

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

1. MOLEFI KHATEANE
2. ARABANG LESIAMO

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 21st day of December, 1982.

Molefi khateane and Arabang Lesiamo (hereinafter referred to as accused 1 and accused 2 respectively) are charged that on or about the 30th May, 1981 and at or near Rothe in the District of Maseru, they both or either of them, unlawfully and intentionally killed one Hlabeli Paki.

The prosecution called eight (8) witnesses to testify on its behalf. At the end of the crown case the defence closed its case without leading any evidence. The court has therefore only the crown evidence to consider and determine whether in law the commission of the crime by the accused has been proved beyond a reasonable doubt.

It appears, according to the evidence adduced by the crown, that on the night of 30th May, 1981, the deceased, Hlabeli Paki, arrived at his home at Ha Ratau in the area of Rothe in the District of Maseru from his place of work in the Republic of South Africa to find his wife, 'Makatleho Paki (P.W.2) in bed with another man, Seabata Mohloki. On his arrival the deceased knocked

2/ at the door

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at the door and asked P.W.2 to open for him. P.W.2 recognised him by his voice. However, she delayed to open the door because she was sleeping with another man in the house. When she eventually opened the door P.W.2 rushed out of the house and bumped against the deceased who fell to the ground. Seabata Mohloki then managed to escape and run away. The deceased got up and in an attempt to get hold of her followed P.W.2. He was unsuccessful and P.W.2 ran into the house of a neighbour, one 'Mankareng Mohloki. While in 'Mankareng Mohloki's house, P.W.2 could hear deceased talking at the home of one Tsotsi, another neighbour. According to P.W.2, the deceased was complaining that he had brought something (she could not follow what) for his wife and found her sleeping with another man in his own house. He was therefore going to see his relatives so that he could divorce her in their presence. When she overheard the deceased saying these words, P.W.2 decided to go and call her own father. At about 4 O'clock in the morning P.W.2 accordingly left 'Mankareng Mohloki's house for her parental home at Matukeng. I shall return to P.W.2's evidence later in this judgment.

The Court also heard the evidence of P.W.4, Tokelo Khantsi, who testified that on the night of 30th May, 1981, he was hosting a feast of head-diviners (mathuela) at his house at Ha Ratau in the area of Rothe. This is confirmed by P.W.3, Ralesika Mosao, P.W.5, Moeketsi Mokheseng, and P.W.1 Makalo Kholoane, who were present at the feast on the night in question. According to the evidence of P.W.4, 5, 3 and 1, the two accused were not only present at the feast but were assigned with the duty of maintaining peace and order at the feast. The accused were armed with sticks, exhibits 1 and 2, as they went about their duty at the feast.

Although P.W.4, who was understandably busy with his guests, did not see the deceased on that night, P.W.1, 3 and 5 assured the Court that the deceased did come to the feast even if it were for a very brief period. I see no reason to doubt them on this point. According to the evidence of P.W.1, 3 and 5, when they first saw him at the feast, the deceased was having an altercation with accused 1. The altercation resulted in a stick fight between the two men. One of the blows delivered by the deceased landed on the head of accused 1, who fell to the ground. Although they were not very far from the deceased and accused 1 as they quarrelled the witnesses did not follow what the quarrel was about.

Now that the deceased is no more, accused 1 is the only person who can put us in the light. He has decided, as it is his right to do so, not to say anything before this Court. The cause of his quarrel with the deceased is, therefore, anybody's guess. If, perhaps, he thought accused 1 was the man who had been sleeping with his wife (P.W.2) the deceased was, of course, wrong on the evidence of P.W.2. Be that as it may, the evidence of P.W.1, 3 and 5 is that after he had hit accused 1 a blow with his stick the deceased immediately left and walked away in the direction towards his house which was not very far from P.W.4's house.

According to the evidence of P.W.3, accused 2 then snatched a torch from P.W.1 and ran after the deceased accompanied by accused 1, who had got up from the ground. The evidence of P.W.1 is slightly different on this point. According to P.W.1, it was accused 1 and not accused 2 who snatched away his torch. It may be mentioned at this stage that P.W.1 has his right side eye missing. I thought because of this abnormality he might be making a mistake when he said it was accused 1 who took away his torch. His testimony was, however, confirmed by that of P.W.5 who was standing next to him when P.W.1's torch was snatched away. Moreover, the evidence of P.W.1 corroborated by that of P.W.3 and 5 is that he immediately followed accused 1 demanding the return of his torch. P.W.1 told the Court that as he left accused 1 was joined by another person who appeared from the direction of nearby kraals and that other person spoke to accused 1 asking whether they should go. He definitely recognised that other person as accused 2 by his voice. I am inclined to accept the evidence of P.W.1 corroborated by that of P.W.5 that it was accused 1 who snatched away P.W.1's torch. Even if I were wrong on this, the important thing is that there is overwhelming evidence that the two accused were definitely seen following the deceased immediately after the latter had fought with and injured accused 1.

Now, coming back to his evidence, P.W.1 told the Court that he was able to follow the two accused on that dark and rainy night because they were each holding a flash light or torch. His torch which was held by accused 1 had a bright light as its batteries were fresh. The torch held by accused 2 had somewhat dim light presumably because of its flat batteries. The evidence of P.W.1 supported

4/ by that

by that of P.W.3 and 5 is that there is a ridge between deceased's house and that of P.W.4 where the feast was held. As P.W.1 was following them, the two accused got over that ridge before him and were for a short while out of his view. As he approached the top of the ridge P.W.1 could hear the sound of breaking glasses from the direction of the deceased's house on the other side of the ridge. When he got to the top of the ridge P.W.1 saw the flashing of two torches in a field of maize adjacent to deceased's house. He went to the spot where the torches were flashing. As he approached closer P.W.1 could hear the sound of repeated blows as if something was being beaten up with sticks. He was about 50 paces away from the two people with torches when accused 1 flashed him with a torch and asked "Who are you?" He recognised him as accused 1 by his voice and the brighter light of the torch with which he was flashing him. In reply to accused 1's question, P.W.1 told him who he was and demanded his torch back. Accused 1 then said the following words or words to that effect :

"Potiane (meaning accused 2) finish quickly with this dog or else this other dog will cause our arrest."

According to him, P.W.1, then got frightened and thought it unwise to approach any further. He decided to return to the place of the feast and immediately hurried back. As he approached the place of the feast P.W.1 said he was raising an alarm by saying:

"Hey God's people here are people killing me when I demand my torch from them".

or words to that effect. There was no response to his alarm and he believed that the reason for the lack of response could have been that people thought he had again taken ill as he had been mentally sick in the past following food poisoning (sejeso). Back at the feast, according to his evidence, P.W.1 sat outside and did not report what he had seen to anybody due to his fright. When it was pointed out to him that at the preparatory examination he had told the magistrate that he did not know the reason why he could not report to anybody, P.W.1 told the Court that he was a mentally sick person when he testified before the magistrate. He had since been treated

by a Sesotho doctor and was cured from his illness.

P.W.2,3,4 and 5 told the Court that they lived in the same village as P.W.1. They were however not aware that P.W.1 was ever mentally sick at any time. I have also observed P.W.1 as he testified before this Court. There was no indication that he was a mentally deranged person. At any rate he himself told the Court that as he court/ testified before this/ he was not mentally sick. He cannot therefore be regarded as an incompetent witness in terms of Sec. 219 of Criminal Procedure and Evidence Act 1981.

I must concede that I also found it rather strange that after he had returned to the place of the feast P.W.1 took no initiative to report what he wanted this Court to believe caused him great fear. It is possible that at the time he came to the accused at the maize field next to deceased's house, it did not occur in P.W.1's mind that they were beating up a human being. He only apprehended the danger of being assaulted by the accused from the words that accused 1 uttered, i.e.

"....finish quickly with this dog or else
this other dog will cause our arrest."

He therefore returned a disappointed person as he had failed to retrieve his torch from accused 1. His story that as he returned to the place where the feast was held he was raising the alarm is most probably an exaggeration ex post facto. Indeed, P.W.3 who according to the evidence, went to look for and met P.W.1 on his way back to the place of the feast told the Court that he did not hear P.W.1 raising any alarm. I can see no good reason why P.W.3 should lie on this point and am inclined to believe as the truth his story that although he appeared sad, P.W.1 was not raising any alarm as he returned to the place of the feast. P.W.1 corroborated by P.W.5 further told the court that towards the morning hours as he sat outside the house in which the feast was held, he saw accused 2 returning to the feast. He was then holding his torch which had brighter light. P.W.1 asked P.W.5 to get the torch from accused 2. P.W.5 complied. P.W.1 then left for his home.

The evidence that the two accused were absent from the place of the feast for a substantial part of the night was confirmed by P.W.4 who testified that at about midnight he had to serve food and was expecting the two accused to assist him. They were, however, not there and it was not until towards the morning that he again saw accused 2.

Returning now to her evidence, P.W.2 testified that when she came to her parental home at Matukeng, she persuaded her father to come with her to her home as there was a quarrel between the deceased and herself. On arrival with her father at her home later that same day, P.W.2 found that her house's window panes, which were in tact at the time she ran out of the house, were broken. Inside the house she found her belongings disorderly scattered.

Shortly after that P.W.2 had the occasion to go to draw water from the village spring. On her way to the spring P.W.2 noticed the deceased lying prostrate in a maize field next to her house. She identified the deceased by the clothing he was wearing as he lay in the maize crop. P.W.2 hastily returned to the house and reported to her father and a friend of the family who had just arrived to pay a visit to the deceased. When her father came to where the deceased was lying, she heard him remarking that the deceased was no longer alive. P.W.2 got frightened and immediately proceeded on her way to Morija police station to make a report. As it was getting late, she had to spend the night at a certain village and continued her journey on the following morning. Before she came to the police station, P.W.2 met the police officer D/Tor Talime (P.W.7) who was going in the company of deceased's younger brother Motlatsi Paki, (P.W.8) and another relative. On the suggestion of P.W.7 she continued her journey to Morija Police station accompanied by the relative who had been going with P.W.7 and P.W.8 while the latter continued on their way to deceased's home

P.W.7, the police officer who attended the scene of crime told the Court that following a certain report, he proceeded to deceased's home at Ha Retau. He confirmed P.W.2's evidence that he found the window panes of deceased's house broken and the property inside the house disorderly scattered. He then went to the spot where the body of the deceased was lying in the maize field next to the deceased's house. He noticed that the pockets of deceased's trousers

7/ were turned . . .

turned inside out. On examining the body itself, he noticed that it had sustained multiple injuries on the neck, upper lip, either side of the temples, back of the head and the lower jaws were loose.

According to P.W.7, the deceased was already dead as his body was cold. He ordered that the body should be carried to the nearest bus stop. He continued with his investigations and did not accompany the body to the bus stop. He later attended the post mortem examination. He did not then notice additional injuries on the body.

In the course of his investigations at Ha Ratau, the/ P.W.7 found that two accused persons were missing from their village and their whereabouts were not known. It was only when he returned to Morija Police Station on 3rd June, 1981 that he found the accused already arrested.

P.W.6, Lt. Thamae told the Court that following a report, he proceeded to a village called Topa in a police vehicle. He found the body of the deceased at a bus stop at Topa and examined it. He noticed a wound which he thought pierced from the left lower jaw of one side through the wind pipe to the lower jaw of the other side; a wound on the left ear and a wound on the upper lip. He however did not carefully scrutinise the injuries as he was not an expert on wounds. He carried the body of the deceased in a police van to Morija Hospital for post mortem examination and it sustained no additional injuries.

Following certain information, he proceeded to Maseru Boarder Post where he found the two accused on 2nd June, 1981, they were still carrying sticks exhibits 1 and 2. Accused 1 had a fresh wound on the head just above the eye. Accused 1 claimed to have sustained the injury at a "Focho" at Thibella location in Maseru Reserve. When he asked them whether they had any money in their possession, accused 2 said he had none. Accused 1 produced only M2.49. He then took the accused in a police van to Maseru Police Charge Office where he searched them. On accused 1, P.W.6 found M2 hidden in one of the socks he was wearing. Accused 1 also handed over the M2.49 and P.W.6

8/ took altogether

took altogether M24.49 from accused 1. When accused 2 was searched, P.W.6 found M59 also hidden in one of the socks he was wearing. P.W.6 again took possession of the money. The total amount of money taken from the two accused was therefore M83.49 which was handed in as exhibit and marked exhibit 3. I think it is worth mentioning here that although deceased's pockets were found turned inside out there was no evidence that he had been carrying any money in his possession. There is no conclusive evidence therefore that the M83.49 belonged to the deceased. P.W.6 also took possession of the sticks carried by each of the accused. They were the type of heavy sticks commonly called "mabetlela" normally bought from shops. They were handed in as exhibits and marked exhibit 1 for the stick from accused 1 and exhibit 2 for the stick from accused 2.

After they had been searched at Maseru Police Station, the two accused were brought to Morija Police Station where they were subsequently charged with the murder of the deceased.

P.W.9, Dr. Moore, testified that he was the medical doctor who performed a post mortem examination over the body of the deceased on 4th June, 1981. The body was identified before him as that of the deceased by P.W.8 Motlatsi Paki. He took notes at the time of examination and basing himself on those notes prepared the post mortem examination report which he handed in as exhibit and was marked exhibit A. According to the medical evidence, the deceased had sustained multiple injuries on the right forearm, left side of the upper lip, left ear, below left side of his jaw, under the chin, on the centre of the scalp, on the back, and the left side of the neck was extremely swollen and bruised. The posterior pharynx was also extremely swollen and completely obstructed the airway. There was however, no fracture of the skull. There were also multiple fractures of the mandible. In the opinion of P.W.9, death was due to respiratory obstruction due to multiple fractures of lower jaw and trauma to the floor of mouth. P.W.9 also formed the opinion that extremely heavy blows with heavy blunt instruments such as the sticks, exhibits 1 and 2 could have been used to inflict the injuries that resulted in the death of the deceased.

Considering the evidence as a whole I am left with no doubt in my mind that after the deceased had fought with and hit accused 1 a blow with a stick, accused 1 assisted by accused 2 with whom he was responsible for the maintenance of peace and order at the feast followed him to his home.

9/ The two accused

The two accused clearly had a motive to assault the deceased because of what he had done to Accused 1. An irresistible inference to be drawn from the evidence as a whole is that the two accused, acting in concert, in fact caught up with and brutally assaulted the deceased with the sticks, exhibits 1 and 2, from his house up to the spot in the maize field next to his house where P.W.1 saw them flashing torches and where the body of the deceased was indeed later found. The inference is strengthened by accused's failure to give any evidence in their defence.

It has been argued before me that even if the court accepts the evidence that the two accused were seen beating up the deceased in the maize crop next to his house, there is no evidence that the deceased was still alive at the time. They may as well have been beating up an already dead body of the deceased. In that event, it could not be properly inferred that the deceased died as a result of injuries caused by the accused. There is no evidential basis for such hypothetical argument. All that the evidence indicates is that the accused must have caught up with the deceased and brutally assaulted him thus inflicting upon him the injuries that, according to the medical evidence, ended up in the loss of his life. I have no hesitation in rejecting the argument.

The only question for consideration by the Court is whether the prosecution evidence has successfully proved beyond a reasonable doubt that when they assaulted and inflicted upon the deceased the injuries that caused his death the accused had the requisite subjective intention to kill. It is trite law that intention is not something that can be reached by any of our senses. It is a matter to be inferred from either the words or the acts of the accused person. In the instant case, there is evidence which this court has accepted showing that the two accused have brutally assaulted the deceased on the upper part of his body. As a result of the assault the deceased sustained multiple injuries including fractures of his lower jaw and trauma to floor of mouth. The result was the obstruction of deceased's respiratory system and subsequent loss of his life. Any reasonable person in the position of the accused who brutally assaults and inflicts serious injuries on the head

10/ of another person

of another person must realise that death is likely to result. The accused were likewise aware that their brutal assault on the deceased was likely to result in death but regardless of whether or not death resulted, carried out their assault and the deceased lost his life. In the premises I come to the conclusion that the question whether the prosecution evidence has established, beyond a reasonable doubt, the accused's intention to kill must be answered in favour of the crown.

The accused are accordingly found guilty of murder as charged.

My assessors agree.

B.K. MOLAI
JUDGE

21st December, 1982.

For the Crown : Miss Moruthane,
For the Defendants : Mr. Matlhare.

CRI/T/5/82

EXTENUATING CIRCUMSTANCES

The two accused have already been found guilty of the murder of the deceased, Hlabeli Paki. The question that remains for the consideration of this Court is whether the verdict should be one of guilty of murder with or without extenuating circumstances.

In the first place, the Court is indebted to both counsel for their able addresses in this regard.

I think it is by now trite law that any fact associated with the crime which serves to diminish the moral blameworthiness of accused person for his deed, must be taken into account in the consideration for the existence of extenuating circumstances.

In the instant case there is evidence that there was beer drinking at the feast on the night in question and that the accused are people who normally drink beer. Although there is no evidence that the accused were actually seen drinking, one thing certain is that they were assigned important duty of seeing to it that the feast proceeded in a peaceful and orderly fashion. It may not be beyond imagination that the accused as important figures at the feast were offered and had taken some beer as they went about their duty. That granted, it may perhaps serve as some explanation for accused's somewhat overreaction after the deceased had arrived at the feast and had an altercation with accused 1.

There is also evidence which was adduced by the Crown and accepted by the Court that the deceased assaulted or was apparently the first to assault accused 1 who was admittedly going about his lawful duty at the feast. That was provocation on the part of the deceased. This provocation could not, however, in law serve as a factor reducing murder to culpable homicide regard being had to the distance which the accused travelled from the place where the feast was held to deceased's house where according to the evidence accepted by the Court the accused finally caught up with and fatally

12/ assaulted the

assaulted the deceased. Nevertheless the Court is perfectly entitled to consider the existence of this provocation for purposes of extenuating circumstances.

I hold the view that there are extenuating circumstances and the question whether or not the verdict should be one of guilty with extenuating circumstances must, therefore, be answered in the affirmative.

My assessors agree.

SENTENCE :

Each of the two accused is sentenced to six (6) years imprisonment.

B.K. MOLAI.

JUDGE

22nd December, 1982.

For the Crown : Miss Moruthane.
For the Defendants : Mr. Matlhare.