

IN THE HIGH COURT OF LESOTHO

In the matter of .

R E X

v

LEBOHANG JOSEPH KOOKO

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 25th day of October, 1983.

The accused is charged with the crime of murder, in that on 1st October, 1982 and at Ha Mosobela in the District of Berea he unlawfully and intentionally killed the deceased, 'Malikhetla Shakhane.

The evidence of P.W.5, the 18 years old Palesa Shakhane, was that a little after sun set on 1st October, 1982, the deceased arrived from her maiden home when she called at her house. Deceased was carrying some provision in a paper bag. P.W.5 who was a friend and a relative of the deceased asked the latter to give her some of the provision she was carrying in the paper bag. The deceased said she would give her the provision if she could accompany her to her house which was in the same village. P.W.5 agreed and the two women set out for the deceased's house.

On the way to her house, the deceased suggested that they should call at the home of a relative P.W.3, Nyatso Shakhane, where she had left her children.

2/ Before reaching ...

Before reaching P.W.3's house, they passed the accused who was lying on the road side.

As they passed him, the accused was laughing and saying if he could miss a person thrice with okapi knife, he would not be a real Motaung. The women did not take notice of what the accused was saying and continued on their way to P.W.3's house. They found P.W.3 outside his house. At that time P.W.5 noticed that the accused had been following them. He was holding a knife with which he threatened to stab P.W.3. P.W.3 was armed with a stick with which he too threatened to hit the accused. The deceased stopped the two men from fighting.

When P.W.3 threatened to hit him with a stick, accused ran away to the spot where P.W.5 and the deceased had passed him lying on the road side. He started hurling insults during which he was heard saying "There is a prostitute shouting 'Lebohang! Lebohang! at night.". P.W.5 did not know whom the accused referred to as a prostitute. When she stopped the fight, deceased had merely said "Tsemeli stop fighting". The Court was told that 'Tsemeli' is another name for P.W.3 - presumably a nickname. I shall return to the evidence of P.W.5 in a moment.

According to P.W.3's evidence, prior to 1st October, 1982, accused had complained that he (P.W.3) was in the habit of insulting him. This was denied by P.W.3. On the evening of 1st October, 1982, P.W.3 was at the home of one Masitha in the village when accused also came there. On arrival, the accused wanted to fight him for having insulted him in the past. P.W.3 complained about this to

3/ Masitha who advised

Masitha who advised him to ignore the accused and go to his house. P.W.3 did.

Shortly after P.W.3 had returned to his house, accused followed him there and on arrival said to him "I am here, Satan you are!" P.W.3 entered into his house. When he came out, he asked the accused whether he was still after him. Accused unclasped a knife. P.W.3 then returned into the house and armed himself with a stick. He got out and wanted to hit the accused with that stick. Accused ran away and sat outside his (P.W.3's) yard from where he (accused) showed him a knife and told him that he would not sleep in the house as he was going to stab him. It was then that P.W.5 and the deceased came to his house. He reported to them that the accused was after him. Deceased told him not to fight the accused. At that time P.W.3 heard accused saying he would kill a prostitute or words to that effect.

I must say I find difficulty with P.W.3's evidence. When he first came to his house, accused told him "I am here, Satan you are!" It was clear then that the accused was in a fighting mood. P.W.3 went into his house but came out unarmed. Only when accused unclasped his knife did he return into the house and armed himself with a stick. When P.W.3 went into the house for the first time it was already clear that the accused was in a fighting mood. Why then didn't he arm himself with the stick? According to P.W.3's evidence, accused threatened him with a knife before P.W.5 and the deceased came to his house. But the evidence of P.W.5 was that this happened after she and the deceased had already come to P.W.3's house. It is, however, not disputed that the deceased

4/ did stop

did stop P.W.3 and the accused from fighting. That being so, it seems to me that the two men must have threatened to fight each other after P.W.5 and the deceased had come to P.W.3's house. It would appear to me that P.W.3 is missing the sequence of events on this point.

Accused's account of what happened on the evening of 1st October, 1982 is slightly different. His story is that he owned a brick field on which he made block bricks. P.W.3 was his employee. On a previous week, he and P.W.3 had quarrelled over the latter's unsatisfactory performance at the brick field. P.W.3 then threatened to fix him up.

When on 1st October, 1982 he met him at Masitha's, P.W.3 fought him. The fight was stopped and he decided to leave for his house. As he was about to go through Masitha's gate, he heard some one shouting "Lebohang, watchout!" P.W.3 then hit him a blow on the head with an iron rod. He tried to stab P.W.3 with a knife but the latter threw himself to the ground and he missed him. When he got up, P.W.3 was furious. They fought through Masitha's gate on to the road. He was armed with a knife while P.W.3 had a stick. (no explanation as to what had happened to P.W.3's iron rod). They both got tired. He then noticed the deceased who called at P.W. 3 and told him to stop fighting him (accused). He walked away in the company of P.W.5 and the deceased. Accused swore he was never at P.W. 3's house on that evening. It was at Masitha's that he fought with P.W.3 and not at the latter's place.

I have observed the witnesses as they testified before this Court and P.W.5 impressed me as a truthful

5/ witness.

witness. I am satisfied that she was testifying to the truth when she said accused came to P.W.3's house where he threatened to stab the latter. On the contrary, accused did not impress me as a witness of the truth. As will be seen in the course of this judgment, although he claims to have been injured by P.W.3, accused never reported to Masitha at whose place he was injured. On the following day he attended a feast as if nothing had happened. He later surrendered himself to the police but never thought of reporting his injury so that he could be sent for medical treatment. I am convinced that accused's story that he fought with P.W.3 and got injured at Masitha's place in the manner he described was a sheer fabrication which I have no hesitation to reject.

Now, coming back to her evidence, P.W.5 told the court, and this was confirmed by P.W.3, that after the accused had run to the spot where he had been lying outside P.W.3's yard, she and the deceased left P.W.3's place and continued on their way to deceased's house. As they passed next to him outside P.W.3's yard, accused joined them. He addressed himself to P.W.5 as follows

"Palesa, my sister, there is a prostitute that goes about saying 'Lebohang, Lebohang' at night. I shall stab that prostitute with a knife till she excretes. She is not even born here. She is from the mountain slopes. Upon hearing a radio, the father of that prostitute from the mountains picked up a stick and broke it."

P.W.5 and the deceased simply ignored what the accused was saying and continued on their way to deceased's house. P.W.5 did not know whom the accused referred to as a prostitute but being an unmarried girl she was ashamed of accused's talk about prostitutes and could

6/ not comment. ...

not comment. As they passed next to Masilo's house in the village, accused called there and asked for matches to light his cigarette. P.W.5 and the deceased continued on their way.

Accused conceded that he had been saying he would kill a prostitute and he was referring to the deceased. He did not, however, know the deceased as a prostitute. He merely said she was a prostitute out of anger resulting from his quarrel with P.W.3.

I fail to understand why, if he had quarrelled with P.W.3, accused should be angry with the deceased and label her a prostitute, particularly so when according to the evidence^{of} P.W.3, P.W.5 and the accused himself it was the deceased who had told P.W.3 not to fight the accused. Although neither P.W.3 nor P.W.5 and, indeed, the accused himself have told the Court that in stopping the fight, the deceased called out accused's name, it seems to me probable that the deceased did call out accused's name and that was perhaps what made him angry with the deceased.

Accused further conceded that while he was walking with P.W.5 and the deceased, he called at the house of his brother-in-law, Masilo, to light a cigarette. After lighting the cigarette, accused says he got a complete black-out and does not remember a thing about what happened thereafter .

According to the evidence of P.W.5, when accused called at Masilo's, she and deceased crossed the road on their way to deceased's house and were walking in a passage between two fences when accused who was then following them called at the deceased and told her to stop. The deceased said she was in a hurry and did not stop. Accused then came running.

7/ When she noticed

When she noticed that the deceased also started running in the direction towards her house. P.W.5 continued in her normal walk towards deceased's house and did not run. As he ran passed her, P.W.5 noticed that the accused was holding up a knife in his left hand. She then apprehended that the deceased might be in danger and started running in the direction in which she and the accused were running.

When the deceased was about to enter through the gate of her premises, accused caught up with her and immediately stabbed her with a knife on the back. P.W.5 was about 5 paces away from them and had no difficulty in seeing what happened. As she was stabbed on the back, the deceased suddenly stopped and turned back. Accused stabbed her several blows in quick succession with the knife. P.W.5 raised the alarm by screaming loudly. Deceased who was also crying managed to escape and enter into a neighbouring yard of one Raphael. Accused followed her into Raphael's yard, caught up with and continued stabbing the deceased. One 'Mamohau called out from a next door yard: "Lebohang, stop doing that to another person's wife!" Accused replied "I can leave this prostitute and come to stab you." 'Mamohau returned into her house.

Immediately, thereafter, P.W.5 noticed her brother Mathula Shakhane (P.W.4) appearing on the scene. When he noticed P.W.4 approaching, the accused stopped assaulting the deceased and stood against a fence. P.W.4 asked her what the matter was and P.W.5 tearfully told him that accused was stabbing the deceased with a knife. P.W.4 then passed on to the accused who was still standing against the fence. She did not notice what then transpired between the accused and P.W.4 for she was attending to the

8/ deceased who

deceased who had by that time collapsed and was unable to walk on her own. Deceased was pleading with P.W.5 to assist her to her house. P.W.5 found the deceased too heavy for her and decided to go and ask for the assistance of her (P.W.5's) sister in the village.

On her return P.W.5 found that a number of grown up people had gathered around the deceased and were assisting her. She was afraid to go closer and stood some distance away.

P.W.4 testified that after sun set on 1st October, 1982, he was at the house of one 'Mamafa in the village when he noticed P.W.5 and the deceased walking in the direction towards the latter's house. Shortly thereafter, he heard a scream of a woman from the direction in which P.W.5 and deceased had gone. He immediately ran in that direction and came to where the accused was with the two women. Both P.W.5 and the deceased were crying while the accused was just standing against a fence holding a knife. He confirmed P.W.5's evidence that on asking her what the matter was, she told him that accused was stabbing the deceased with a knife. That was said within the hearing of accused who did not say anything. He then went to accused and asked him what the matter was, Accused angrily told him : "I have stabbed this sister of yours." He caught hold of the accused, presumably in an attempt to either arrest or disarm him of the knife. The accused pulled himself free and managed to escape and run away. He chased the accused, however, outran him out of the village.

Having been outrun by the accused, P.W.4 returned to the spot where he had left P.W.5 and the deceased. He found many people already assisting the

9/deceased who

deceased who was subsequently conveyed to T.Y. hospital in a vehicle.

P.W.3 confirmed that shortly after P.W.5 and the deceased had left his house, he heard the scream of a woman from the direction which the two women had taken. He also ran in that direction and found the deceased having sustained bleeding wounds. Many people were already assisting the deceased. She was subsequently taken to T.Y. hospital and he was one of the people who accompanied the deceased to T.Y. hospital.

The evidence of P.W.5 was also confirmed by P.W.2, Kupa Mosobela, who testified that on the evening of 1st October, 1982 he was at his home in the village of Mosobela when he heard the scream of a woman. He ran in the direction from which the scream had come. He came to the spot where many people were attending to the deceased who had sustained numerous bleeding wounds and was speechless. He assisted in conveying the deceased to T.Y. hospital.

In their evidence, P.W.2, 3 and 4 assured the Court that no additional injuries were sustained by the deceased whilst she was being conveyed to T.Y. hospital. At the hospital, they also assisted in carrying the deceased on to the hospital bed but the deceased was then found to be dead and they had to carry her body to the mortuary before they could even make a report to the police.

P.W.6, D/Tpr Seboka, confirmed that on the evening of 1st October, 1982, he received a report following which he proceeded to T.Y. mortuary where he found a dead body of a woman. The body was identified to him as that of the deceased, 'Malikhetla Shakane,

10/ by P.W.2, 3 and 4

by P.W.2, 3 and 4. On examining the body, he found that it had sustained multiple wounds on the head, neck, shoulders, spinal cord and hands. On the following day P.W.6 attended the scene of crime after which he started looking for the accused. On 3rd October, 1982, he met the accused at the police charge office in T.Y.

Following accused's explanation, P.W.6 went to a certain Mokhachane Thuntsa at a place called Ha Lebina. Mokhachane Thuntsa gave him a brown knife (Exh.1).

Although he had given evidence at the Preparatory Examination, Mokhachane Thuntsa was not available to testify before this Court. An application that his deposition at the Preparatory Examination be admitted in evidence was opposed on the ground that no diligent search had been made for him. In support of the application, the crown re-called into the witness box P.W.6, who testified that he was the investigating officer in this case. When preparations were made for the trial, he was given a subpoena to serve on Mokhachane Thuntsa who was required as a crown witness. He went to the house of Mokhachane Thuntsa at Lebina's. He could not find him. The information he received at Mokhachane Thuntsa's home was that he had gone to Rooderport in Johannesburg in the Republic of South Africa to visit his sister, 'Mamots'elisi Mpoi.

On 27th September, 1983 and with the assistance of the South African Police, P.W.6 went to 'Mamotselisi's home in the Republic of South Africa. He could not find Mokhachane Thuntsa who was alleged to have left his sister's home some two weeks earlier to look for employment with the contractors in the

11/ area known as

area known as Bocksburg in the Eastern Transvaal. His address in Bocksburg was unknown. P.W.6 had to return home with Mokhachane.

From the evidence of P.W.6, I took the view that a diligent search had been made to trace the whereabouts of Mokhachane Thuntsa but all in vain. It seemed to me the trial could not be postponed for this witness without considerable delays and expenses. That would be neither in the public interest nor the accused himself. Wherefore I granted the application and ruled that the deposition of Mokhachane Thuntsa be admitted in evidence.

The deposition was read by P.W.7, the magistrate who had recorded it at the Preparatory Examination. It was to the effect that one day during September or October last year, he and accused attended a tomb unveiling ceremony at a place called Ha Mosoeunyane when accused lent him the knife (Exh.1). He kept that knife until one Sunday when P.W.6 came and demanded it. He handed it to him.

The evidence of P.W.1, Dr. Makoa, was that on 6th October, 1982, he performed a post mortem examination on the body of the deceased at T.Y. mortuary. The deceased was identified before him as 'Malikhetla Shakhane by P.W.3 and another. P.W.1's findings were perfectly consistent with P.W.5's evidence that the deceased had been brutally assaulted by the accused. He found altogether eight wounds on the body of the deceased - on the head, neck, hand, finger, shoulders, chest and spinal cord. Some of the wounds penetrated between the ribs into the lungs with the resultant internal haemorrhage. He formed the opinion that a sharp instrument such as a knife could have been used to inflict the injuries on the deceased and death was due to excessive loss blood.

12/ As has been.....

As has been pointed out, accused's evidence was that after he had lighted his cigarette at Masilo's place, he got a black-out and could, therefore, neither deny nor admit the crown evidence as to what had happened thereafter. After his black-out, the next thing accused remembered was that he found himself running late at night when P.W.4 came to him. He could not even remember what he discussed with P.W.4. He ran to the home of Mokhachane Thuntsa with whom he was to attend a ceremony of the unveiling of a tomb on the following day. At the ceremony he had lent his knife, Exh.1, to Mokhachane Thuntsa. He only learned from the villagers that he had killed the deceased and the police were looking for him.

For fear of being assaulted by the police, he decided not to go to his own house but to that of his grandmother, who advised him to hand himself over to the police.

On 3rd October, 1982 he accordingly surrendered himself to the police at T.Y. and reported that his knife was with Mokhachane Thuntsa. He was subsequently charged with the murder of the deceased. He never reported to the police that he had sustained any injuries in the course of his fight with P.W.3. Accused assured the Court that he occasionally took grape beer but had not taken any beer at all on 1st October, 1982. He had never suffered from any mental illness or disorder in his life.

The evidence is simply overwhelming that the deceased was brutally assaulted by the accused and died as a result. The only question is whether or not the accused had the requisite subjective intention to kill the deceased.

The defence's contention is that at the time he assaulted the deceased, the accused was under a black-out and does not, therefore, remember what happened. But on accused's own evidence, there is no suggestion that this is associated with any mental disorder on his part. In other words his black-out was simply what is commonly known as amnesia. In R. v. Johnson 1970(2) S.A. 405 at p.406, Lewis, J. stated the law on amnesia as follows:

".....amnesia is not per se a defence. What it amounts to simply is that; that the accused, if the amnesia be genuine, is a person who cannot remember what happened. Therefore, it is the duty of the jury to scrutinise the crown case with particular care to make sure that the crime has been brought home to such a person."

In the present case, there is evidence that when the accused quarrelled with P.W.3 at the latter's house, the deceased stopped them from fighting. It seems to me that in the process the deceased must have called out the name of the accused, Lebohang, for on the evidence, it was against the calling of his name at night that the accused objected and threatened to stab the deceased whom he admittedly referred to as a prostitute. There is also evidence that as he was walking with both the deceased and P.W.5 and before they reached Masilo's house, the accused was still brooding over his anger against the deceased who had called his name at night. When accused called at Masilo's house to light his cigarette, the deceased and P.W.5 continued on their way to the former's house. Having lighted his cigarette, the accused followed the two women. Notwithstanding his claim that he was then a black-out, he clearly remembered that it was the deceased and not P.W.5 with whom he

14/ was annoyed.


was annoyed. He called out at the deceased and told her to stop. When the deceased did not comply, the accused unmistakably ran after her, passed P.W.5 on the way, caught up with the deceased and started assaulting her in the manner described by P.W.5. A certain woman called at the accused and told him to stop what he was doing to the deceased. Accused was not forgetful that it was the deceased "the prostitute" who had provoked his anger and was heard by P.W.5 replying "I can leave this prostitute and come to stab you". That the accused vividly remembered that it was the deceased he was assaulting is also confirmed by P.W.4, Mathula Shakhane, who told the Court that when he came to him and asked what the matter was, the accused boasted : "I have stabbed this sister of yours."

In my view, the evidence clearly depicts the accused as a person who was fully conscious of not only what he was doing to the deceased but also the reason why he was doing so. There is simply no evidential basis for his contention that at the time he assaulted the deceased, he was in a state of amnesia. I come to the conclusion, therefore, that the contention does not hold water and accordingly reject it.

The accused stabbed the deceased a total of not less than eight (8) wounds with a knife. Most of the wounds inflicted on the deceased were directed at the vulnerable parts of her body. No doubt the accused was aware that such brutal assault on the deceased was likely to result in her death. He nevertheless acted not only with utmost callousness but reckless of whether or not death occurred. Considered as a whole the evidence leaves me with no doubt in my mind that in his brutal assault on the deceased, the accused had

at least the legal intention to kill her. In the circumstances, I have no alternative but to come to the conclusion that the commission of the offence against which the accused stands charged has been established beyond reasonable doubt and accordingly find him guilty of murder as charged.

My assessors agree.


B.K. MOLAI
JUDGE

25th October, 1983.

For Crown : Miss Moruthane,
For Defendant : Mr. Matlhare.

EXTENUATING
CIRCUMSTANCES

The accused has already been convicted of murder. It now remains to decide whether or not there are any factors, connected with the commission of this crime, tending to reduce the moral blameworthiness of the accused person. Section 296(2) of the Criminal Procedure and Evidence Act, 1981 provides:

"In deciding whether or not there are any extenuating circumstances, the High Court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the accused belongs".


The accused neither lives in Maseru nor does he work within the precincts of the High Court with people who daily deal with questions of law. He lives in the rural areas under the influence of people who are not so privileged in the knowledge of how the law functions. There is evidence before this Court that on the day in question, the accused had had an angry altercation with P.W.3, Nyatso Shakhane. In the cause of that altercation, the deceased tried to stop the two men from fighting each other. I have already found as a fact that in trying to stop the fight, the deceased must have called the name of the accused, Lebohang. To those of us who live in places like Maseru, there may be nothing offensive in hearing one's name being shouted at night. But to people like the accused who live in the rural areas, things may be different. The accused may have taken offence at his name being called out at night. This added to the fact that the accused was already angry as a result of his

17/ quarrel with

quarrel with P.W.3 may have had effects on his mind at the time he fatally assaulted the deceased. In terms of S.296(2) of the Criminal Procedure and Evidence Act, supra, this is a factor to be properly taken into consideration in determining whether or not there are extenuating circumstances. For that reason, I come to the conclusion that extenuating circumstances do exist and the proper verdict should be that of guilty of murder with extenuating circumstances.

With this finding, my assessors agree.

SENTENCE : Twelve (12) years imprisonment


B.K. MOLAI
JUDGE

1st November, 1983.