CRI/T/2/82

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MEKHOA MOLULELA
MOLELEKI MOLULELA
THABANG MOLULELA

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 11th day of November, 1982.

The accused were charged with the murder of one Ramakhobotle. They pleaded not guilty.

The Crown led the evidence of Dr. Mphu Ramatlapeng who conducted an autopsy on the dead body of Ramakhobotle (hereinafter referred to as the deceased). She reduced her findings to writing. She deposed that the cause of death was due to excessive haemorrhage and subdural haemorrhage. These were due to · multiple injuries on the head, scalp fracture, fracture of frontal sinus, wound on right flank abdomen penetrating into the abdominal cavity, wound on left side of chest penetrating into the abdominal cavity, wound and pierced the ventricle (left), the left lung collapsed. She said the wounds or injuries on the chest, abdomen were caused by a sharp instrument and those on the head and related areas by a blunt instrument. The assault was savage in her opinion

The mother of accused 1 and 2 and a very close

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relation of accused 3, gave evidence next. She told the Court that she had recently fallen in love with the deceased. Her own husband was alive but was away in the mines and only came home when his contract with the mines expired. She said all three accused live with her. The deceased had paid her "visits" three times and each time he left the following day after sunrise. She was adamant that the villagers and her sons (she has a married son living in the same village) did not know about this illicit love affair. On the fourth occasion he visited, while they were actually having sexual intercourse with the deceased, the three accused came into house. She says they had knocked at the unlocked door and she actually told them to come inside. Finding the deceased in these circumstances, they told him to leave the house He dressed up and left

Hardly a week later, the deceased was again surprised inside the house, in the very act, with the mother. The accused told him to leave as their father was not at home but at the mines. The deceased, for reasons better known to him, told the accused he had visited their mother. The accused were angry that night. Their mother says for that reason she looked at them and saw no weapons with them. They went. Immediately the deceased "went after them." she said, she then heard the sound of sticks clashing as when men fight or play with sticks. She went out. Further away from her house, about ten paces she pointed, she hazely saw figures of people who appeared to be fighting.

She approached. She asked her sons to leave the deceased alone. They ignored her. She did not scream nor

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raise an alarm No other villagers came. She saw them leave and a person had fallen. She went nearer. Indeed, it was the deceased. She went back to her house. She heard the following day about the death of her lover.

When the Crown was about to call another Crown witness Mr. Matlhare, on behalf of the accused, made an application for a change of plea to one of culpable homicide. The matter being in the hands of the Courts since issue had been joined between the Crown and the accused, the Court made it quite clear that it had the sole discretion in the matter. But as a matter of practice (and a well-established one at that) the Court wished to know the attitude of the Crown. Needless to say (and for reasons the Court cannot divulge here) it was welcomed with both hands. The Court was, in fact, not surprised. However, after a brief adjournment, the Court, with the agreement of the assessors agreed to a change of plea. There were good grounds.

The plea of guilty by the accused to the crime of culpable homicide means that they admit that they, through negligence, caused the injuries which the medical doctor has deposed to. They agree, therefore, that whatever blunt instruments were used to cause injury on the head and nearby areas they were in their possession, including sharp instruments which in the doctor's opinion cause injuries on the chest and abdomen. It was dark where the assault took place so they could not have picked the sharp instrument(s) on the ground.

In his address to the Court Mr. Matlhare suggested that the Court could not refer to the record of the Preparatory Examination as that evidence was not before

/Court

Court With respect, the Court thinks he has missed the boat. That record is to inform the Court and the accused about the nature of the evidence the latter is to face. The position as I see it, is simply as follows: The accused has now pleaded guilty and that plea is a judicial confession Since this is not a summary trial, the Court is aware of the full facts from the record of the preparatory examination. It is true that a plea of guilty is not an admission of the facts stated in the depositions and yet this Court can pass sentence without hearing any evidence (See R. v. Fouche, 1958(3) S A. 767 at 774).

Now the reason why evidence is not required when an accused pleads guilty before the High Court is based on a very simple principle and that principle is this As a general rule, no criminal charge will ever be preferred against an accused person, in the High Court, unless a preparatory examination shall have been first held and the accused committed for trial, by the High Court, by the judicial officer conducting the preparatory examination In terms of section 78(1) he can only commit the accused for trial "whenever there appears sufficient reason" that is, a prima facie case for the commission of the offence has been made out by the evidence led The Director of Public Prosecutions would similarly not indict an accused in the High Court unless there existed prima facie evidence of the commission of the offence on the preparatory examination record (See S v K and Another, 1964(2) S A 539 at 540(T), Section 294(3)(b) of the Act (supra))

That principle is again enshrined in the procedure followed in applying sections 79(3) and 240(1) respectively In the former, at the close of a preparatory examination an

/ accused

an accused having been committed for sentence before the High Court if he pleads guilty again before that Court he is dealt with in the same manner. In the latter case, where an accused pleads guilty before the High Court, he may be sentenced without hearing any evidence The judge is expected to have satisfied himself that in fact accused is guilty from the perusal of the preparatory examination, and should he find that it is not so, he will order evidence to be led (C/F Rex v Filer, 1927 T P.D 667 at 670) It is therefore correct, in my view to say that where there is a preparatory examination record and the accused pleads guilty, the judge is entitled to refer to the preparatory examination in order to satisfy himself as to whether a proper and just decision has been arrived at and generally to inform itself on other matters of interest. (Rex v Filer,) (supra). A criminal trial, moreover, has been said, in the most often - quoted case of Rex v Hepworth, 1928 A D. 205, is not a game and that the trial judge is not an umpire to see that the rules of the game are observed. He is to arrive at a just decision and when he has to pass sentence, he is possessed of enormous powers in terms of section 295(2) which reads, in part ·

"295(2)

> The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself .... ."

This power, in my humble view is so enormous that it permits the Court to use the preparatory examination record to inform itself as to a proper and a just decision to arrive at although Mr Hardhare was in the legal sense partially correct yet there was some fallacy in his argument if it meant that the Court could be held at ransom by the defence by limiting its area of activity to the

/evidence

evidence of the witnesses whose had given viva voce evidence and should not look at the record of preparatory examination. Needless to say, this would be a beautiful device contrived by the defence to have the accused get out scot free. That would be a traversity of justice.

In our law provocation has been given a very generous definition S 4 of the Criminal Law (Homicide Amendment) Proclamation defines provocation as follows

> "(a) The word 'Provocation' means and includes; except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care of to whom he stands in conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.
>
> (b) For the purposes of this section the expression 'an ordinary person' means an ordinary person of the class of the community to which the accused belongs
>
> (c) Where such an act or insult is done or offered by one person to another or, in the presence of another to a person who is under the immediate care of that other or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault

The situation of the accused is akin to (c) or can find accommodation under that sub-section

The position in this case is rather unique in the sense that so ethnic contrary to Sesotho Custom has occurred namely that children of the age of the accused should ever care enter their parents sleeping hut My assessors advise me that it is never done and I have never heard of a similar situation before Be that as it may, the position of the accused is aptly summarised by the following passage

/from the

from the judgment of Rooney, J until recently on the bench of this Court, thus

> "The Sesotho family law is finely balanced between different interests Within the system each man and woman is aware of his rights and obligations and their importance. A man's standing within his family may often depend upon his assertion of his customary rights and the acceptance of his customary obligations. The man who defied established custom challenges all those who are affected by his actions The normal process for the settlement of disputes include a resort to the Court. But, where this does not provide immediate and salutary correction of an abuse of customary law the tension created may often lead to violence." (Rex v Mothebe, 1981(1) L L R 86 at 92). I entirely agree.

I hope this will put paid to Mr. Matlhare's argument that Sesotho custom has no part to play in the development of our Criminal Law. Well the Legislature has been wise enough to allow assessors to assist the judges. In any event, the law empowers the Courts before passing sentence, to call any evidence which can be of assistance to it in arriving at a just decision

The accused are still young They have no previous convictions. I take into consideration the passionate plea of their counsel. He said everything, in my view, that could possibly be said. In the final analysis, however, they have killed a fellow human being The Court has shown that they were wronged but Courts do not encourage the principle of self-help It is one of the pillars of the Rule of law that there shall be no self-help This runs like a silver thread in all countries where the Rule of law still exist

Accused 1 was twenty-one (21) years old at the commission of this crime Accused 2 was 17 years and accused 3 was 18 years They have committed a particularly bad type of culpable homicide They will be punished

/Accused 2

Accused 2 and 3 could receive corporal punishment but this Court does not believe that it has any remedial or corrective effect It produces contra results.

Accused 1 is sentenced as follows Five (5) years' imprisonment two (2) years of which are suspended for a period of two years on condition that during the said period of suspension he is not found guilty of the crime of assault for which the fine exceeds Fifty Maluti (M50.00)

Accused 2 is sentenced as follows Two years' imprisonment the whole of which is suspended for a period of one year on condition that during the said period of suspension he is not convicted of assault and the fine exceeds Fifty Maluti (M50.00).

Accused 3 is not a brother to his co-accused His position in the Molulela family would have been in jeopardy if he did not join the accused in this venture It is the Court's belief that this was the position that evening He merely obeyed the commands given to him and although he could have refused, he found it difficult to do so However, he is older than accused 2 In his case the sentence will be extremely lenient in the sense that he will not be sent to prison But the sentence will be sufficiently severe to deter him from taking another's life as if it does not matter His sentence is

> "3 years' imprisonment the whole of which is suspended for a period of two years on condition that during the said period he is not convicted of an offence involving violence to the person of another or the fine exceeds an amount of M50.00 "

My assessors unanimously agree

JUDGE
11th November 19[illegible]

For the Crown Miss Suite
For the Defence Mr Matlere