

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

THUSO MPHASI  
THOKOA MPHASI

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 14th September, 1984.

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

"In that upon or about the 19th February, 1983 and at or near Ha Khojane in the district of Mafeteng the said accused did one or other or both of them unlawfully kill Makume Khojane, Mosito Makhele and Litlhokoa Tsosi."

It is common cause that on the evening of 19th February, 1983, there was beer drinking at the home of PW.1, 'Masepiriti Mokheleli. All the three deceased, the two accused, Jonas Khomo, Mabusetsa, Malebohang and PW.2, 'Manthabiseng Maqalika, attended.

According to PW.1, the three deceased were the first people to come to her house on the evening in question. They were going together and the first deceased, Makume Khojane, was carrying a tape recorder

/from

from which music was offered. None of the deceased carried a stick.

After the arrival of the deceased, PW.2, accused 2 and 'Malebohang also came to her house. They were also going together. It is not clear when Jonas and Mabusetsa had arrived.

On his arrival accused 2 carried a stick. He bought R1 worth of Sesotho beer. He gave the R1 to 'Malebohang who actually paid for the beer with it. While the beer was being taken, accused 1 also came into the house. He too carried a stick.

On his arrival accused 1 angrily told 'Malebohang to give him beer. 'Malebohang explained that the beer did not belong to her.

Because of the manner in which he demanded beer from 'Malebohang, PW.1 decided to offer a free scale of beer to accused 1 to avoid trouble in her house. After that PW.1 noticed accused 2 dancing with PW.2. As they were dancing, PW.1 heard accused 2 quarrelling with the third deceased, Litlhokoa Tsosi, who was PW.2's secret lover. She heard him angrily saying: "Litlhokoa, you are telling a lie, man." She had not followed what Litlhokoa had said to accused 1 before the latter told him that he was telling a lie. When accused addressed him in the manner described above, Litlhokoa replied and told accused 2 that he (Litlhokoa) was not fighting but only remonstrating with him. Accused 2 then raised his stick towards

/Litlhokoa

Litlhokoa and PW.1 appealed to the men in the house to stop them from fighting and get them out of her premises. She noticed that all the men in the house tried to intervene and stop the fight between accused 2 and Litlhokoa who, however, did not stop. Jonas and Mabusetsa then left the place. With accused 2 and Litlhokoa physically struggling and the other men trying to stop the fight, there was a commotion in the house. They all crowded at the door and eventually got out of the house. As they got out of the house PW.1 could see that accused 2 and Litlhokoa were grappling with each other on the forecourt. Out of fear, she closed the door behind them.

While inside the house PW.1 could hear repeated blows of striking sticks outside. She heard the voice of accused 1 calling out. "His mother's anus! Kill him, he is not a child of your mother!" PW.1 screamed from inside the house in an attempt to raise an alarm.

After a while the commotion stopped outside the house. She opened the door and noticed Makume and Mosito lying prostrate on the forecourt of her house. It was all quiet. The two accused and Litlhokoa were, however, no where to be seen. PW.1 rushed out and went to the home of Jonas to report what had happened at her house. On her way to Jonas, PW.1 was in the company of PW.2. It is not clear from the evidence of PW.1 what had happened to 'Malebohang. PW.1 reported to

/Jonas

Jonas with whom she returned to her house, where they found that Makume and Mosito were in fact dead. Litlhokoa was also found lower down the forecourt. He was also dead. Pieces of broken sticks which had been carried by the accused and also accused 2's red pair of shoes were found on the forecourt next to the dead bodies.

In as far as it is material, the evidence of PW.2 corroborated that of PW.1. She, however, told the court that as she went to PW.1's place she was in the company of 'Malebohang. They were following accused 2 whom they found already in PW.1's house together with the three deceased. She did not notice accused 2 giving R1 to 'Malebohang nor did she see the latter paying for the beer with the money. She confirmed that while they were drinking, accused 1 joined them and angrily demanded beer from 'Malebohang who was carrying some in a billycan from another of PW.1's houses. She further confirmed that the two accused were the only men carrying sticks in PW.1's house. She confirmed that while drinking in the house, Makume's tape recorder was playing music to which she and accused 2 danced. According to her it was soon after she had played with him that she noticed accused 2 going to Litlhokoa her secret lover, and telling him that he was telling a lie. As it was noisy in the house she too had not followed what Litlhokoa had said to accused 2 before the latter told him that he was telling a lie.

/Accused 2

Accused 2 was clearly angry with Litlhokoa for when the latter asked what he had done he poked him with a stick on the chest several times and told him to go outside. People tried to intervene but accused 2 pushed Litlhokoa outside. They were followed out by the people who were trying to stop them from fighting.

After all the men had gone out, PW.1 closed the door behind them. PW.2 then heard the sound of striking sticks and the voice of accused 1 shouting: "Kill him, his mother's vagina! He is not your mother's child." She confirmed PW.1's evidence that while the commotion was going on outside the house she and the other women were raising the alarm by screaming from inside the house. After some time the commotion outside subsided and PW.1 opened the door when she went out. PW.2 then noticed Makume and Mosito lying prostrate on the forecourt. She could not, however, see Litlhokoa or either of the accused. She left with PW.1 to Jonas's place but when PW.1 entered the house she proceeded to her own house so that she was not present when PW.1 actually reported to Jonas.

On the following morning PW.2 returned to PW.1's place. It was then that she noticed that the body of Litlhokoa was lying some distance lower down the forecourt of PW.1's house. She also noticed accused 2's pair of red shoes and 4 broken pieces of sticks next to the bodies of the deceased on PW.1's forecourt.

/PW.4

PW.4, 'Mamathula Khomo, told the court that she was the wife of Jonas Khomo. She too had beer-selling at her home on 19th February, 1983 and the three deceased, the two accused, PW.2 and 'Malebohang were among the people who called at her house during the day. After the three deceased had left for PW.1's place, accused 2, PW.2 and 'Malebohang also went to PW.1's house which was not very far from her house. It was just before sunset. She could see them going together till they reached PW.1's place. She confirmed the evidence of PW.1 that she (PW.1) later came to her house and asked her husband Jonas to go and see what had happened to her door. Jonas and PW.1 then left. She remained with accused 1's wife, 'Makhahliso, who was already drunk. At about 7 p.m. after PW.1 and Jonas had left, accused 1 came to her house and spoke to his wife. Accused 1 did not enter into the house but stood outside as he spoke to his wife. He told his wife where the key to their house was. He said "they" had killed the three deceased and were leaving.

After accused 1 had left, PW.4 got out and went to PW.1's place. She returned at the gate of PW.1's place from where she could notice that many people had gathered on the forecourt. There were dark objects lying prostrate on the ground. The objects appeared like human beings.

Asked why at the P.E. she said accused 1 had come to her house at 10 p.m., PW.4 said she had made a mistake about the time and the truth was that it was

/at about

at about 7 p.m. After she had said it was her husband Jonas who told her that the time was 10 p.m. PW.4 later changed and said the time was mentioned in the summons (subpoena). She finally conceded that she was confused at the P.E. and was still confused even before this court. I consider it unsafe, therefore, to accept PW.4's evidence unless it is corroborated by some other evidence.

According to PW.3, 14 years old Moalosi Mphasi, he usually slept at the home of one Tsepo, a relative of his. On the evening in question he was sleeping with Tsepo and another boy by the name of Fusi. He denied that there was any time after sunset when he and Tsepo parted company. He remembered that whilst they were sleeping in their house on that evening, the two accused came in and said they came from PW.1's place where they had assaulted people whom they believed had died. The accused did not explain why they had assaulted those people. After a short while the accused left without explaining where they were going to.

PW.5, Mokiri Khojane testified that he was the father of one of the deceased, Makume, and was the chief's representative or bugle at the village of Khojane. On the evening in question he was attending a night virgil for his cousin who had passed away in the village. While at the virgil he received a certain report following which he proceeded to PW.1's home where he found the three deceased lying dead on the

/forecourt.

forecourt. When he asked her what had happened, PW.1 explained that she had fainted and did not know how the deceased met their death.

PW.5 immediately went to Van Rooyan police post but the police there could not help him. He then proceeded to Mafeteng police station where he got assistance. He returned home with the Mafeteng police. They went to PW.1's home where he showed the bodies of the deceased to the police. The bodies were examined by the police. He could see that the bodies were lying in pools of blood. Next to the bodies he noticed accused 2's pair of red shoes and 4 pieces of broken sticks. In his presence, PW.1 was questioned by the police as to what had happened to the deceased. It was only then that, to his surprise, PW.1 explained that the two accused, were the people who had killed the deceased.

The accused were, however, not present and in my view, not much reliance can be made on this clearly damaging statement about them.

According to PW.5 the bodies were subsequently carried to Mafeteng mortuary. He accompanied and later identified them before the medical doctor who performed the post mortem examination. No injuries were sustained by the bodies while they were being transported from Khojane's to the mortuary.

PW.6 D/Lt 11 Ramonate confirmed that in the early morning of 20th February, 1983, PW.5 reported to the

/police .

police at Mafeteng that three (3) men had been killed in his village. On the same day he accompanied PW.5 to the village of Khojane's. They went to the home of PW.1 where he found the bodies which were identified as those of the three deceased. He examined the bodies and observed the following injuries: The first deceased Makume Khojane, had a wound near the forehead and a bone was protruding next to the left eye. There was another wound on the back of the head more towards the left side. On the back of the body there were weals that appeared to have been inflicted with an instrument such as a stick. On the inner ankle of the right leg there was what appeared to be a punctured wound. The second deceased, Mosito Makhele, had a wound on the right side of the head above the right eye and something like brain substance was oozing out there from. On the middle of the head but more towards the left side, there was a cut wound which appeared to have been inflicted with a sharp instrument. The third deceased, Litlhokoa Tsosi, had three (3) wounds which were next to each other on the head but more towards the back. His face was crashed down to the upper lip. Both eyes were smashed. His upper teeth were missing. Those on the lower jaw were loose and bending backwards. On examining the scene of crime PW.6 noticed that there were pools of blood where the bodies of the deceased were lying thus indicating that the deceased had bled profusely. He also found a pair of shoes which was identified as the property of accused 2. He again

/found

found four (4) broken pieces of stick. He took possession of the pair of shoes and the broken pieces of stick. He formerly handed them in as exhibits. The red pair of shoes and the four (4) broken pieces of sticks were respectively marked Exh.1 and 2 in this trial.

PW.6 looked for the two accused but could not find them in the village. He searched their homes but found nothing of interest in this case at accused 2's house. On searching the home of accused 1 he however, found a broken piece of stick outside his house. It had what appeared to be blood stains on it. He took possession of it and formally handed it as exhibit in his evidence. It was marked Exh.3. He confirmed that he conveyed the bodies to Mafeteng mortuary where a postmortem examination was later performed on them. No additional injuries were sustained by the bodies whilst they were being transported to the mortuary.

It may be mentioned that at the close of the Crown case, the court was informed that the medical officer who performed the post mortem examination had since left the country and was not available to testify in this case. The defence counsel made no admissions as regard the post mortem examination report which was, therefore, not used in evidence.

On the evening of the same day, 20th February, 1983, PW.6 received a certain information following which he and another police officer proceeded to a  
/village

village called Ha Masiu in search of the two accused. They could not find them in the village.

However, as they were leaving the village PW.6 and his companion noticed two people sitting on a hillock outside the village. It was at dusk. They went to those people and found that they were the two accused. When they approached them PW.6 called out and said they (PW.6 and his companion) were police officers. Accused 2 tried to run away but accused 1 told him not to. He stopped and returned to accused 1. PW.6 then asked the accused what they were doing there at that time. Accused 1 said following their quarrel with the deceased they had fled their home for fear of the village men. PW.6 informed the two accused that the deceased had in fact died and he was, therefore, arresting them. The accused were escorted to Mafeteng police charge office where they were formally charged as aforesaid.

PW.6 told the court that he was the one in charge of the investigations in this case but neither of the accused ever complained to him about any injuries he had sustained before or after their arrest.

The two accused gave evidence on oath. Accused 1, Thuso Mphasi, whose evidence was, in as far as it is material, virtually the same as that of accused 2, Thokoa Mphasi, confirmed the Crown evidence that when he came to PW.1's house on the evening of 19th February, 1983 the three (3) deceased, accused 2, PW.2 and 'Malebohang were already there and there was

/music

music and drinking in the house.

According to the accused when he came to PW.1's house, accused 1 was armed with a stick. Accused 2 was, however, not carrying any stick while at PW.1's place. Instead it was one of the deceased, Makume Khojane who had a stick in his possession.

As has been pointed out earlier, the evidence of PW.1 and 2 was that none of the deceased carried a stick while at PW.1's place. It was in fact accused 2 who carried a stick with which, according to PW.1 and 2, he threatened or poked Litlhokoa. Furthermore, it was not really disputed that two of the people who were in PW.1's house on that evening carried sticks and that accused 1 was one of them. Likewise there was no dispute that when he came to PW.1's house Makume was carrying the tape recorder which offered music.

I find it unlikely that Makume would have carried a tape recorder and a stick when going for drinks in the village. In my view, the probabilities favour the story of the two crown witnesses that the stick was carried by accused 2 and not Makume. I am, therefore, inclined to accept as the truth the Crown version that it was not Makume but accused 2 who carried the stick.

The accused conceded that after his arrival, accused 1 asked 'Malebohang to give him beer. They, however, denied that he angrily demanded the beer nor did PW.1 have to offer a free scale of beer to accused 1

/in order

in order to avoid trouble.

That accused 1 did angrily demand the beer was, however, noticed by PW.1 and 2. I see no good reason why the two witnesses should fabricate against accused 1 on this apparently innocent issue. They were, in my view, testifying to the truth and I am prepared to accept their evidence.

It is common cause that while the music was being played, there was a time when accused 2 danced with PW.2. According to PW.1 and 2 they then heard accused saying Litlhokoa was telling a lie and started attacking him in the manner already described. They had, however, not heard what Litlhokoa had said to accused 2 before the latter uttered those words.

In their evidence, the accused told the court that before accused 2 told him that he was telling a lie Litlhokoa had said he was disapproving of the manner in which he was holding PW.2 as they danced and if he did not desist he was going to beat him till he excreted.

It must be remembered that PW.2 admittedly had a love affair with Litlhokoa. It is not improbable that out of jealousy Litlhokoa could have disapproved of accused dancing with PW.2. The accused may, therefore, have well been testifying to the truth when they said they had heard Litlhokoa remonstrating with accused 2 in the manner described. As there was drinking and music playing, it was naturally noisy in

/the house.

in the house. PW.1 and 2 may, therefore, have missed to hear what Litlhokoa had said to accused 2 before the latter angrily told him that he was telling a lie. I am prepared, therefore, to accept the evidence of the accused that before accused 2 told Litlhokoa that he was telling a lie the latter had expressed his disapproval of accused 2 dancing with PW.2 and threatened to beat him up until he excreted.

The accused conceded that after accused 2 had told Litlhokoa that he was telling a lie, there was a commotion in the house with all the men in the house (including accused 1) trying to intervene by stopping the fight between accused 2 and Litlhokoa. The two men could not however, be stopped.

Litlhokoa then hit accused 2 a blow with a fist and the latter fell behind the curtains. This was, however, categorically denied by PW.1 and 2 according to whom when accused 2 attacked Litlhokoa, the two men immediately caught hold of each other and physically struggled out of the house. They said they would have seen it if accused 2 fell behind the curtains.

I observed all the witnesses as they testified before me and there is no doubt in my mind that PW.1 and 2 were telling the truth when they said accused 2 did not at any time fall behind the curtains. I am, therefore, prepared to reject the evidence of the accused and accept that of PW.1 and 2 on this point.

Be that as it may, the accused further told the  
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court that when the commotion came to the forecourt of PW.1's house, Litlhokoa fell accused 2 to the ground and was strangling him. According to accused 1, Makume then belaboured accused 2 with a stick while Mosito was kicking him with boots. He (accused 1) stood outside the door of PW.1's house from where he asked the three (3) deceased whether they were killing accused 2 because he was not a child of their mothers. Makume then told accused 1 that if accused 2 was his brother he should also fight. At that time PW.2 and 'Malebohang passed next to him and left the house. PW.1 closed herself in the house.

It was then that Makume came to him and delivered a blow with his stick. He warded off the blow and a fight started between him and Makume. It was in the course of the fight that Makume's stick broke into pieces. He hit him a blow on the head and he (Makume) fell to the ground. His stick also broke into pieces.

Accused 1 then went to where accused 2 was still being assaulted by Litlhokoa and Mosito. As he approached them Tsepo came to the scene and asked what was happening. He told him that accused 2 was being assaulted Mosito then ran away and was chased by Tsepo who caught up with him and hit him a blow with a stick.

When he came to where he was assaulting accused 2, accused 1 started beating up Litlhokoa with the piece of broken stick he was holding and it was only then that Litlhokoa left accused 2.

/Accused 2

Accused 2 was unable to walk on his own and accused 1 had to support him away from PW.1's place. When they came to the gate he noticed that Tsepo was belabouring the deceased on the forecourt of PW.1's house. Accused 1 then left accused 2 and returned to where Tsepo was belabouring the deceased. He stopped Tsepo from belabouring the deceased in the manner he was doing. Tsepo then left.

Accused 1 returned to accused 2 and assisted him to his (accused 1's) house. On the way they called at PW.4's house to get a key from his wife. He also reported what had happened at PW.1's place.

It is clear from the evidence that when Litlhokoa and accused 2 started fighting in the house, all the men (including accused 1) were trying to intervene by stopping the fight. But according to the accused, once the fight came to the forecourt, all the deceased, for no given reason, suddenly assaulted accused 2. I find this highly improbable. I have already accepted the Crown evidence that Makume did not carry any stick while at PW.1's place and accused 1 and 2 were the people carrying the sticks. I do not, therefore, accept the accused's story that Makume assaulted either accused 2 or accused 1 with a stick after the commotion had come to the forecourt of PW.1's house. Similarly, I find it unlikely that accused 1 could have just stood at the door of PW.1's house while, as he claims, accused 2, his own brother, was being assaulted by the three deceased.

/The accused

The accused and the crown witnesses are probably telling the truth when they say in the course of the physical struggle Litlhokoa fell accused 2 to the ground. That is perhaps the explanation why accused 1 naturally intervened on behalf of accused 2, his own brother, and assaulted, as he himself concedes, Litlhokoa and Makume.

If he joined in the fight on the forecourt I find it incredible that accused 1 could have politely asked whether whoever was assaulting accused 2 was doing so because the latter was not his mother's child. It seems to me that the truth lies in what PW.1 and 2 told the court namely that they heard him angrily shouting: "Kill him, he is not your mother's child" or words to that effect.

Coming back to their evidence, the accused testified that at PW.4's house accused 1 obtained the key to his house from his wife. As has been mentioned earlier this was denied by PW.4. But on her own words, PW.4 told the court that she was a confused witness, For that reason very little reliance can be made on her evidence. I am prepared, therefore, to accept accused's version on this point.

Having obtained the key, the accused went first to accused 1's home and then to the house in which PW.3 was sleeping with Fusi and Tsepo. They found Tsepo still unfastening his railway boots while PW.3 and Fusi were lying on their beddings. They explained to Tsepo that following the assaults on the deceased,

/they were

they were going to report themselves to the police and it were better that he too went to report himself. This was, however, denied by PW.3, according to whom he, Tsepo and Fusi were already lying on their beddings at the time the accused entered into the house and Tsepo did not own railway boots.

I must say notwithstanding his tender age, I found PW.3 very impressive from the witness box and there was no doubt in my mind that he was a witness of the truth. I, therefore, believed him when he said on the evening in question he did not part company with Tsepo after sunset; that when the accused came to their house, he, Tsepo and Fusi were already in bed and all that the accused said was that they had assaulted people whom they believed had died.

Be that as it may, according to the accused, they then left for accused 2's house from where they proceeded on their way to the police station at Mafeteng. On the way they called at the village of Ha Masiu where they went to the home of accused 1's wife and explained to his father-in-law what had happened. From there they continued on their way to Mafeteng. After they had come out of the village they sat on a hillock where they were found and arrested by PW.6. They were then escorted to Mafeteng Police Station where they were formally charged as aforesaid.

Although no medical evidence was led in this case, there can be no doubt on the evidence that the three deceased died as a result of brutal injuries inflicted

/upon

upon them during the commotion that took place at PW.1's place on the late evening of 19th February, 1983.

In his own testimony, accused 1 took part in the assault on the deceased. The only question that remains for determination is whether accused 1 assaulted the deceased with Tsepo or accused 2. I have already indicated that I accepted the evidence of PW.3 that on the evening in question he had never parted company with Tsepo from sunset. It was not disputed that the commotion at which the deceased were inflicted the fatal injuries took place after dusk. It follows, therefore, that Tsepo could not have been at the commotion and assaulted the deceased with accused 1. I do not have the slightest hesitation in rejecting accused 1's evidence that he had.

There is simply overwhelming evidence that accused 2 was the person who was fighting at PW.1's home and I am convinced that he and accused 1 are the people who inflicted the injuries that resulted in the death of all the three deceased. The accused brutally assaulted, with sticks, the deceased who were clearly not armed with any weapons and the defence of self-defence simply cannot avail them. The evidence of PW.6 as regard the injuries sustained by the deceased was not seriously challenged and there is no good reason to doubt it.

Taking into consideration all the injuries

/inflicted

inflicted on the deceased and particularly the portion of their bodies on which these injuries were inflicted. I come to the conclusion that, in assaulting the deceased as they did, the two accused had the requisite subjective intention to kill, at least in the legal sense. They are accordingly found guilty of murder as charged.

My assessors agree.

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J U D G E.

14th September, 1984.

For the Crown : Mr. Seholoholo

For the Defence : Mr. Khaueo.

EXTENUATING CIRCUMSTANCES.

In determining whether or not there exist factors which tend to reduce the moral blameworthiness of accused's act in this case I take into account firstly that one of the deceased, Litlhokoa, told accused 2 that he would beat him up till he excreted. In a community of rural people the words are likely to be taken seriously with the resultant accused's emotional disturbance. Hence the reaction of the accused in the manner described by the evidence. Secondly there was undisputed evidence that prior to the assault on the deceased the accused had been indulging in intoxicating drinks. Naturally that, to some degree, affected their minds so that the accused were then prone to do things which sober they would not have done.

For these reasons I come to the conclusion that extenuating circumstances do exist in this case and the proper verdict is, therefore, that of guilty of murder with extenuating circumstances.

My assessors agree.

SENTENCE: Eleven (11) years' imprisonment, each.

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J U D G E.

17th September, 1984.

For the Crown : Mr. Sehlohoho  
For the Defence : Mr. Khauoe.