

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

SELLO NKETU

J U D G M E N T.

Delivered by the Hon. Mr. Justice F.X. Rooney
on the 11th day of August, 1982.

Miss Moruthane for the Crown,
Mr. Macutu for the Defendant.

On the 21st June, 1981, at Ha Senekane in the district of Berea, the accused killed a young married woman named 'Maliempoilo Lebabo by striking her on the head with an object which I would describe as a hatchet, but, which was referred to as a tomahawk or an axe by several witnesses. It is as capable of being used to chop wood as it is to hammer nails. It appears to be made of steel with a rubber handle. It measures 32.5 cm from the bottom of the handle to the top of the head. The blade of the hatchet is 8.5 cm long and the hammer knob on the opposite side is 3 cm in diameter. It weighs 925 gr.

The cause of death was cerebral contusion and damage and intracranial bleeding. In the opinion of Dr. Park, who performed the post mortem examination, the victim received one blow on the head with a blunt heavy object applied with strong force. It caused a circular depressed fracture in the parietal region of the skull 4.5 cm in diameter. The bone fragments were buried

2/ in the brain

in the brain tissues. It can be concluded that the deceased was struck with the hammer head with sufficient force to punch a hole in her skull.

It is not in dispute that the accused and the deceased were lovers and had been such for a period of some years. Their affair was continued without regard to the respective obligations of the parties. The accused's wife left him some years ago. The affair received the active encouragement of the accused's aunt 'Mamaipato Ramahata (PW.6). It was her action in reporting to the accused something that she had seen or suspected which precipitated the crisis which directly led to the death of the young woman.

When the indictment was put to the accused, he offered a plea of culpable homicide. Miss Moruthane, who appeared for the Crown, was quite willing to accept the plea. However, I was not satisfied that the evidence recorded at the preparatory examination supported the prima facie view that the accused was guilty of culpable homicide only. This Court is not bound, after an accused has pleaded not guilty to the charge to enter a plea of guilty to a lesser charge even if the prosecutor accepts it. (R. v. 'Makhethang Setai, 1980 (2) LLR 359). The trial therefore proceeded on the basis that the accused had to answer a charge of murder. The issue to be resolved was the subjective intention of the accused in striking the fatal blow. The Crown was obliged to prove that the accused intended to kill. All the circumstances had to be examined in order to discover his intention.

The evidence disclosed that on the Sunday afternoon in question, the deceased returned to the village in the company of a friend 'Malerole Lekhali (PW.2). The two ladies went together to the house of one 'Malebajoa where there was beer drinking. Among those present were Hape Phaqane (PW.3) and Lebajoa Senekane (PW 5). According to 'Malerole, Hape (who is a young man of 23 years) made advances to the deceased. He was sitting close to

3/ her and after

her and after a while he left the rondavel in which they were drinking. Shortly afterwards, 'Malerole noticed that the deceased had disappeared. She went in search of her but when she next saw her, she was dead.

Hape Phaqane (PW.3) agreed that he met the deceased and 'Malerole (PW.2) at 'Malebajoa's. He did not know either of these ladies except by sight. He denied that he paid any particular attention to the deceased. Although he admitted that at one stage he left the rondavel, he said it was to go home and fetch tobacco. In particular, Hape said that it was untrue that he went into a flat roofed house adjoining the rondavel with the deceased or that he was discovered there by the accused.

Hape said that when he returned with his tobacco, he re-entered the rondavel in order to finish his beer. The deceased and Lebajoa were present. While he was sitting there, the accused entered and having greeted them, pulled out a hatchet from his waist and hit the deceased with it. They had all stood up when the accused produced the hatchet. Hape ran out through the door and raised the alarm. Later when he went back into the rondavel, the deceased was lying on a skin covered with a blanket.

In cross-examination, Hape told the court that he ran out because the accused was coming towards him aggressively. When the accused first produced the hatchet, Hape was unsure whom he was going to strike. He denied that the deceased caught the accused by the waist before she was hit. He said that the accused had no reason to attack him or the deceased. He did not know that they were lovers.

Lebajoa (PW.5) who was present during the incident, was a poor witness. He told the Court that while they were drinking in the rondavel, the accused entered and without greeting anyone, produced an axe and "chopped a woman with it".

Although born in 1939, this witness is still unmarried. He admitted that he had been drinking that day and that his recollection of events was a little confused. He gave the general impression that he was a man who derives little from life apart from such consolations as the consumption of beer may offer.

'Mamaipato (PW.6) played an important role in the tragedy. She is very fond of the accused. She fostered his love affair with the deceased.

She told the Court that when she called at 'Malebajoa's, she observed the conduct of the deceased and Hape. She saw them go into the flat roofed house. She came to the conclusion that they had improper intentions. She observed them together and, feeling jealous on behalf of her nephew, she immediately went to inform him of what she suspected. He was at 'Mamabusa's another drinking place a short distance away. Although 'Mamaipato denied that she instigated the accused to take action in the matter, she was concerned for his interests. She explained that the deceased did not care for her own husband.

Before I consider the evidence given by the accused, I may say that I am satisfied that Hape has not been truthful when he denied that he was interested in the deceased. The evidence that he induced her to leave the rondavel and go with him to another house is overwhelming. I believe that it was Hape's intention to persuade the deceased to have intercourse with him. He has decided to deny his conduct in order to escape any measure of responsibility for what subsequently occurred. The fact that Hape gave false evidence on this score does not necessarily lead me to conclude that his evidence is totally unreliable. It has not been shown that he bears any animosity towards the accused.

The accused gave evidence to the effect that he is 48 years of age, married with four children. His eldest child was born in 1961 and the youngest in 1976. His wife returned to her maiden home the year after the birth

of his latest child on account of his persistent love affair with the deceased. He claims that he respected his lover's husband by being discreet about his affair. Although the accused received no complaints from the husband, he admitted that the deceased told him that her husband knew about her misconduct and had remonstrated with her on that account. The accused had lavished gifts upon his paramour and was jealous of her.

Earlier that day he had gone to the house of a man called Rathetsane armed with the hatchet. His purpose was to scarify a beast which was lame. After he had accomplished this task, the accused went to the house of 'Mamabusa (not a witness) to drink beer. When he was there, 'Mamaipato (PW.6) came to him and told him that his lady love was to be found with Hape at 'Malebajoa's place in a flat roofed house. She said that the door of the house was closed. All this was told to him privately while he was in the company of one Tlali (not a witness). When Tlali asked 'Mamaipato what she was talking to the accused about, she repeated the story. Tlali reprimanded her for mentioning such matters to the accused. However, 'Mamaipato persisted and said that she was jealous on his account as he had spent a lot of money on the deceased.

The accused said that for a time he ignored what had been told to him. But, his aunt kept on repeating the story until suddenly he lost his temper. He got up and walked to 'Malebajoa's house which is only about a hundred metres away.

According to the accused, when he reached the rondavel, he found Lebajoa seated alone inside. He said that there is a window opening from the rondavel into the house with the flat roof. He heard soft noises coming from within. When he asked Lebajoa who was inside, the latter replied that he did not know. He said that he opened the window a little and saw Hape "stand up from preparing his bed". He also saw the deceased getting up from the floor. When he went to the flat, he found the

6/door locked.

door locked. He shouted to them "Come out, what are you doing in there?" The door opened and Hape and the deceased came out and went back into the rondavel.

The accused continued according to my note :

"To scare her I used the axe not intending to hurt her. But I did so. Her head was in the region of my stomach, she held me firm and I tried to hit her so that she would leave. The axe is a heavy object and I did not use much force. It was not my intention to do this thing. I was not fighting with her. I wanted to fight Hape. She fell and Hape ran out of the rondavel. I killed her but not intentionally. Before this occasion, I had chastised the deceased with a small stick. I felt that I had taken liquor but I was not staggering or drunk".

In cross-examination, the accused agreed that he had lost his temper before he left 'Mamabusa's house. He insisted that he saw the couple coming out of the house and that they were not in the rondavel when he arrived. He said that he was not advancing on the deceased when she took hold of him. He had no intention of using the hatchet which he agreed was a dangerous weapon. The accused demonstrated before the Court the position which he and the deceased were at the time he hit her with the hatchet.

Now it seems to me common sense that if the deceased was grasping the accused about the waist and was pressing her head against his stomach, it would have been very difficult for the accused to have struck her at such close quarters with a force sufficient to do the damage which was done in this case. Hape denied that the deceased caught hold of the accused just before she was struck down. Although Hape was not a satisfactory witness in the respects that I have already mentioned, his version as to what occurred was far more plausible than that propounded by the accused. If the accused had wished to detach the deceased from him, he could have done so more easily and effectively by pushing her to one side. I am unable to accept that what the accused told the Court was true.

7/ The accused

The accused admitted that he is a jealous man. He was enraged by what he was told by his aunt and he was in that state of mind when he reached 'Malebajoa's place. There is a conflict of evidence as to where the couple were when the accused arrived. But, it is agreed that the actual attack on the deceased took place, not in the flat roofed house, but, in the adjoining rondavel. I am satisfied that the accused struck the deceased in a fit of rage and that the blow with the hatchet was a strong one.

What was the accused's intention at that moment? While it may be said that there is no evidence that when he struck the deceased, he intended to bring about her death, there is no doubt that he must have foreseen the possible consequences of his act and was reckless as to these consequences. I do not consider it necessary to review the many authorities which deal with what is described as subjective foresight. I have found that the accused struck this woman with a lethal weapon with a reckless disregard of the consequences. That is in itself sufficient to establish the legal intention to kill.

The killing was without provocation as that term is defined by statute in the Criminal Law (Homicide Amendment) Proclamation 1959. The deceased may have been the lover of the accused but that is all. She did not stand in relation to him in any conjugal, parental, filial or fraternal relationship. Her supposed misconduct with Hape cannot be said to be wrongful within the meaning of Section 4(a) of the Proclamation. Her relationship to the accused, however strong, their affections, remained an illicit one. The accused had no business with her and therefore he could not complain if she elected to bestow her favours elsewhere.

In the circumstances (my assessers agree with me) the proper verdict in this case is one of murder and it is entered accordingly.

8/ Extenuating

Extenuating circumstances are found because the accused acted in a rage without premeditation.

(The Judge's remarks before passing sentence form part of the record).

SENTENCE :

Ten (10) years imprisonment.

F.X. ROONEY.

JUDGE.

11th August, 1982.

Attorney for the Crown · Law Office
Attorney for the Defendant : Mr. Maoutu.