

IN THE HIGH COURT OF LESOTHO

In the Matter of .

R E X

v

1. NTELETSANE LELIMO
2. MOTLOMELO MOHAKALA
3. RANTHOKO LEFERA

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 8th day of December, 1983.

The accused are charged with the crime of murder on the allegations that on 26th November, 1982 they unlawfully and intentionally killed the deceased, Johannes Mohapi at Pela-Tsoeu in the Leribe district.

When the trial commenced, Mr. Pitso for the Crown accepted the admissions made by Mr. Mphutlane for the defence that the facts deposed to by Motlohelela Motseki Tpr. Ralebeha, Padman Lethoele and Dr. Motsamai who were respectively P.W. 4, 5, 6 and 7 at the Preparatory Examination would not be disputed and it was, therefore, unnecessary to call them as witnesses. Their depositions were accordingly admitted in evidence in terms of the provisions of S. 273 of the Criminal Procedure and Evidence Act, 1981.

Three witnesses were then called to testify in support of the prosecution case.

At the close of the prosecution case, Mr. Mphutlane applied for the discharge of all the three accused on the ground that the evidence adduced by the Crown witnesses had failed to establish a prima facie case for the accused to answer. The application was opposed. I was not prepared to deal with the question of credibility at this juncture but took the view that although there was no evidence connecting No. 1 accused with the commission of the offence, there was on the face of it, sufficient evidence so connecting accused 2 and 3. That being so,

2/ to refuse the

to refuse the application for his discharge and expect him to go into the witness box would, in my opinion, amount to expecting No.1 accused to help build a case which the prosecution had failed to establish against him. In the circumstances, the application for the discharge of No.1 accused was allowed and he was accordingly acquitted and discharged at the close of the crown case. The application was, however, refused as regard Nos. 2 and 3 accused, who did not call any witnesses to testify on their behalves but they themselves gave evidence on oath.

It was common cause that on the day in question a stockfair party was held at the home of P.W.2, Lefu Khamathi. Many people were drinking and dancing while a musical instrument was being played in the hut in which the party was held. P.W.1, Mots'elisi Lebeha, P.W.3, Lepoqo Nthau, the deceased and the three accused were among the people who attended the party.

P.W.1 was one of three (3) women who were responsible for selling Sesotho beer at the party. Her evidence confirmed by that of P.W.3, accused 2 and 3 was that during the course of the party, there was a time when the deceased supported himself with both his hands on her thighs. P.W.1 was not offended by the act of the deceased but, for one reason or another, accused 1 apparently did not approve of the manner in which the deceased was supporting himself on her thighs. He, therefore, asked the deceased how he was touching another person's wife. It is not clear from the evidence what the deceased's reply, if any, was, but accused 1 asked him to go out with him so that they could have a chat. Shortly after the deceased and accused 1 had gone out, accused 3 also went out. According to his evidence, he was going to pass water.

When he came to the back of the hut, accused 3 found accused 1 fallen on the ground and the deceased

3/ kicking him

kicking him with his boots. As soon as accused 3 appeared at the back of the hut, the deceased jumped over accused 1 and rushed at him. He hit accused 3 a blow on the nose with a fist and accused 3 fell to the ground. The deceased then started kicking accused 3 on the ribs until accused 1 came and pushed him away. When accused 3 got up from the ground, the deceased took out a knife with which he cut him on the upper lip. Accused 3 managed to escape and run away but later returned to accused 1 who was still standing at the back of the hut. They were wondering why the deceased had assaulted them when P.W.2 came to them.

The evidence of P.W.2 was that he too was in the hut in which the party was held. As there were many people drinking and playing in the hut, he did not notice the deceased and accused 1 and 3 going out. However, he was at one time called out by one Mohau Rakhommo. As he got out of the house, P.W.2 found the deceased angrily rummaging about the forecourt. The deceased was folding up his sleeves on which he noticed there were some blood stains. He tried to ask him what was wrong but the deceased told him to leave him alone so that he could "moorscont the Lesotho Mparas". He did not know what the deceased meant by that.

Whilst he was talking to the deceased, Mohau Rakhommo came and told him to leave the deceased and go to the back of the hut where people had already been injured. P.W.2 then hurried to the back of the hut where he found accused 1 and 3 dusty like people who had fallen on an ash heap. Accused 1 had a swelling on the forehead. Accused 3 was bleeding from the mouth. He asked them what had happened. Accused 3 said he had been assaulted for no given reason after he had got out of the hut and perhaps accused 1 might know the reason for the assault. Accused 1 explained that he had called the deceased out after he had seen him touching another person's wife in a disgraceful manner in the hut.

At that stage, P.W.2 noticed accused 3 suddenly running in the direction towards the front of the hut.

At the same time P.W.2 heard there was a commotion in front of the hut. Women were screaming as though there was a fight going on. He left accused 1 and hurried to the front of the hut.

When he appeared to the front of the hut, P.W.2 saw accused 2 hitting the deceased a blow with a stick above the right eye and the latter immediately fell to the ground. They were about 40 paces away from him. There were many people milling around the place where he saw accused 2 hitting the deceased a blow with a stick. Some were fleeing through the gate while others were crowding around the deceased in an attempt to protect him from accused 2 who was clearly struggling for an opportunity to strike the deceased another blow with his stick. P.W.2 ran to the scene and tried to assist the deceased to a sitting position. The deceased was unable to sit on his own.

After he had come where the deceased had fallen, P.W.2 noticed that accused 3 was standing next to his flat roofed hut about 5 paces from the deceased. Accused 1 was also standing in the crowd that had gathered around the deceased. While he was assisting him, P.W.2 noticed that a lot of blood was flowing from the deceased who was then lying in a pool of blood. Although the wound above the deceased's right eye was bleeding, so much blood could not have come from that injury. He uncovered deceased's shirt to find if he did not have other injuries. It was then that he noticed that the deceased had sustained other injuries on his body. There were two stab wounds on the back and another one on the collar bone from which a lot of blood was flowing. He asked a general question as to who had stabbed the deceased. When he asked the same question for the second time, accused 3 replied that he was the one who had stabbed the deceased and showed the knife Exh 1.

How the fight between the deceased and accused 2 had started was explained by the latter who

5/ told the court

told the court that while sitting and drinking in the hut in which the party was held, he noticed P.W.2 switching off the musical instrument and going out. As there was no music playing in the hut, he decided to go out to pass water. He was met just outside the door by the deceased who grabbed him by the shirt and dragged him to the forecourt without saying anything. The deceased then hit him a blow with a fist on the chest. He jumped back and his shirt got torn. The deceased who was still grabbing him by the shirt unclasped a knife with his teeth. He then hit the deceased a blow on the hand with a stick Exh 2 and the knife which he had been holding at the time dropped to the ground from the deceased's hand.

I have seen the stick Exh 2. It is too long for accused 2 to have been able to strike the deceased a blow so powerful as to cause the knife to drop from his hand especially at so close a range. In any event accused 2 told the court that when he was struck the blow on the hand, the deceased then jumped back. He hit him another blow with the stick above the right eye and the deceased fell down. Some people held him back and he was unable to hit the deceased further blows. As he was taken away through the gate, he looked back and noticed that the deceased and accused 3 were engaged in a struggle on the forecourt of P.W.2's two huts. The deceased was on top of accused 3. Shortly after that P.W.2 called everybody to the forecourt. He returned to the forecourt and saw the deceased lying on the ground with bleeding injuries on the body.

P.W.3 confirmed the evidence of accused 2 in that as the latter was going out of the hut he saw the deceased grabbing him by the shirt when accused 2 hit him a blow on the head with the stick, Exh. 2. The deceased fell to the ground. He also tried to assist the deceased who never got up.

The story of accused 3 was that while P.W.2 was talking to him and accused 1 behind the hut of the

party, he heard that there was a fight in front of the hut. He ran in that direction intending to pick up his eye-glasses from the hut in which the party was held and leave the place. He was going to make a report at the chief's place. As he passed on the forecourt, accused 3 noticed accused 2 hitting the deceased a blow with a stick and a knife dropped away from them. He, however, entered into the hut and collected his spectacles. He was leaving P.W.2's place when he noticed the knife, Exh.1 on the forecourt. He picked it up and on examining it noticed that it had blood stains on the handle. He took possession of it and walked towards the gate. When he approached the gate, he met the deceased followed by P.W.3. The deceased then hit him a blow on the chest with a fist and fell him down. The deceased strangled and pressed him to the ground in an attempt to disarm him of the knife. In the course of the struggle for possession of the knife, he stabbed the deceased twice on the back and once on the collar bone. The deceased then released him and sat down after which he (accused 3) got up and returned to the forecourt. He fell disy and sat down next to P.W.2's flat roofed hut. He confirmed that while he was next to his flat roofed hut, P.W.2 inquired as to who had stabbed the deceased and he replied that he had done so.

In his own evidence, when he left P.W.2 and Accused 1 behind the hut where he had been assaulted by the deceased, accused 3 was hurrying to collect his spectacles which he had left in the hut and leave the place to avoid getting into more trouble. However, if his evidence were to be believed, it would appear that after collecting the spectacles, accused 3 had all the leisure to pick up the knife, Exh 1, which he saw lying on the forecourt, examine it and notice that it had blood stains not on its blade but on the handle. That does not picture him as a person who was in a hurry to leave the place. His evidence that after leaving the

7/ forecourt he

forecourt he met the deceased walking next to the gate is equally improbable. According to the evidence of P.W.3, confirmed by that of P.W.2, when he was hit the blow above the right eye at the forecourt, the deceased immediately fell to the ground and never got up. He could not afterwards have walked next to the gate.

Admittedly as he testified from the witness box, P.W.3 was at times evasive and did not impress me as a very reliable witness. I was not, therefore, prepared to accept his evidence unless it was corroborated by a more reliable witness. His story that when he was hit the blow that fell him to the ground the deceased never got up was, however, corroborated by the evidence of P.W.2. I found P.W.2 a reliable witness who gave his evidence in a straightforward manner before this Court. I had no good reason, therefore, to doubt that P.W.3 corroborated by P.W.2 was testifying to the truth when he told the court that the deceased never got up after accused 2 had hit him the blow above the right eye. That granted, I am unable to accept as the truth the story of accused 3 and accused 2, that after he was hit the blow above the right eye, the deceased was able to fight with accused 3. In my view, the only reasonable inference to be drawn from the evidence is that when he left accused 1 and P.W.2 at the back of the hut in which the party was held, accused 3 had noticed that the deceased was again engaged in another fight with accused 2 in front of the hut. Determined, therefore, to revenge himself on the deceased for what the latter had done to him and accused 1 at the back of the hut, accused 3 ran to the scene and in the course of the commotion that had ensued, quickly stabbed the deceased. When accused 2 hit him the blow above the right eye, the deceased had probably already been stabbed the fatal wounds.

It has been suggested during evidence and in argument that the knife, Exh 1, is the property of the deceased who had used it to stab accused 3 and accused 2.

8/It must, however,

It must, however, be remembered that, when P.W.2 got out of the hut, he found the deceased folding up his sleeves and angrily rummaging about the forecourt, obviously shortly after he had assaulted accused 1 and accused 3 at the back of the hut. If the deceased were armed with a knife, P.W.2 could have noticed it at that time. He did not. When the deceased started assaulting accused on the forecourt, P.W.3 was close enough to have seen him brandishing the knife in the manner accused 2 suggested he did. But he did not. As it will be shown later in this judgment, the medical doctor who examined the injuries on accused 3 found that they had been inflicted with a fist. Considering all this evidence I am not convinced that the deceased was armed or fighting with a knife. It is more probable that he was assaulting the accused with fists and boots.

P.W.2's evidence, confirmed by that of accused 2 and 3, was that after accused 3 had admitted that he was the one who had stabbed the deceased, he (P.W.2) remarked that the deceased was dying. Accused 3 then suggested to go and get some money from his house so that the deceased could be taken to the hospital. Before accused 3 could leave for his house, P.W.2 told him to hand over his knife and he complied. Accused 2 also handed over his stick. P.W.2 took possession of the knife and the stick which he later handed to Motloheloa Motseki, the Chief of the area, when the latter came to the scene of crime.

After accused 3 had returned with the money, the deceased was carried on P.W.2's vehicle in preparation to rush him to the hospital. Shortly, thereafter, it was, however, realised that the deceased was in fact dying. He was then taken down from the vehicle and placed in the shade where he passed away. P.W.2 accompanied by the chief went to report to the police who came on the following day.

Tpr. Ralebeha confirmed that following the report made by P.W.2 and the chief, he proceeded to

9/ Pelatsoeu where.....

Pelatsoeu where he found the body of the deceased. On examining the body, he found four injuries . A wound above the right eye, another one on the collar bone and two on the back. He conveyed the body of the deceased to the mortuary and it sustained no additional injuries on the way. The three accused together with the knife Exh.1 and the stick Exh. 2 were handed to him by the chief. Accused 2 claimed Exh.2 as his property but no body claimed Exh.1. He subsequently cautioned and charged the accused as aforementioned. As they complained of some injuries, the accused were, on 29th November, 1982 referred to a medical doctor for treatment.

According to the medical reports which were handed in by consent, accused 2 and 3 had sustained some minor injuries which were caused by a fist. On 30th November, 1982, the body of the deceased was identified by Padman Lethole and another before the medical officer who performed a post mortem examination. In the opinion of the medical officer, death was due to internal haemorrhage resulting from the stab wounds over the left clavicle and the 7th intercostal space posteriorly penetrating the left side of the chest and injuring an already diseased left lung. He found that there was another stab wound over the right eye-brow penetrating the eye. He formed the opinion that a sharp instrument such as Exh.1 could have been used to inflict all the injuries found on the body of the deceased.

There is ample direct evidence showing that the injury above the deceased's right eye was inflicted by accused 2 with the stick, Exh 2, and not a sharp instrument such as the knife Exh 1. I have no reason to doubt that evidence. With all due respect, therefore, to the opinion of the medical officer who performed the post-mortem examination that the injury above the deceased's right eye was inflicted with a knife, I am convinced that he was mistaken.

10/ It is clear

It is clear from the above evidence that the deceased was on the day in question stabbed to death. Accused 3 himself admitted to P.W.2 and, indeed, before this Court that he was the one who had stabbed the deceased. I have already found that at the time accused stabbed the deceased, the latter was no longer fighting him. It was at the time deceased was engaged in a fight with accused 2 in front of the hut.

It has been argued before me that accused 3's statement to P.W.2 that he was the one who had stabbed the deceased amounted to an inadmissible confession in as much as it was not subsequently reduced to writing before a magistrate. I am unable to agree with this argument. The statement is proved by competent evidence of P.W.2 to have been freely and voluntarily made by accused 3, who has confirmed it before me in the course of this trial. As such the statement is, in my view, admissible confession in terms of S. 228(1) of the Criminal Procedure and Evidence Act, 1981 which clearly provides:

"228(1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person provided the confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto."

(My underlinings)

Considering the evidence as a whole, there is no doubt in my mind that when he stabbed the deceased, accused 3 was aware that his act was likely to result in the latter's death. He, however, stabbed him reckless of whether death occurred or not. That being so, it must be accepted that accused 3 had the requisite subjective legal intention to kill.


11/ As regards accused 2....

As regards accused 2, there is evidence that when the commotion started in front of the hut, the deceased was unlawfully attacking him. He was, therefore, entitled to defend himself by repelling the unlawful attack. In the circumstances of this case, I am not convinced that accused 2 can be said to have exceeded the limits of self-defence. The only important issue for the determination of the court is, however, whether in the circumstances of this case accused 2 and 3 can be held equally liable for the death of the deceased on the well known principle of common purpose. I have already found that when he noticed that the deceased was engaged in a fight with accused 2 in front of the hut, accused 3 went to join the fight on the side of accused 2. He inflicted the stab wounds that resulted in the death of the deceased. There is, however, no evidence indicating that accused 2 was aware that accused 3 had joined in the fight and inflicted the fatal stab wounds. If the deceased had died as a result of the injury inflicted by accused 2, there would be no doubt that accused 3 would be held equally liable for the death of the deceased because when he saw accused 2 fighting the deceased he went to join the fight on the side of accused 2, thus doing something positive to indicate his association with the act of accused 2. In the present case, there is no indication that accused 2 was aware that accused 3 had joined in his fight with the deceased. Accused 2 did nothing positive to indicate his association with accused 3's act of stabbing the deceased fatal wounds which resulted in his death. That granted, it seems to me that the question whether in the circumstances of this case accused 2 is equally liable for the death of the deceased must be replied in the negative.

In the premises, I came to the conclusion that there is no conclusive evidence connecting accused 2 with the murder of the deceased and he is accordingly found not guilty and discharged. There is, however,

sufficient evidence connecting accused 3 with the commission of the offence against which he stands charged. He is found guilty of murder as charged

My assessors agree.



B.K. MOLAI
JUDGE.

8th December, 1933.

For the Crown • Mr. Pitso.
For the Defendant Mr. Mphutlane.

EXTENUATING CIRCUMSTANCES

There is evidence that the deceased was the first to assault accused 1, 3 and 2 at the party. His behaviour was clearly provocative. There is also evidence that the deceased and accused 3 had been drinking at the party. That may well have affected the conduct of accused 3.

Although, in the circumstances of this case, the special defences of provocation and intoxication could not avail accused 3, they must, however, be taken into account for purposes of extenuating circumstances.

In my finding, extenuating circumstances do exist and the proper verdict is, therefore, that of murder with extenuating circumstances.

Both my assessors entirely agree with this finding.

SENTENCE : Three (3) years imprisonment.


B.K. MOLAI
JUDGE

8th December, 1983.