

IN THE COURT OF APPEAL  
HELD AT LOBATSE

Court of Appeal No. 4 of 1987  
High Court Criminal Appeal No. 31/86

In the matter between:

OLEBILE NANKHIBIDU                      Appellant

vs.

THE STATE                                      Respondent

Mr. C. L. Culubane for the Appellant  
Mr. S. A. Aiful for the Respondent

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J U D G M E N T

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Coram: I. A. MAISELS, JP.  
A. H. E. AMISSAH, JA.  
L. DE VAN WINSSEN, JA.

AMISSAH, JA:

The appellant was convicted of murder by Barrington-Jones J. There was no dispute that he had stabbed the deceased who had died as a result of the stab wound. On the face of the prosecution evidence, this was a case of homicide committed with an intent to kill or to do grievous harm. Left unanswered, it was clearly a case of murder.

The appellant gave evidence which suggested that the stab wound was inflicted either in self defence or as a result of an accident. These defences were advanced on his behalf by Counsel. There were also indications from his version of the events that the fatal wound was inflicted as a result of provocation. Although that defence was not put forward by Counsel, it was raised by the learned trial Judge and considered in relation to the facts proved by the prosecution. The result of this consideration was that the appellant was convicted

of murder.

The learned judge then looked at what extenuating circumstances there might be, concluded there was not such extenuation as would enable him substitute any other penalty for the death penalty. Accordingly the appellant was sentenced to death.

From this conviction and sentence the appellant has now appealed to this Court. With respect to his conviction two submissions were made by Counsel on his behalf. One was that there was a possibility of self defence which was not excluded by the prosecution. The other was that there was provocation to reduce the charge of murder to manslaughter.

To evaluate these arguments a brief reference to the evidence is necessary. The appellant lived in Metlolo Village with one Kekgonegile Marumoatsile as his common law wife. The deceased, Ramosarwana Dikao, also lived in the same compound with Kekgonegile's daughter Kofi. On the fatal day, the appellant had returned to the household late in the afternoon and asked that Kekgonegile should prepare some food for him as he was leaving for the cattle post. Kekgonegile, obviously suspecting that the appellant's explanation for going out that night was an excuse for visiting a girl friend, said that it was too late for the appellant to go to the cattle post. Some argument must have ensued, because Kekgonegile's uncle, Mosimanemotse who was present was drawn into the argument by the appellant, putting Ramosarwana's position to him. Whereupon Mosimanemotse made the pronouncement that no woman could tell a husband not to work.

The deceased at some stage in the argument between appellant and Kekgonegile had made the remark that there was misunderstanding between appellant and Kekgonegile. There was some evidence that this

remark was made in a loud voice. Apparently it was intended, whoever else heard it, for the appellant's ear. The appellant did hear it and took exception to it. He thereupon advanced in a threatening manner on the deceased and there is evidence that the appellant pushed the deceased. The deceased also kicked the appellant a couple of times. The evidence is not too clear on this point, but it seems as if there was some fight between the two which was broken up by Mosimanemotse stepping between them.

Later the appellant took out an Okapi knife which was in the back pocket of his trousers, drew out the blade and stabbed the deceased in the neck. This was after he had said to the deceased that he would hit the deceased with something that cut meat, or words to that effect. According to the Pathologist, from the neck, the direction of the stab wound was downwards, and towards mid-line, entering the chest cavity. Blood gushed out profusely from this wound. Mosimanemotse tried to stem it by placing a finger against the wound. But by then, as agreed, the appellant had lost too much blood to survive. He died later that day from haemorrhage and shock due to the stab injury to the neck and chest.

Meanwhile the appellant had escaped from the scene. He was later arrested while asleep that very night in the home of a woman friend of his, in another village. To this woman he had said nothing about what had transpired earlier that evening.

Some attempt was made to canvas the defence of accident before us. But the nature of the weapon, the circumstances of the case and especially the position of the wound on the body of the deceased dissipated the force of this attempt.

The case of self defence was built on the elements of the fight between the appellant and deceased, and was developed on the lines that the appellant was at the point of being overwhelmed by the deceased when the appellant drew his knife and stabbed the deceased. Of a fight of this nature there was no credible evidence whatsoever. And Counsel eventually conceded that there was no evidence to support the argument that the degree of force used was necessary on the particular case. Yet according to section 18 of the Penal Code a person is relieved of criminal responsibility for the use of force in repelling an unlawful act, only

".....if the means he used and the degree of force he employs in so doing are no more than is reasonably necessary in the circumstances."

The means used in this case, namely, a vicious Okapi knife, and the nature of the wound inflicted bore no relation to any need to repel the highest form of the alleged aggression taken on the facts given even by the accused. What is more, the learned trial judge did consider the defence and gave reasons, which were not challenged, for rejecting it.

The case of provocation was predicated primarily on the remarks made by the appellant during the argument between the appellant and Kekgonegile over whether or not the appellant should go to the cattle post that evening. Counsel sought to bolster this up with an alleged ill-treatment by the deceased of Popi, the daughter of Kekgonegile, whom the appellant claimed by custom to be in the position of a daughter. When the appellant made his statement to the Judicial Officer before his trial he gave the impression that Popi was present at the scene on the day in question and that the ill-treatment, or at least an instalment of such treatment, by the deceased took place that

very day, just before the transaction leading to the death of the deceased. This was a complete fabrication. As stated by all witnesses present that day Popi was not even in the Village. She had been staying at another Village for a while. The ill-treatment of Popi was then used as background to the feeling of resentment which the appellant must have developed against the deceased, and which in turn easily ripened into provocation when the deceased allegedly attacked the appellant before the stabbing.

Even if this story was true, and the learned Judge found that it was not, the appellant was faced with the same problem in respect to the relationship between the nature of the provocation and the response to it as he faced with the defence of self defence. Section 210(2) of the Penal Code provides that the defence of provocation

"...shall not apply unless the Court is satisfied that the act which causes death bears a reasonable relationship to the provocation."

It seems to me, as it seemed to the trial judge, that the act of the appellant complained of, namely the stabbing with the Okapi knife, bore no relationship to the provocation suggested which was capable of being described as reasonable.

The judge rejected the evidence of the appellant. The appellant had told a story to the Judicial Officer which he totally departed from in the witness box. The story in the box also appeared false to the judge. In the circumstances no one could reproach the judge for rejecting that evidence. I am bound therefore, to conclude that the conviction for murder was justified.

Counsel for the appellant has urged that we should set aside the sentence of death passed as a result of this conviction. In support of this appeal he has canvassed a number of factors all of

