

IN THE HIGH COURT OF LESOTHO

In the Matter of :

REX

Plaintiff

v

LEHLOHONOLO PHILLIP MAKOKO

Defendant

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 29th day of December 1983

The accused before me Lehlohonolo Phillip Makoko is indicted on a charge of murdering Litsietsi Moleleki (deceased) on or about 28th December 1981 at or near Ha Mokhothu, TY, in the district of Berea. The accused pleaded not guilty.

Mr. Moorosi for the accused admitted all the evidence given (as well as the exhibits produced) at the preparatory examination in terms of s.273 of the Criminal Procedure and Evidence Act 1981 and also admitted an affidavit of a Lt. M.J. Raath of the Forensic Science Laboratory, Private Bag X620, Pretoria 0001, R.S.A., who the Crown intended to call but found no necessity of doing so. Mr. Raath had averred that he was in possession of a B.Sc degree from the University of Natal with majors in Biological Science and had 5 years practical experience in this discipline. All the evidence adduced at the preparatory examination thus became evidence at the trial. I do not think this tactic should be adopted, except in respect of formal witnesses, on charges of murder.

The Court, moru motu, and despite counsel's admissions on the accused's behalf, called important witnesses to give evidence (even if briefly or on certain points only) at the trial, viz, Mrs. Selina Makoko, Mrs. Alice Musa Mohapi,

/Det.Sgt.

Det.Sgt. Khobatha, Mrs. Nkareng Musa, Det. Trooper Chakache and Mrs. 'Matukule Cheli.

The facts as established disclose the following:-

1. The accused, a miner, arrived from the mines in the R.S.A., on or shortly before Christmas day 1981 to spend the holiday in Lesotho.
2. The accused, who was married but separated from his wife, lived in a room (in a six roomed house) with his aunt Mrs. Selina Makoko (P.W. 2 at the preparatory examination and P.W. 1 at the trial). He shared the room with his brother who also worked at the mines and who also had come to Lesotho for the Christmas holiday.
3. On the morning of 27th December 1981, the accused, his brother, and Mrs. Selina's husband, all left the house saying they were returning to the mines. The accused was wearing a bluish pair of trousers (sometimes described as grey) and a blue and white striped jersey. Both were identified and marked Exhibits 1 and 3 at the trial and referred to by Lt. Raath as Exhibits A and C in his admitted sworn report dated 17th March 1982.
4. During the night (the exact time of which had not been established but I think it could not have been late since people in rural areas go to bed early) Mrs. Selina Makoko heard a knock at the door of her room. It was the accused's voice demanding entry. Since she had already retired she did not wish to be disturbed and refused to open the door. Although she did not see him, she heard him (or rather his footsteps) go into his room, but to get there he had to pass a room occupied by children. The children are young and were not called

/to

to testify, but Selina says that when she woke up i.e. on the morning of the 28th December 1981 she did not see the accused and asked the children about him.

5. A short time afterwards the police arrived at her house and inquired about the accused. Selina told them he was not there and showed them the room where he (and his brother) stayed. There was a trunk which was identified by her as being the accused's. It was locked but the police forced it open. Inside the trunk the police found and seized

- (1) one pair of blue (or grey) trousers
(Exhibit 1)
- (2) one blue and white striped jersey
(Exhibit 3) and
- (3) one pair of beige trousers (Exhibit 2)

All these items had on them what appeared like blood although only "drops" appeared on the beige trousers. In the room occupied by the accused (but not in the trunk) an open "okapi" knife was found. The blade and handle had what appeared like blood. This item was also seized (Exhibit 4).

6. Earlier that morning (i.e. the morning of the 28th December) the body of the deceased with several horrible wounds inflicted by a sharp instrument on her stomach, chest, head, and arms, was discovered. The chief, Mosiuoa Rats'iu (P.W. 5 at the preparatory examination), was called first and then the police came under Det.Sgt. Khobatha and Det. Trooper Chakache. The latter put the time at about 8.00 a.m. and estimated the distance of the place where the body was found to the accused's house, i.e. his aunt's at Ha Mokhothu, at "ten minutes

/fast

fast walk" and to Mohapinyane's where the deceased stayed, as at "60 minutes normal walk". On or near the body were found the clothes she was wearing (some torn) when last seen (more about this later) which included a bra, a brownish jersey, a yellow and blue striped dress and a hat (Exhibits 5 - 8).

7. The accused and the deceased were seen together by a number of witnesses in the early and late afternoon of the 27th December 1981 first at the home of 'Matukule (P.W. 8 at the preparatory examination and P.W. 4 at the trial) where a party, with drinking, music, and dancing, was in progress, and later at a time given as "4.30 p.m." by Alice Mohapi (P.W. 4 at the preparatory examination and P.W. 2 at the trial) walking on the road leading to the accused's aunt's house at Ha Mokhothu.

8. It has been established with certainty that the accused's wife (from whom he was estranged) was at 'Matukule's party at about the same time when the accused and the deceased were seen drinking there. The accused took the deceased for a dance. The accused's wife objected strongly to their behaviour at 'Matukule's party but one witness, viz, Nkareng 'Musa (P.W. 3 at the preparatory examination and P.W. 5 at the trial) speaks of her directing her wrath at both but mostly at the deceased whom she charged with stealing her husband and father of her children. The same witness also says that when the accused and deceased left the party together, the accused's wife followed them and threw stones at them. Accused's wife was alone. The witness last saw the deceased entering a public toilet, the

/accused

accused following her there, and pushing her out. They walked together towards Mokhothu's, i.e. the accused's aunt's house.

9. The last person to see them together was Alice Mohapi. She knew them both. The witness met them going in the direction of Mokhothu's at about 4.30 p.m. They were alone. They waved to (or greeted) each other. The witness saw nothing unusual, e.g. signs of distress on either. The deceased was wearing the clothes described and the hat found near her body the following morning.
10. From about this time until the accused sought entry into his aunt's room there is a gap of perhaps several hours.
11. The clothes worn by the deceased and/or found next to her body had according to Mr. Raath "human or ape blood of Group 'O'". Neither the hat nor the shoes found near her body were sent for analysis.
12. The blue (or grey) trousers and the blue and white striped jersey the accused's aunt Selina says the accused wore when he left her house on morning of 27th December 1981 and Nkareng says the accused was wearing when she saw them together at around 4.00 p.m. found in the accused's trunk, had the same blood Group 'O' as did the open "okapi" knife found in accused's room. There was a beige pair of trousers in accused's trunk which was also found to have blood Group 'O'. There is evidence that the

/accused

accused and his brother often exchanged clothes and there is evidence that the accused's wife had a grudge against the deceased and there is a gap of some hours between the last time accused and deceased were seen together and the finding of the body the following morning. There were, however, in my view, three vital facts adverse to the accused:-

- (a) the accused said he was leaving for the mines on the morning of 27th December but had not because his aunt heard his voice at night when he knocked at her door whilst his brother was not seen anywhere that day after he left the house. Further his brother returned to Lesotho for visits whilst the accused did not return until early March 1982. The accused's brother could be excluded, prima facie, as a suspect in the crime. The presence of drops of blood Group 'O' on the beige trousers (which the accused was not wearing) did not unduly worry me because it was stored in the same trunk as the blue (or grey) trousers and the striped jersey which the accused was wearing. The beige trousers could therefore coincidentally have been soiled with the same blood group if it was an item of clothing close to those that had blood
- (b) the accused's wife did not figure anywhere after being seen stoning the accused and the deceased before 4.30 p.m. She lived in Mohapinyane - "60 minutes normal walk" away. The deceased's body was found near the accused's house, so accused's wife, or her relatives and friends, could be prima facie, excluded as suspects
- (c) the accused was given the opportunity to cross examine the witnesses at the preparatory examination and he opted to say to the magistrate, at the conclusion of Dr. Park's evidence (she performed the post mortem examination - P.W. 1 at preparatory examination) when

/the doctor

the doctor was still in the witness box:-

"I was going to ask the witness which of the wounds contributed to deceased's death but I am no more asking her since she explained in her evidence and I have no questions since I know the wounds". The words I have underlined are not unequivocal but could mean that he, the accused, knows how the wounds were inflicted.

When coupled with the circumstantial evidence associating him with the deceased in the events of the late afternoon of the 27th December, the finding on the following morning of the clothes he was wearing at the time, and an open knife blood stained with what must have been the deceased's blood group (though common), the disinterestedness of the witnesses whom the Court called particularly his aunt Selina who was his kith and kin and who could not have made a mistake in the clothes accused wore since hardly 24 hours had elapsed between her seeing him depart wearing these clothes and seeing them blood stained in his trunk the following morning, an overwhelming case emerged on the evidence of which the Court may (or could) but not necessarily would convict. I held that the accused had a case to answer.

The accused decided to remain silent as he is entitled to do. No onus rests on him at all, so that, if the case for the Crown is hopelessly inadequate, it matters not one iota whether the accused decided to remain silent or makes a statement from the dock, but when the case for the Crown irresistibly points to his being implicated in the crime, the accused's silence will be taken as one item, amongst others but within the totality of the evidence, to determine whether the Crown has been able to discharge the onus placed upon it to prove his guilt beyond reasonable doubt. In the particular circumstances of this case it has.

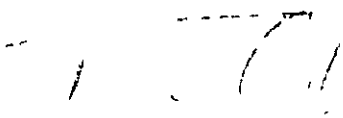
It was submitted on accused's behalf that even if the Court finds the accused guilty of killing the deceased there is no evidence upon which the Court could make a finding that he subjectively intended to murder her because he could have been ~~drunk~~ or the deceased could have provoked

/him

him. I am unable to subscribe to this preposition for no evidence was forthcoming, and it can only come from him about what really happened and what was the state of his mind or sobriety.

Applying the principles enunciated in such cases as State v Theron 1968 4 SA 61, State v Mthetwa 1972 3 SA 766 (and a host of others) the Court is satisfied beyond reasonable doubt that the accused killed the deceased (unless he' lects to say something at the extenuation stage) in circumstances that amount to murder. We find him guilty accordingly.

My assessors agree.


CHIEF JUSTICE
29th December 1983

For the Crown : Mr. Kabatsi

For the Accused : Mr. Moorosi

Extenuating Circumstances

On the 29th December 1983 the accused was found guilty of murder. His defence counsel sought time to consult with the accused on the question of extenuation. This was granted.

On the 5th January 1984, the accused elected to go into the witness box and he admitted killing the deceased. He gave details of what happened between the time Alice Mohapi saw them together at 4.30 p.m. of the 27th December 1981 and the killing which took place about 11 p.m. the same day.

The story is rather long but briefly it is this:-

He did leave home with his uncle and brother on the 27th December 1981 to return to the R.S.A. They worked in different mines, however, and his route was not the same. He had to go by taxi from TY market to Ficksburg and from there by bus.

He was at the bus stop at about 1.45 p.m. He was not due to leave to Ficksburg until 5 p.m. and wanted to kill time. He passed by 'Matukule's house where a party was in progress. He met deceased there by accident and not design. He knew her and had had sexual intercourse with her on two or three previous occasions. At 'Matukule's he consumed drinks and then went with the deceased to Machapi, another drinking place on his way to the bus stop. At Machapi's "hard liquor" was available. He drank beer and left the deceased there because he wanted to catch the taxi at 5 p.m. He got to the bus or taxi rank at 5 or 5.30 p.m. and saw many people wanting to leave, there was a large queue, and he also heard that the South African Police had closed the border because too many drunken persons wanted to cross. The accused says he

/decided

decided to remain for the night and leave on the following morning.

The Orange Hotel is some 30 yards from the bus stop so he went for another drink. There was music and merriment. The deceased entered the hotel at 8.30 p.m. and joined him till about 9.30 p.m. or 10 p.m. He then noticed her walking out and talking to a policeman in plain clothes. He followed her out but she remained with the policeman. She "beat around the bush". He suspected she was having or about to have an affair with him. She and the policeman disappeared. He went back to the restaurant and sat with a friend drinking. At about 11 p.m. his friend left to park his car. He saw the deceased enter the restaurant without the policeman. She came to his table. He asked her where she had been but she refused to divulge this. He asked deceased if she would come and sleep with him at home, i.e. his aunt's home, explaining that she would have retired by that time and the children would be asleep, and she could wake up early, wash, and go, before any one wakes up. The deceased agreed and she walked along with him but on the way she said she had changed her mind and did not want to go and sleep with him because she was ill. Accused explains that he was angered by her attitude and behaviour from inception, and he did not believe she was ill. She had spent a long time with the policeman and he thought she probably slept with him. He himself had had too much to drink, she accepted to go to sleep with him and at the last moment she changed her mind. She apparently wanted to run, he gave chase, and a struggle occurred in the same area. He then stabbed her not knowing how many times.

There is no evidence to contradict the accused and we must perforce accept what he says.

/In

In his favour we have the following factors:-


1. lack of premeditation,
2. absence of actual intent to kill, i.e. that the dolus was eventualis not directus,
3. consumption of alcohol,
4. some element of provocation, although slight, on deceased part when she first accepted to go with accused and then changed her mind.

We do find, with some hesitation, that the cumulative effect of the above, constitute extenuating circumstances.

It is nevertheless a shocking murder.

Sentence : 14 years imprisonment.

My assessors agree.


CHIEF JUSTICE
11th January 1984