IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

1. 'MANAHANO POKI
2. 'MAKHOTSANG POKI

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 1st day of November, 1983.

The two accused have pleaded not guilty to a charge of murder on the following allegations :

> "In that upon or about the 15th day of October, 1982 and at or near Maboloka in the district of Quthing the said accused did each or one or both unlawfully and intentionally kill 'Makhang Mokoteli."

At the commencement of the trial, Mr. Moorosi, counsel for the accused, made the following submissions which were accepted by Miss Moruthane, counsel for the crown: that the defence admitted the depositions made by Dr. G. van Gelder, Mooi Mokoteli, 'Mabathepu Mopeli, D/Tpr Ntsapi, Mongamotse Khalla and Raletsoai Mosenene who were respectively P.W.1, 4, 5, 6, 7 and 8 at the Preparatory Examination. It would not, therefore, be necessary to call those persons as witnesses and their depositions could be

2/ admitted in .....

admitted in evidence at this trial. The depositions were accordingly admitted in terms of the provisions of S.273 of the Criminal Procedure and Evidence Act, 1981.

The crown called P.W.1, 'Mamontsi Mokoteli who after some initial hesitations told the Court that on 15th October, 1982, she brought food for the men who were ploughing her field at Mopeli's in the area of Maboloka. While the men were having their meal, she heard one 'Matemoho Santi and another woman raising an alarm to the effect that people were fighting at a mountain slope. Her evidence was on this point corroborated by the depositions of 'Mooi Mokoteli and Raletsoai Mosenene. They all looked at the mountain slope and noticed two women beating up a third who was between them. They were about 300 yards away from the fighting women, whom they clearly identified as the accused and the deceased. Accused 2 was facing the deceased who was giving her back to accused 1 during the scaffle. Raletsoai Mosenene raised an alarm by calling at the women, and asked what they were doing. At about that time the deceased fell to the ground and shortly thereafter, the two accused left her and ran away in the direction towards the village.

P.W.1, 'Mooi, Raletsoai and others ran to the spot where the deceased had fallen. On arrival, they found the deceased bleeding through the mouth and nostrils. She had a bleeding wound on the back of her head and another below the armpit of the left side. She was speechless.

While P.W.1 and others were attending to the deceased, 'Mooi and Raletsoai ran for the accused. With the assistance of accused 1's husband, one Koenehelo, they arrested the two accused and escorted them back to where they had left the deceased. They found the deceased already dead.

3/ After they .....

After they had admitted that they had assaulted the deceased with knives, the accused took 'Mooi and Raletsoai to their respective houses from where they produced the knives and returned to the scene of crime.

A report was sent to the chieftainess of the area, one 'Mabathepu Mopeli to whom the accused were handed together with their knives. The Chieftainess sent a report to the police and D/Tpr Ntsapi confirmed that following that report he proceeded to Maboloka where he attended the scene of crime.

On inspecting the body of the deceased, D/Tpr Ntsapi found that it had an open wound on the back of the head and another one on the left side of the chest. The two accused were handed to him together with the knives - a brown okapi knife and a silver knife respectively claimed by accused 1 and accused 2. He took possession of the knives and brought them to the police charge office together with the accused. He also conveyed the deceased's body to the mortuary at Quthing.

The deposition of Mongamotse Khalla was that, following a certain report, he proceeded to the home of deceased who was his daughter. He found his daughter dead and accompanied her body to the mortuary. Both D/Tpr Ntsapi and Mongamotse confirmed that the deceased's body sustained no additional injuries whilst it was being conveyed to the mortuary.

According to Dr. G. Van Gelder, on 18th October, 1982, he performed a post mortem examination on the body of the deceased. It was identified before him by Mongamotse Khalla and another. He found a small wound

4/ on the back .....

on the back of the head and another on the left side of the back. The latter wound had penetrated into the left lung causing a severe bleeding. He formed the opinion that a sharp instrument had been used to stab the deceased and death was due to the stab-wound on the left side of the back.

It is perhaps significant to note that none of the crown witnesses testified on how the fight between the accused and the deceased had started. The only witness who could have enlightened the Court was 'Matemoho Santi, who had testified on this point at the Preparatory Examination stage. She was, however, not available to give evidence at this trial and in his submissions, the defence counsel did not admit her deposition which was, therefore, not admitted in evidence under the Provisions of S. 273 of the Criminal Procedure and Evidence Act, supra.

In an attempt to have the deposition of 'Matemoho Santi admitted in evidence, the crown called into the witness box D/Tpr Ntsapi to testify that he was responsible for the serving of her subpoena. He had repaired to her home but could not find 'Matemoho Santi. The information he received from her husband was that after the Preparatory Examination had been completed, his wife became mentally ill and disappeared. The husband suspected that her relatives might have taken 'Matemoho out of the country for medical treatment. The Chieftainess of the area also confirmed that since January this year, she had not seen 'Matemoho in the village. As a result of another information received from an acquaintance of 'Matemoho, D/Tpr Ntsapi went to a certain place in Quthing Reserve where she was alleged to have been working. He was told that her brother who worked on the mines in the Republic of South Africa could have taken 'Matemoho to Johannesburg for medical

5/ treatment. .....

treatment. D/Tpr Ntsapi then left the matter in the hands of a certain Tpr Thelle who was, however, not called as a witness before this Court.

D/Tpr Ntsapi conceded that he had not personally checked the hospital mental health centres in this country where 'Matemoho could be undergoing treatment nor had he made inquiries at the mine recruiting offices where the address of 'Matemoho's brother suspected of having taken her to Johannesburg for medical treatment could be traced.

I was not convinced that a deligent search had been made to trace the whereabouts of 'Matemoho Santi. She may well be still in the country and available to testify in this trial. The application to have her deposition admitted in evidence was in the circumstances refused.

However, both the accused persons gave evidence on oath and told the Court that at about 11 O'clock on the forenoon of 15th October, 1982, they had decided to go and look for wild vegetables in the fields. It was customary for women to carry knives when going for wild vegetables. Accused 1, therefore, carried the brown okapi knife while accused 2 carried the silver knife. They were, however, not aware of the knive each carried as they set out for the wild vegetables.

According to accused 1's evidence which was on the whole confirmed by accused 2, while they were picking up wild vegetables in the fields, the deceased came to them and asked why they had been throwing stones at her at a stockfair party on the previous night. They

6/ denied to have .....

denied to have thrown stones at the deceased who, however, started throwing stones at them. They were about 8 paces away and could have run away but seeing that the deceased was in a fighting mood, they decided to return the fight by picking up stones which they also threw at her. One of the stones thrown by the deceased hit accused 2 on the head when she bled perfusely. They nevertheless continued throwing stones at the deceased till accused 2 came to her and they started struggling physically. In the course of the struggle, accused 2 stabbed the deceased with a knife on the body. The deceased stumbled and fell to the ground. Accused 1 then came from behind and also stabbed the deceased on the back of the head. A lot of blood came out from the deceased. They were normally scared of blood. On seeing blood coming out from the deceased, they, therefore, got frightened and ran away. They ran away because they were frightened by the sight of blood from the deceased and not because they had heard the alarm raised by Raletsoai.

I do not doubt the accused when they say it is customary for women to carry knives when going for wild vegetables. Such knives are used to pick up wild vegetables. Even if it were true, therefore, that when they first left their home for the wild vegetables, each of the accused did not actually see the knife carried by the other, they knew that they were carrying knives with which to pick wild vegetables. In any event according to the evidence of Accused 1, they were already picking up the wild vegetables when the deceased came to them. They must have openly used the knives to pick up the vegetables and had, therefore, the opportunity to see the knife each was using. The accused cannot, therefore, be heard to say during the fight they did not know that each was in possession of a knife which could be used in the assault against the deceased. Moreover, I have seen the knives

themselves. They were not of the size of a pin but ordinary long pocket knives which could not have escaped notice of the accused whilst they were being brandished in the course of the scaffle with the deceased.

In fighting the deceased, openly armed with these leathal weapons, the accused clearly acted in common purpose. Whether it is accused 2 or accused 1 who inflicted the fatal stab-wound does not, therefore, really matter for, on the principle of common purpose, they are equally liable.

The accused's story that they were normally scared of blood and had to run away from the deceased on seeing blood coming out from her is equally unconvincing. On their own evidence the accused told the court that when she was hit with a stone, accused 2 was bleeding perfusely. Like people who were scared of the sight of blood, they did not , however, run away. In my view, the truth of the matter seems to be in the crown version that the accused stopped assaulting the deceased and ran away when they heard the alarm raised by Raletsoai.

The accused agreed with the crown evidence that after they had run away, they were brought back to deceased whom they found already dead. They took 'Mooi and Raletsoai to their respective houses from where they procuced their knives. They were subsequently handed over to the police and charged with the murder of the deceased. While at the police charge office, accused 2 was referred to a midical officer who treated her injury. The medical officer prepared a report which was by consent handed in as Exh "B" in this case. According to Exh."B" compiled by Dr. Van Gelder, accused had sustained a "small wound and haemotoma on the head". It was a

8/ minor injury .....

minor injury for which she was treated as an out patient.

It is clear from the evidence that the defence relied upon by the accused is that of self-defence or private defence as it is sometimes called. In Gardener and Landsdown S.A. Law and Procedure Vo.II, 5th Edition - p. 1412, the learned authors say

> "For self-defence to operate as a complete excuse on a charge of murder, ...the following conditions must exist : (a) the accused must have been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury, (b) the means used in self-defence must not have been excessive in relation to the danger apprehended, (c) the use of these means must have been the only method, or the last dangerous method, whereby the accused could reasonably have thought that he could avoid the threatened danger."

It has been argued that in considering the question of self-defence, the court must endeavour to imagine itself in the position in which the accused were. With this I agree.

Assuming that the accused were correct in that it was the deceased who had first thrown stones at them there can be no doubt that on that evidence the deceased was unlawfully attacking the accused who had the right to repel such attacks. However, on her own evidence accused 1 told the Court that when she first threw stones at them, the deceased was about 8 paces away and they had the opportunity to flee (if they wished to)without running the risk of being seriously hurt by the deceased. In their own words, they were,therefore, in no danger of death or serious injury and should have seized the opportunity to flee rather than attack the deceased. According to accused's evidence, deceased had admittedly been throwing stones at them but there is no suggestion that at the time she was physically struggling with accused 2, the deceased was still using

stones, The accused, however, drew out knives with which they stabbed the deceased who was at the time fighting with her bare hands. The accused had, in my view, reverted to excessive means to repel whatever danger they may have apprehended from the deceased. Added to this, is the fact that the accused were two on the deceased who according to the post-mortem examination report was about the same age as accused 1.

By and large, it seems to me that there can be no doubt, in the present case, that the accused have exceeded the bounds of self-defence and that defence cannot, therefore, be available to them.

Now, the head and chest are vulnerable parts of the body of a human being. By stabbing the deceased on these parts of her body, the accused realised that their acts were likely to result in death. They, however, acted reckless of whether death occurred or not. That granted, it must be inferred that the accused had the legal intention to kill the deceased. That being so, I have no alternative but to come to the conclusion that the accused have committed the offence against which they stand charged and accordingly convicted them of murder as charged.

Both my assessors feel the intention to kill has not been established by the evidence and do not, therefore, agree with my findings.

B.K. MOLAI
JUDGE
1st November, 1983.

For Crown . Miss Moruthane,
For Defence . Mr. Moorosi.

EXTENUATING CIRCUMSTANCES

In the absence of any evidence to the contrary, the accused's version that it was the deceased who had started the unlawful attack on them remains unchallenged. I have held that the accused were, in the circumstances, entitled to repel the unlawful attack but in the process exceeded the bounds of self-defence which could not, therefore, avail them.

Whilst I took the view that for reasons already stated in my judgment, the accused could not be exculpated on the basis of self-defence, I, however, believe that the fact that the deceased unlawfully attacked the accused contributed to the manner in which they reacted. That, in my view, tends to reduce the moral blameworthiness of accused's conduct and must therefore, be taken into account for purposes of extenuating circumstances.

In the premises, I come to the conclusion that extenuating circumstances do exist and the correct verdict should be that of guilty of murder with extenuating circumstances.

My assessors agree.

SENTENCE . Six (6) years imprisonment for each of the accused.

B.K. MOLAI
JUDGE
2nd November, 1983.