

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

MAKALO MOJAKI

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr.
Justice T.S. Cotran on 30th September 1982

The accused before me Makalo Mojaki is indicted upon a charge of murdering Ramosololi Mosebi(deceased) at or near Kena in the district of Maseru on or about 28th July 1981. The charge would have been more accurately framed if the particulars had read that the accused had inflicted grievous injuries on the deceased from which he succumbed on the 11th August 1981.

There is no evidence of, nor was any suggestion made, that there was a novus actus interveniens, either physically or medically. It is common cause that death was due to a penetrating knife wound in the chest. The deceased died after two operations were performed at Scotts hospital Morija to save his life, one on admission on 28th July, and another one day before or on the day of his death.

We have two versions of what happened, one by the deceased's wife 'Malekhula Mosebi (PW2) supported by two other witnesses 'Mapolo Manyokola (PW3) and 'Matsokolo Lekhooa (PW4) and the version supplied by the accused who called no witnesses though his wife must have witnessed at least part of the events at one stage or the other.

'Malekhula the deceased's wife testifies that she has been having a love affair with the accused who is a fellow

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villager. They had known each other from childhood but the affair had been going on for about eight months prior to the events giving rise to these proceedings. On the Thursday prior to the Tuesday of the 28th July 1981 (and not two months before as the court initially understood the witness to be saying) the deceased saw her with the accused, in flagrante delicto, making love near or behind some ruins in the veld outside the village.

The deceased decided to thrash the matter out with the accused and his parents who had a joint complex but the accused parents were not unfortunately at home. The deceased asked Malekhula his wife to call the accused's wife who was then in the hut which she did, but on coming out, the accused ordered her to go back inside, which she also did. I think the deceased wanted the accused's wife to hear what he had to say.

The deceased told Malekhula to tell the accused openly that their affair was over. She did so. She says the accused denied that he had been having an affair with her and struck deceased with a stick on the head. Deceased said he had not come to fight but if the accused wanted one he can have it and retaliated by striking accused on the head. Both had sticks but accused carried a knife as well. The accused inflicted three stab wounds and one as we have seen, proved fatal. Deceased's wife Malekhula tried to intervene by standing between them raising an alarm. The accused stabbed her on the thigh. The accused has not been charged with any offence in connection with this injury but I have no doubt that she is telling me the truth that he had inflicted that injury as well.

'Mapolo(PW3) is Malekhula's "sister", in fact she was married to deceased's brother, and lived 70 yards away (pointed). Malekhula had confided her secret to Mapolo and when she saw deceased and his wife going in the direction of accused's house she surmised it was in connection with that love affair. She heard Malekhula screaming "Mapolo(accused) is killing my husband". She ran to the scene and saw the stabbing and the deceased exclaiming "why do you stab me more since you have finished me?" If this is true, as I think it is, that could not have been the first stab. She also saw

/accused

accused stab Malekhula on the thigh when she tried to intercede on her husband's behalf. Accused struck deceased again with a stick. This lady speaks of two additional small wounds on deceased, one above the eye, and one on his palm presumably when he tried to wrench the knife from accused.

'Matsokolo (PW4) says she too was at home some 80 yards away (pointed) and accused's compound was in front of her and the events took place within her sight. She heard cries and a commotion, and even before she reached the scene, she could see from the distance accused and deceased fighting. She saw accused holding both a stick and knife. She maintains she reached accused's compound before Mapolo and saw accused stab deceased, one stab, the one on the kidney region when deceased was prostrate in front of the stoep.

There are a few variations in the evidence of the three lady witnesses of course but they are the sort that one would expect when persons see events from different positions distances and angles. Deceased's wife Malekhula who was perhaps in a better position than the others. Though herself involved she confirms there was a struggle between the men on the stoep before both rolled over to the forecourt. She adds that deceased did attempt to take from accused the knife injuring his palm and actually succeeded in the sense that the knife dropped from accused's hand. A further struggle ensued over its possession accused getting hold of it first. He again stabbed deceased this time on the shoulder region.

The accused's version is completely different. He denies first of all that he had had an affair with deceased's wife, much less that he made love to her on Thursday behind the ruins which was the occasion Malekhula says the deceased saw them. The accused says that far from being the aggressor, the deceased in fact came blanketed. The deceased's wife said "My husband says he had seen us at the ruins on Thursday and he has ordered me to tell you so". When accused denied the allegation deceased instructed his wife to call his (accused's) wife from inside the hut - but when she came out accused ordered her back. Accused says he only did so because their small child was crying. Accused adds that on his wife obeying the order deceased struck him with his stick and in

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the struggle that followed deceased's blanket fell off and this revealed that he had a knife in his hand. Accused tried to get hold of both weapons and they rolled over from the stoep to the ground below, the deceased impaled himself on his own knife in the kidney region. The accused then pulled the knife with both hands and both stood up. The deceased, using his head as a weapon, banged him on the chin causing him to fall on his buttocks next to a willow tree. The deceased tried to pin him to the tree. The deceased was the stronger man. The knife was with the accused and in self-defence struck deceased twice in the region of the neck.

The three witnesses for the Crown struck us as truthful in spite of the few variations. In particular I am convinced that though the deceased may have gone to see the accused and his parents in an angry mood he carried only his stick - not the knife which was with the accused. What is possible is that accused, knowing he had done wrong, may have suspected that the deceased had come with more evil intention than he actually had, and prepared himself with the lethal weapon.

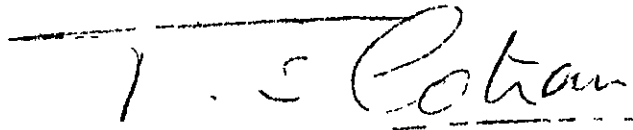
In our view the accused had the subjective intent to kill. His story that he was injured on his hand (or indeed elsewhere) during the fight is negatived by policeman No. 1 (PW 5) of Morija Police Station to whom the accused had gone to report the incident and to surrender his knife. He had been to see his own chief earlier. The policeman saw no injuries on the accused. He complained of none, and most importantly, he did not say to anyone that he was acting in self-defence, which if true, would have been the first thing said to his wife, chief, friends and the police.

We are unable to subscribe to Mr. Mlonzi's submission in the alternative that the deceased was himself an aggressor and should have complained about his wife's infidelity to the authorities and should not have gone to accused's home. It would have been wiser for the deceased not to have gone to accused's home, but that does by itself render the killing culpable homicide, though we agree they may have been some sort of provocation. There was also lack of premeditation both matters of which may be material considerations in deciding

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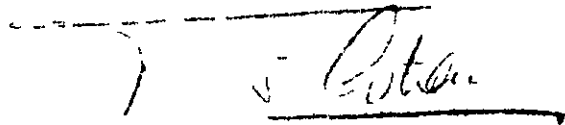
whether or not extenuating circumstances exist, but that is another matter.

We find the accused guilty of murder. My assessors agree.



CHIEF JUSTICE
30th September, 1982

Extenuating circumstances having been found on the grounds of absence of premeditation and the possibility of slight provocation the accused was sentenced to 8 years imprisonment.



CHIEF JUSTICE
30th September, 1982

For Crown: Mr. Kabatsi
For Defence: Mr. Mlonzi