnesses of the actual fight, which led to the demise of the deceased. However, from the accused own evidence it is clear that the deceased bore no dangerous weapon which could pose a mortal danger to the accused, during their fist fight.

On the other hand the deceased had called the accused. He tried to fool the accused by falsifying the reason why he called the latter's wife. This clearly irritated the accused. The deceased could not let him go after he said he was not interested in the topic any more. The deceased grabbed him in the manner which the accused did not like. The retaliation of the deceased may have infuriated him. The deceased was stabbed only once but at very vulnerable spot of the body.

The issue is whether a verdict of murder is justified in the circumstances. In the case of **Phumo vs Rex LAC 1990 – 1994** at page **146 at 148 Browde JA** quoted with approval the case of **S v Sigwahla 1967 (4) SA 566 at 570** where **Holmes J** said

*“The following proposition is well settled in the country.*

1. The “intention to kill” does not in law require that the accused should have applied his will to compassing the death of the deceased, it is sufficient if the accused objectively foresaw the possibility of his act causing death and was reckless of such result. This forms the intention known as **dolus eventualis** as distinct from **dolus directus**.
2. The fact that objectively the accused ought reasonably to have foreseen such a possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of homo paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. **The factum probandum is dolus not culpa** these two concepts never coincide.
3. Subjective foresight like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can be reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively, the accused did not foresee, even though reasonable to have done so, and even if he probably did so. See **S v Malunga 1963 (1) SA 692 at 694 G** and **S v Nkombani 1963 (4) SA 877 at pp.883 A.C. 890 B 895 F**. “See also **R v Selibo LAC 2000 – 2004 p. 977**.”

CF:- **Ratsebe v Rex LAC 2000 – 2004 835 at 838 EFG**. The same concepts are discussed per **Kumbleben AJA** (as he then was).

Taking the evidence holistically, the scenario that emerges is that the Crown has failed to prove that the accused had “a *subjective intent*” to kill the deceased.

However, the killing of the deceased was unlawful, on the basis that it was foreseeable in the circumstances. The attack with a knife on the left side of the

chest had the high probability of causing fatal injury and the accused, should have foreseen it See **Ratsebe** (supra) at *pages 838H to 839A*.

The accused is accordingly found guilty of Culpable homicide due to his negligent conduct.

### **Mitigation**

Mr Malefane asked the Court to consider the following factors:

1. That the accused was a first offender
2. The matter has hung over him for five (5) years
3. The accused is married with three (3) children of very tender age and he is the sole bread winner of the family.

He is an illiterate street vender selling traditional medicine

He surrendered himself and the weapon to the police immediately to show to remorse. The deceased had provoked him by having an affair with his wife.

The deceased lied about the call and aggressively tried to force the accused to discuss the unpalatable topic



On the other hand the use of a knife in a fist fight was uncalled for. The accused was a relatively mature man who should have known better given the circumstances.

That taking away the life of one human being was a loss to the family.

The Court should strike a balance between the interest of the accused and the public. The accused is sentenced to a Term of five (5) years in prison – one (1) years suspended for three (3) years.

My Assessors Agree.

The okapi knife should be destroyed by the police.

**T. MATOOANE**

**ACTING JUDGE**

**For Crown : Ms M. Mapesela**

**For Defence : Mr Malefane**