IN THE HIGH COURT OF LESOTHO

Held at Maseru

CRI/T/0034/2022

In the matter between

REX	**CROWN**

And

KHOTHATSO MOKHUPI	**1ST ACCUSED**
KHUPISO PAKI	**2ND ACCUSED**
MOREKA NTSEMA	**3RD ACCUSED**
KHOMO MAFIKE	**4TH ACCUSED**
RETHABILE NTOA LEFATSA	**5TH ACCUSED**

Neutral Citation: Rex vs Khothatso Mokhupi & 4 Others [2023] LSHC 34 Crim (09th March 2023).

CORAM : T.J. MOKOKO J

HEARD : 08TH MARCH 2023

DELIVERED : 09TH MARCH 2023

SUMMARY

Murder – Crown failing to prove beyond reasonable doubt that the accused persons sharing a common purpose, had the necessary intention to kill the deceased. Accused persons found guilty of culpable homicide- Accused persons ought reasonably to have foreseen possibility of resultant death, and that such death ensued.

ANNOTATIONS

CASES

1. *Director of Public Prosecutions v Mosae LAC 2009-2010 107*
2. *Lepoqo Seoehla Molapo v Rex LLRLB 1999-2000 316*
3. *Phumo v. R LAC (1990 -1994) 146*
4. *R v Selibo and Others LAC (2000 – 2004) 977*
5. *S v De Bruyn 1968 (4) SA 498 (A)*
6. *S v Malinga 1963 (1) SA 692 (A)*
7. *S v Mothibe 1977 (2) SA 823 (AD)*
8. *S v Mothibe 1978 (4) SA 563 (AD)*
9. *S v Nkombani and Another 1963 (4) SA 877 (A)*
10. *S v Ntuli 1975 (1) SA 429 (A)*
11. *S v Rabie 1975 (4) SA 855(AD)*
12. *S v Sibiya 1973 (2) SA 51 (AD)*
13. *S v Sigwahla 1967 (4) SA 566 (A)*
14. *S v Snyman 1968 (2) SA 582*
15. *S v Whitehead 1971 (4) SA 613 (A)*
16. *S v Zinn 1969 (2) SA 537 (AD)*

STATUTES

1. *Penal Code Act 2010*

JUDGMENT

Introduction

[1] The accuseds are charged with the contravention of *section 40 (1) of the Penal Code Act 2010*, read with *section 26 (1)* thereof; in that upon or about the 26th day of December 2014, and at or near Ha Sothane in the Mokhotlong district, the said accused sharing a common intention or purpose to pursue an unlawful act together, did perform an unlawful act or omission, with the intention of causing the death of Mphuthi Mokhupi, the said accused did commit the offence of the murder of the said Mphuthi Mokhupi such death resulting from their act or omission.

Crown's Case

[2] Crown led evidence of PW1-Fusi Sotane a male Mosotho adult of Mokhotlong. He testified that on the 26th December 2014, one Tsotleho Mokhupi (the brother to the deceased), came to his house and told him that they had tied the deceased. PW1 testified that later Tsotleho Mokhupi and his companion left. PW1 and PW3 then followed Tsotleho Mokhupi to a place called Seabata pass. When PW1 arrived there, he found the deceased lying down. PW1 asked the deceased as to what was going on. The deceased replied that he was tired.

[3] PW1 testified that he observed that the deceased's face was swollen and had an injury on the hand though he could not recall which hand it was. The deceased was tied with the rope on the waist. PW1 asked the accused persons if they thought that the deceased could be taken to the initiation school in that condition. The accused persons said that there was nothing to worry about, as the deceased looked tired because, he was drunk the previous day. PW1 testified that he directed that question to A2 and A3. PW1 was permitted by the court to

leave the witness box and he pointed at A2 and A3 in the dock. PW1 testified further that he formed an opinion that the deceased could die at any time, as the deceased looked very weak. He testified further that at that time, the deceased could neither speak nor walk.

[4] PW2- Tlontlollo Joel testified that on the 26/12/2014 he was on his way to Sekoting to fasten his horse. Along the way he saw four accused persons and the deceased on horseback. The deceased's hands were tied together as well as his waist. PW2 saw the accused persons assaulting the deceased while the deceased was on horseback. The accused persons were assaulting the deceased with lebetlela stick, Sesotho stick and sjambok. After fastening the horse, PW2 went back to the accused persons as he was curious to find out what was happening. When PW2 caught up with the accused persons, they had already dismounted the deceased from the horse. PW3 asked the accused persons what the deceased had done. They told him that they were taking the deceased to the initiation school. PW3 remarked that, that was not how a person should be taken to the initiation school. They tied the deceased with the rope again as the deceased was still lying on the ground. PW2 observed that the deceased had sustained injuries on the face and on the hand. Amongst these men, the witness recognised one Ntoa, and he pointed at A3 as the man he recognised. Later, there arrived someone on horseback and the accused persons mounted the deceased on horseback, and then took khaujoaneng direction. Lastly, PW2 testified that all the accused persons before court were the same people that were with the deceased on the fateful day.

[5] PW3- Lebohang Sotane testified that on the 26/12/2014, Tsotleho Mokhupi came to his house and told him that they had tied the deceased as they wanted to take him to the initiation school. Tsotleho Mokhupi later went away. After Tsotleho's departure, PW2 and PW1 saw people assaulting someone. PW3

together with PW1 went to the scene to investigate what was happening. When they arrived at the scene, they found the deceased lying on the ground and he looked exhausted. PW3 asked Tsotleho Mokhupi if it was possible to take someone in the condition of the deceased to the initiation school. PW3 told the accused persons that no initiation school would accept anyone in that condition. PW3 testified that the deceased's face and hands were swollen. Lastly, PW3 testified that A5 and A4 carried the deceased, and he left the deceased and the accused persons there.

[6] Under cross-examination, the accused persons denied that they assaulted the deceased in any manner whatsoever. They stated that one Tsotleho Mokhupi and Matsotleho Mokhupi (brother and mother to the deceased respectively) had asked them individually to accompany the deceased to the initiation school. All the accused agreed to accompany the deceased to the initiation school. However, while they were walking along to the initiation school, the deceased changed his mind. They persuaded him to go on with the plan, as it was unculturable for him to return home at that stage. Along Seabata pass, as the accused persons were walking in front of the deceased, the deceased ran off and threw himself down the cliff. As a result of that fall, they all observed that the deceased had sustained a head injury. The accused went further to state under cross-examination, that there has never been a time when the deceased was made to mount a horse as he could walk well by himself. They denied further that anyone among them carried the deceased. The accused denied further that the deceased was ever tied with the rope on the hands and waist. They contended that the rope was in the possession of Tsotleho Mokhupi so that he could use it to tie the sheep that Tsotleho was going to use to perform the rituals for the deceased. They stated further that the sticks exhibited before court, are just normal sticks that men who live in rural communities, carry around as they go about with their daily business. The accused under cross-examination denied

that they formed an intention to kill the deceased, rather the intention was to accompany the deceased to the initiation school. The accused pleaded that the deceased sustained the injuries reflected in the Post-Mortem report, from falling down the cliff.

Defence Case

[7] All the accused persons testified in their own defence. Their evidence was to the effect that they had been requested by Tsotleho Mokhupi and his mother, to accompany the deceased to the initiation school. They all heeded that request. On the fateful day, the accused persons left with the deceased from his parental home, for Thuhloane, where the initiation school was. Things took a different turn when the deceased along the way, changed his mind about going ahead with the plan. The accused persons said they advised him that it was unculturable for him to change his mind at that stage, therefore he could not return home. When the accused persons together with the deceased were walking along Seabata pass, the deceased ran off and threw himself down the cliff. The deceased sustained amongst other injuries a head injury, which caused his death. The accused persons denied that they ever assaulted the deceased. They further denied that the deceased's hands and waist were ever tied with the rope. At all material times, the deceased was in good condition. The accused persons denied that the deceased was tied on the horse in any manner, or that he was carried by the accused persons.

Analysis of Evidence

[8] It is a matter of common cause that on the fateful day the deceased was accompanied by all the accused persons to the initiation school. That along the way the deceased changed his mind about undergoing this traditional practice. It would seem that the accused were not prepared to let the deceased go back. In

order to ensure that this mission was accomplished, the accused persons decided to force him to go on with the plan. It is without any doubt that Tsotleho Mokhupi and the accused persons tied the deceased with the rope so that they could drag him there.

[9] It should be remembered that PW2, while going about with his personal business, saw the deceased on the horseback with his hands and waist tied together. He stated that the accused were assaulting the deceased with the lebetlela stick, sesotho stick and sjambok. The evidence of PW2 that the deceased's hands and waist were tied with the rope was corroborated by Pw1. The evidence of PW2 that the deceased was assaulted is corroborated by evidence of PW1, who testified that upon his arrival at the scene he observed that the deceased's face was swollen and that he had an injury on the hand. The post-mortem report indicates that the deceased had bruises which were between 2- 3 cm long on the right leg, there were 2 bruises of about 2-3 cm long and that death was due to head injury, 3 bruises on left florum and 2 bruises on the right leg. The post-mortem reports clearly confirms that the deceased was assaulted.

[10] PW1 testified that the deceased managed to tell him that he was tired, from there the deceased was not able to speak anymore. PW1 stated that he observed that the deceased looked exhausted. PW1 had at that time formed an opinion that the deceased could die. PW1 pointed out that the deceased could not even walk due to the bad state he was in. PW2 testified that he realised that the deceased had sustained injuries on the face and on his other hand. Pw2 testified that he saw four men, who are these accused assaulting the deceased. PW3 in the same vein, testified that he saw the accused persons assaulting the deceased. PW3 testified that the deceased looked exhausted. That his face and hands were swollen. PW3 testified that all the accused persons assaulted the deceased.

[11] The testimonies of PW1, PW2, and PW3 as shown above clearly show that these accused persons are the ones that assaulted the deceased.

[12] The next question is whether the crown has established beyond reasonable doubt that the accused persons intended the killing of the deceased. In ***S v Sigwahla***[1] **Holmes JA** said:

"… the following propositions are well settled in this country:

1. *The expression "intention to kill" does not, in law, necessarily 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 form of intention is known as dolus eventualis, as distinct from dolus directus.*
2. *The fact that objectively the accused ought reasonable to have foreseen such 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 a bonus paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The fuctum probandum is dolus, not culpa. These two different 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 which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not*

[1] 1967 (4) SA 566 (A) at 570

foresee, even if he ought reasonably to have done so, and even if he probably did so. See ***S v Malinga***[2] *and* ***S V Nkombani and Another***[3]".

[13] The test in essence therefore is what did the accused persons intend and what did they foresee would be the result of the assaults on the deceased. This court holds a strong view that the intention of the accused persons was to accompany the deceased to the initiation school, as they had been requested by the deceased's mother and the deceased's older brother- Tsotleho Mokhupi. Trouble started when the deceased reneged on his undertaking to go to the initiation school. The accused persons would not let him return home, thus abort the mission. The accused persons made it their mission to drag the deceased to the initiation school no matter what. In order to ensure that the deceased reached the initiation school, the accused persons started assaulting the deceased, with the sticks they were carrying. This court cannot draw an inference that the accused persons were carrying sticks, with the murderous intent. This is so because, this court has taken judicial notice that, men who live in the rural community carry sticks wherever they go. There is no evidence further that when the accused persons gathered at the deceased's house on the fateful day, they gathered there with the intention to kill the deceased. Their common mission was to accompany the deceased to the initiation school.

[14] This court would like to align itself with the principle that the court should not adopt the role of an armchair critic, of being wise after the event. This principle was enunciated in the of ***S v De Bruyn***[4].

"*What is needed in these cases is down-to-earth reasoning with a view to ascertaining what was going on in the minds of the appellants. This*

[2] 1963 (1) SA 692 (A) at 694 G-H;
[3] 1963 (4) SA 877 (A) at pp. 883 A – C, 890 B, 895 F
[4] 1968 (4) SA 498 (A) at 507

involves looking at all facts, on the ground as it were, and allowing for human factors such as the robust truism that, when the blood is up, reason is apt to recede, or the human frailty that , when intoxicating liquor has been imbibed may do things which sober he would not do. One must eschew any tendency toward legalistic armchair reasoning, leading facilely to the superficial conclusion that the accused must have foreseen the possibility of resultant death. And one must avoid any hindsight tendency to draw the inference in question from the fact of death. One must also be careful about applying the rubber-stamp maxim that a person is presumed to intend the natural and probable consequences of his act".

For one thing, the maxim contains a deceptive blending of the subjective and objective. How far is the foreseeable the test of the foreseen? For another thing, this court has been moving away from the notion of so-called presumptions arising from selected facts, because they involve piecemeal processes of reasoning and rebuttal, See ***S v Sighwala***[5] ***(supra), and S v Snyman***[6]. The court prefers to look at all facts, and from that totality to ascertain whether the inference in question can be drawn".

[15] In the case of ***Director of Public Prosecutions v Mosae***[7], **Ramodibedi P**. stated that it is settled law, however, that the true test is whether in assaulting the deceased the accused foresaw the possibility of resultant death and nevertheless persisted regardless whether it ensued or not. If so, he is guilty of murder. If on the other hand, he ought reasonably to have foreseen the possibility of resultant death and such death ensued, he is guilty of culpable

[5] at p 569 H
[6] 1968 (2) SA 582 (A.D) at p 589 H
[7] LAC 2009-2010 107, at page 112

homicide. See ***S v Ntuli***[8]***; R v Selibo and Others***[9]. **Ramodibedi P**. stated that the Court of Appeal in the case of ***Phumo v. R***[10], [quoting from ***S v Sigwahla***[11] it was repeated the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus*, not c*ulpa*. These two different concepts never coincide.

Conclusion

[16] In summary, the relevant facts show that the accused persons at all material times, especially from the time they assembled at the deceased's parental home, had agreed to accompany the deceased to the initiation school according to the Sesotho custom. There is no doubt that prior to this, the deceased's older brother had planned to secure a sheep that would be used to perform the necessary rituals. The accused persons testified that everyone was excited about accompanying the deceased to the initiation school, as such they were reciting their individual lyrics or poems, and other people were ululating as they left in the company of the deceased. There is no doubt in the mind of the court that, at the time the deceased told the accused persons that he had changed his mind, the accused persons became frustrated and took it upon themselves that they would take the deceased to the initiation school no matter what. It was at that stage that they started assaulting the deceased, to force him to carry on with the initial plan.

[17] It follows from these considerations, in my view, that the crown failed to prove beyond a reasonable doubt that the accused persons sharing a common intention or purpose had the necessary intention to kill the deceased, either in the form of direct intention (*dolus directus*) or in the form of an indirect

[8] 1975 (1) SA 429 (A) at 437 (B-D
[9] *LAC (2000 – 2004) 977 at 979-980*
[10] *LAC (1990 -1994) 146 at 149 A-B*
[11] *1967 (4) SA 566 (A) at 570 D*

intention (*dolus eventualis*). The latter situation would obtain if the accused persons foresaw the possibility of resultant death but were reckless whether or not it ensued.

[18] Having said that, however, there cannot by any slightest doubt in my mind, on the totality of the evidence, that the accused persons ought reasonably to have foreseen the possibility of resultant death in the circumstances, and such death ensued. See ***S v. Ntuli*** (*supra*). The accused persons are therefore found guilty of culpable homicide.

[19] Adv. Thaba, counsel for the Crown submitted that the accused persons do not have previous convictions.

SENTENCE

[20] On the mitigation of sentence, Adv. Molefi Masoabi submitted on behalf of the accused persons that they are sorry that the deceased lost his life at their hands, while they were in a mission to take the deceased to the initiation school. At all times the accused persons cooperated with the police up to the last day. Every time when they were instructed to appear before court, they would appear right on time without failure. He submitted that their conduct demonstrated that they were remorseful of their actions. All the accused persons were not working except for accused No. 5 who is employed as a teacher. A2 to A4 are subsistence farmers and are bread winners for their respective families. A5 is a bread winner as his wife is unemployed. He further submitted that all the accused persons have minor children who are all dependent on the accused for their livelihoods. Accused persons are prepared to raise the head of the deceased, therefore should be given time to do so. Lastly, he pleaded that the accused persons never planned the deceased's death.

[21] On aggravating circumstances Adv. Thaba submitted that the fact that the accused persons did not plead guilty to culpable homicide, should be considered as a factor that demonstrates that the accused persons are not remorseful. He submitted further that the prevalence of the commission of this offence, in the circumstances similar to the ones in this matter is very high in the rural areas, therefore courts of law should send a strong message to others, that people should not be taken to the initiation school against their will. To deter others from doing this, the court should pass a sentence that will send a strong message to others, who think like these accused persons.

[22] In passing the appropriate sentence the court has considered that the accused persons are first offenders. It means that the accused persons should be taken as fallen angels, who should be given second chance in life. The court is cognisant of the fact that on the fateful day the accused persons had one motive, being to accompany the deceased to the initiation school. Unfortunately, things took a different turn when the deceased changed his mind about pursuing his dream. Out of frustration the accused persons assaulted the deceased. The court has taken into consideration that the accused persons have families and children who depend on them for their livelihoods. The fact that the accused persons cooperated with the police until the completion of this case, shows that the accused persons are remorseful of their actions, as well as indicating that they respect courts of law. The court has considered further that there was no premeditation of the killing of the deceased.

[23] Be that as it may, the court in passing the appropriate sentence should strive at all costs, to balance the interests of the accused and that of the society. The court has taken judicial notice of situations where people are taken to the initiation school against their will. Often, such people are killed along the way to the initiation school or at the initiation school due to unwarranted assaults. In

passing sentence in casu, the court should also demonstrate its displeasure towards forcing people to undergo initiation. The court in sentencing these accused persons has considered that the accused persons did not plead guilty to a competent verdict of culpable homicide, thus indicating that they are not remorseful of their actions and have not saved court's valuable time.

[24] However, in determining sentence where there are more than one accused persons, the principles applicable were enunciated in the case of ***Lepoqo Seoehla Molapo v Rex***[12], where **Steyn P** stated that offenders who have the same or similar degrees of moral guilt and involvement in the commission of a crime, should, in the absence of circumstances that justify discrimination, be treated equally. The court's impartiality and fairness could be seriously questioned if marked disparities between the offenders whose moral guilty is indistinguishable from one another were to occur. This court holds a strong view that the accused persons in this case had the same or similar degree of moral guilt and involvement in the commission of this offence, therefore should be treated equally.

[25] The court therefore should impose a sentence that would give expression both to the objective seriousness of the offence as well as the special personal circumstances of each accused. See ***S v Mothibe***[13]***; S v Sibiya***[14]***; S v Mothibe***[15]***; S v Rabie***[16]***; S v Whitehead***[17]***; S v Zinn***[18]**.**

Order

[12] LLRLB 1999-2000 316 at P321
[13] 1978 (4) SA 563 (AD)
[14] 1973 (2) SA 51 (AD)
[15] 1977 (2) SA 823 (AD)
[16] 1975 (4) SA 855(AD)
[17] 1971 (4) SA 613 (AD)
[18] 1969 (2) SA 537 (AD)

1. The accused persons are each sentenced to four (4) years imprisonment without an option of a fine.

My assessors agree.

T.J. MOKOKO

JUDGE

APPEARANCE:

FOR THE CROWN: ADV. THABA.

FOR THE ACCUSED PERSONS: ADV. M. MASOABI.