IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

LEBOHANG MPAKANE

JUDGMENT

Delivered by the Hon. Mr. Justice F.X. Rooney
on the 30th day of September, 1982.

Miss Moruthane for the Crown
Mr. Ramodibedi for the defendant

The accused is charged with murder. The indictment alleges that upon or about the 11th July, 1980 at or near Likhutlong in the district of Mohale's Hoek, he did wrongfully and unlawfully and with intent to kill, assault Paseka Motlohi and inflict upon him certain wounds or injuries from which Paseka died in Mohale's Hoek Hospital on the 18th July, 1980.

A preparatory examination was commenced before Mr. E.A. Kotey (a magistrate) who on the 6th February, 1981 committed the accused for trial on a charge of murder. An indictment was presented in this Court on the 28th April, 1981 and the accompanying Notice of Trial fixed the 7th September 1982 as the date of the trial. I have been unable to obtain any explanation as to why it was decided to select a date of hearing more than 16 months after the presentation of the indictment. It is not my experience that the High Court rolls are so congested with outstanding cases that an earlier date could not have been obtained. Whatever the reason for the extraordinary delay, a direct result was that the

2/ prosecution encountered ..

prosecution encountered difficulty in presenting its evidence before this Court. Fortunately, the accused was admitted to bail shortly after his committal for trial and has been at liberty ever since.

It is provided by section 140 of the Criminal Procedure and Evidence Proclamation (now replaced by Section 141 of the Criminal Procedure and Evidence Act 1981) that a person committed for trial shall be brought to trial at the first session of the High Court for the trial of criminal cases held after the date of commitment and further that if he is not brought to trial at the first session of the Court held after the expiry of six months from the date of his commitment he shall be discharged from his imprisonment for the offence in respect of which he has been committed. The object of these provisions is to ensure that an accused person is afforded a speedy trial and that he shall not be subject to indefinite imprisonment while awaiting trial. The accused could have brought to trial during the High Court session commencing in August 1981. Since that time there has been a further completed session of the High Court which begun in February of this year.

Before the accused was asked to plead Mr. Ramolibedi submitted that he was entitled to a discharge as he had not been brought to trial within the time prescribed by Section 141 above. I rejected this contention on the authority of Van Wijk v. Attorney General Transvaal 1915 AD 733 in which Innes C.J. said at 736

> "The prisoner referred is to be discharged, not from his indictment or from liability for the crime, but from imprisonment. The legislature did not intend to constitute a prescription of rather more than 6 months for all criminal offences under such circumstances; but it declared that no prisoner should be detained in custody pending his trial for longer than the period mentioned".

The accused was on bail throughout the period and his right to be freed from imprisonment was not infringed. However, his bail bond should have been discharged automatically at the end of the first session of the

3/ High Court .....

High Court held after the expiry of 6 months from the date of his commitment. A person who is not liable to be imprisoned cannot be subjected to any manner or condition of bail. In Van Wijk v. Attorney General (supra) the Appellate Division agreed that the bail bond should be discharged. The accused in this case was thereafter permitted to attend before the High Court on a voluntary basis. If he has chosen to abscond the Court would have been faced with a new situation.

Defence counsel admitted that a post mortem examination was conducted on the body of the person named in the charge as Paseka Motlohi. In addition two depositions recorded at the preparatory examination were admitted. 'Manuku Chesa said that the deceased was the son of his sister. On the 22nd July, 1980, he went to the mortuary and identified the body there as that of Paseka Motlohi.

Thabang Chesa also knew the deceased. On the 22nd July, 1980 he identified the body. Neither of these witnesses identified Dr. H.M. de Ronde who, it is said, carried out the post mortem examination.

Counsel for the Crown applied for the admission of the deposition of Dr. de Ronde in evidence at the trial under the provisions of section 227 of the Criminal Procedure and Evidence Act. It was contended that Dr. de Ronde is outside the jurisdiction and her attendance cannot be procured without a considerable amount of delay and expense. In the alternative it was submitted that as the witness cannot be compelled to attend at the trial, the Court should exercise a discretion to admit her deposition.

Section 227 reads :

"(1) The deposition of any witness taken upon oath before any magistrate at a preparatory examination in the manner required by section 70 in the presence of any person who has been brought before the magistrate on a charge of having committed an offence, or the deposition of a witness taken in circumstances described in section 95, shall be admissible in evidence on the trial of the person for any offence charged by the Director of Public Prosecutions in pursuance of

4/ the preparatory .....

the preparatory examination at which the deposition was taken or on that person's trial before a subordinate court or on the remittal of that person's case by the Director of Public Prosecutions after considering the preparatory examination except that

(a) it is proved on oath to the satisfaction of the court that

(i) the deponent is dead;

(ii) the deponent is incapable of giving evidence;

(iii) the deponent is too ill to attend; or

(iv) the deponent is kept away from trial by the means and contrivance of the accused or is outside the jurisdiction and his attendance cannot be precured without considerable amount of delay or expense and the deposition offered in evidence is the same which was sworn before the magistrate without alteration; and

(b) it appears on record or is proved to the satisfaction of the court that the accused, by himself, his counsel, attorney or law agents, had a full opportunity of cross-examining the witness.

(2) The evidence of a witness given at a former criminal trial shall, under like circumstances, be admissible on any subsequent trial of the same person upon the same charge.

(3) Subject to the conditions mentioned in this section where the witness cannot be found after diligent search or cannot be compelled to attend, the court may allow his deposition to be read as evidence at the trial."

In support of the application to admit the deposition there was placed before the Court an affidavit sworn by Mr. M.T. Thabane, Permanent Secretary in the Ministry of Health. This affidavit revealed that Dr. H.D. de Ronde was employed by the Lesotho Government as a Medical Officer and was stationed at the Government Hospital Mohale's Hoek between the 30th January, 1980 and the 31st March, 1982. Following the completion of her contract, Dr. de Ronde applied for part time work in the Ministry of Health but, this application was refused. Attached to Mr. Thabane's affidavit is a minute dated 21st May, 1982 signed by an official in the Ministry confirming that position.

5/ Mr. Thabane went .....

Mr. Thabane went on to say :

"That consequently and as a result of this refusal Dr. H.M. DE RONDE had no alternative but to leave the Kingdom of Lesotho for her country of origin which is the Netherlands.

(7)

That to date Dr. H.M. de Ronde is not in the Kingdom of Lesotho but remains in her country of origin.

(8)

That it would be impractical for the Government to pay for her passage back here without incurring a lot of expenses and undue delays."

Also annexed to the affidavit was another minute dated 7th September, 1982 referring to the retrospective extension of Dr. de Ronde's contract up to the 31st March. There is also a reference to leave calculation. I do not know why these matters were being attended to by the Ministry several months after Dr. de Ronde's departure. A copy of a letter from the Royal Netherlands Embassy in Pretoria dated 10th November, 1981 with reference to Dr. de Ronde's work in Lesotho does not appear to me to be relevant.

I have no doubt that Mr. Thabane swore his affidavit in the honest belief of the truth of its contents. However, it is possible that he could be mistaken as to the present whereabouts of the witness. It does not follow that because Dr. de Ronde left the services of the Lesotho Government that she is no longer resident in Lesotho. This is a matter which may be in the knowledge of the Chief Immigration Officer but he has not deposed to it.

There is nothing to show that the doctor is not resident in a neighbouring country. When I was faced with a similar situation in Botswana some years ago I delt with it, in the State v. Bantumetse Lobi and Another 1974(1) Botswana Law Reports 15 at 16 :

" The second condition which must exist before the Court may exercise its discretion to admit

> a deposition is that contained in subsection (3). Either the witness cannot be found after diligent search or cannot be compelled to attend or is absent from Botswana and delay or unnecessary expense would arise if he were compelled to attend. It is the State's contention that Dr. Marrow is absent from Botswana and delay or unnecessary expense would arise if he were compelled to attend to give evidence at this trial. The only evidence led to establish this premise was that of Sub. Inspector Dube of the Botswana Police Force, an officer who was in charge of the investigation of the alleged offence. All that Mr. Dube could tell the Court was that Dr. Marrow is not now in Botswana and that he left the country after the preparatory examination was held. He was an expatriate officer in the Government service serving on contract terms. Mr. Dube said that the doctor came from somewhere in Europe, but he does not know where is now. I consider that while this evidence may well satisfy the Court that Dr. Marrow is not in Botswana today, it does nothing to establish that delay or unnecessary expense would arise if were compelled to attend. I cannot assume that Dr. Marrow is not living in some neighbouring country at no great distance from Lobatse, and that his attendance cannot be procured without either undue delay or unnecessary expense."

I saw no reason why I should adopt a different approach in the present case particularily as in terms of section 227, the Court is not vested with a discretion. It must be proved an oath that the circumstances exist. As far as sub-section (3) is concerned and where a discretion is admitted there is no evidence that the witness cannot be found after diligent search or that she cannot be compelled to attend.

Some time was taken up during the course of the trial by a consideration of the provisions of section 227 (1) (b) above. On the record of the preparatory examination, the magistrate made use of the notation "XXD - accused reserved" which I interpret to mean that at the point in the record the accused indicated that he wished to reserve his cross-examination of the witness until his trial. It was, noted that whereas at the end of the first deposition this notation appeared at its proper place, namely, at the end of the deposition and before the witness was asked to subscribe to it and before there appeared the signatures of the witnesses and the Certificate of the magistrate,

7/ in other parts .....

in other parts of the record and in particular in the case of Dr. de Ronde, the notation was not in that order. The words"XXD reserved" appear at the very end of the document after the magistrate's signature. This suggested that the magistrate may have regarded the intimation by the accused that he did not wish to cross-examine the first witness as being general in character applying to all the others.

The prosecution was unable to call Mr. Kotey, the presiding magistrate, to give evidence as to whether or not he gave the accused a full opportunity to cross-examine the witness. This was because Mr. Kotey left Lesotho just before the commencement of the trial and he is not expected to return. An attempt was made to solve the problem by calling , the prosecutor,Mr. K.A. Tsoeliane who subscribed to the deposition as a witness. Having heard that gentleman, the Court gave the accused an opportunity to give evidence contra with the result that the accused admitted under oath that he had been given an opportunity to cross-examine Dr. de Ronde.

One other matter had to be considered. It is required that the Court must be satisfied that the deposition offerred in evidence is the same which was sworn to before the magistrate without alteration. On this there was no evidence at all.

Mr. Tsoeliane who signed the deposition as a witness may have been in a position to assist but his evidence on the point was not canvassed. It follows that even if I have been satisfied that Dr. de Ronde could not be produced as a witness another essential requirement of the section was not satisfied.

I find that in practice very few magistrates add a comprehensive certificate to a deposition taken at a preparatory examination. To obviate the kind of difficulty which faced the Court at this trial I strongly recommend that judicial officers presiding at preparatory examinations should certify each deposition recorded on the following lines.

" I certify that the evidence recorded in this deposition was given by the witness under oath/ affirmation to the effect that he will tell the truth, the whole truth and nothing but the truth. The evidence was taken down in writing in the presence of the accused who was given a full opportunity to cross-examine the witness which he did/did not do. It was then read over to the witness who signified that it was correct by signing his name/affixing his mark/or thumb print thereto in my presence and in the presence of the witnesses."

Before proceeding to consider the effect on the prosecution case of the exclusion of the deposition of Dr. de Ronde who performed a post mortem examination on the body of the deceased, I make the comment that had Crown Counsel chosen to invoke the provisions of section 223(7) of the Act she might have succeeded in restoring the prosecution case to some degree.

There is evidence that the accused struck the deceased on the head with a stick or knobkerrie and the latter fell down bleeding. Some witnesses said that thereafter the accused trampled on the deceased and stamped on his head with his boots. The deceased was taken to the Mohale's Hoek Hospital and a week later was dead. Detective Trooper Letsoepa (PW.5) said that on the 18th July, 1980, he saw the dead body at the mortuary and he observed 6 stitched wounds on the head and on the left ear. He was unable to say what caused these injuries which might have been the result of surgery.

It is not incumbent upon the Crown to prove the scientific cause of death provided it is able to establish that the act that resulted in death was perpetrated by the accused. (Rex v. Fred Tekane 1980 (2) LLR 342). In Rex v. Sekati 1980 (1) LLR 213 Mofokeng J. reviewed the principle Lesotho authorities relating to the establishment of a chain of causation in homicide cases. It is unnecessary for me to quote any particular passage from the judgment. The case established the general principle that it is for the Crown to exclude the possibility of the existance of novus actus interveniens . If it fails to

9/ discharge the .....

discharge that onus then it will not have proved its case beyond reasonable doubt. There is no onus upon an accused person to establish that there was no novus actus interveniens .

It cannot be said in this case that there is direct evidence of an assault so violent that it could not but have caused immediate death. This appears to be the test as to whether or not medical evidence is necessary (Waihi and Another v. Uganda 1968 EA 278 referred to in the State v. Mokotedi 1973 (1) Botswana Law Reports 85 at 87). It does not depart from the views expressed by Cotran C.J. in R. v. Fred Tekane (supra).

In the result therefore the Crown has failed to establish beyond reasonable doubt that the accused caused the death of the deceased and he cannot be found guilty either of murder or culpable homicide.

By virtue of Section 188 (2) of the Criminal Procedure and Evidance Act a person charged with murder in regard to whom it is not proved that he caused the death of the person whom he is charged with killing may if it is proved that he is guilty of having assaulted the deceased be found guilty of an assault with intent to murder or to do grevious bodily harm or common assault.

I do not propose to review the evidence in detail. It was established that a number of persons were drinking at a rondavel where 'Manthakoana Mohlotsane (PW.1) was selling beer. There was music and dancing and it was either before or after (and probably after) the hour at which such parties are expected to close. Many people were assembled in a small rondavel which was lit by two candles placed on a table. At some point the accused and another man named Tsietsi(whose present whereabouts are unknown) entered the rondavel and the trouble began. The witnesses at the High Court were testifying about events which took place over two years previously in a poorly lit and crowded room. The general tenor of the testimony adduced

10/ in the High Court .....

in the High Court created the impression that as memories of the incident became faint with time, they were refreshed by a measure of imagination. There were inconsistances between the evidence of the witnesses and in some cases a radical departure from evidence already given at the preparatory examination. I cannot say that I am surprised at this. However, a picture emerges of the accused behaving in a violent fashion, not towards 'Manthakoana, but against her customers. At least four people were assaulted either with fists, sticks or a knobkerrie. The accused lifted a candle and peered into people's faces obviously with the intention of determining who was present. Not one witness was prepared to hazard a guess as to the cause of the accused's behaviour. There were no quarrels recorded over drinks or women or anything else. It is said that the accused was not only violent in his behaviour but in his speech, threatning to kill "a man and a woman".

'Mampolokeng Motau reported that the accused said to 'Manthakoana at one stage

> "I told you I will do something at your homestead".

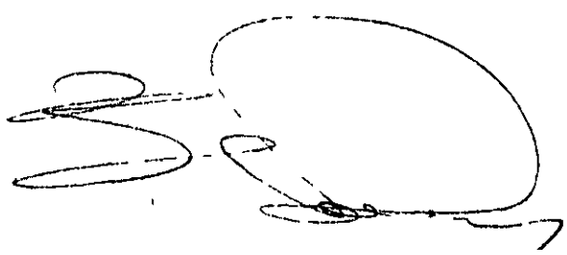
My assessors consider it possible that the eruption of the accused and his companion into the rondavel at that hour of the evening may have been prompted by a desire to suppress drinking parties of this nature which sometimes go on too late in the evening. There may be some substance in this view but there is no evidence to support it.

The accused did not give evidence at his trial either to deny the conduct attributed to him or to explain it. Although the evidence of the prosecution witnesses was unsatisfactory to the extent that I have already mentioned, there is general agreement among them that it was the accused who violently attacked the deceased and hit him on the head and caused him severe injury. This evidence stands uncontradicted and I have no reason to disbelieve it.

11/ It is a fact that .....

It is a fact that when the accused was arrested shortly afterwards by W/O Joseph Matiea no weapons were found in his possession. But, I am nonetheless satisfied that he did make use of either a stick or knobkerrie or both. The W/O told the Court that he actually saw the accused hitting a woman with a stick. Instead of arresting the accused forthwith and confisticating the weapon, he contented himself with merely ordering the accused to desist. He then went to the Police Station to fetch a vehicle to take the wounded to hospital and the accused to the Charge Office.

The accused is found not guilty of murder but guilty of an assault with intent to do grevious harm. My assessors concur in this verdict.



F.X. ROONEY
JUDGE
30th September, 1982.

Attorney for the Crown · The Law Office