

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

THABO LEPHALLO

J U D G M E N T

Delivered by the Hon. Acting Mr. Justice
J.L. Kheola on the 29th October, 1984.

The accused before me, Thabo Lephallo, is charged with the murder of Sechaba Liphoto (hereinafter called the deceased), on the 1st of January, 1983 at Pitseng in the district of Leribe.

The accused pleaded not guilty.

The depositions at the preparatory examination of the following witnesses were admitted by the defence as evidence before this Court:

- (1) P.W.6 Mabile Nkhasi;
- (2) P.W.7 D/Sgt. Mokheleli - he took photographs of the deceased's head showing the position of the wounds;
- (3) P.W.8 Sgt. Masimole whose evidence is to the effect that he went to Sakei's butchery on the 1st January, 1983 and found a pool of blood near the door of the butchery. The accused told him that he hid the spade under a bush on his way to the police station. He (accused) subsequently led him (P.W.8) and

/P.W.9

P.W.9 Major Rantoa to a bush where he pointed out a spade; and

- (4) P.W.10 L/Sgt. Peete - he examined the deceased's body at the mortuary and noticed that there was a large laceration on the top of the head and another laceration on the forehead and some bruises on both sides of the body at the ribs.

It is common cause that injuries which caused the death of the deceased were inflicted by the accused with the spade (Exhibit 1). Dr. Moteetee (P.W.5) found that the cause of death was intracranial haemorrhage and brain compression. Externally he found two sutured lacerations on the head. The first one was on the left frontal region - 5 cm long and the other one was a V-shaped laceration on the centre of the scalp - 5 cm. each wing. There was a depressed frontal skull fracture and a commuted depressed fracture on the centre of the skull with rupture of sagittal sinus. If there were any other injuries on the body he would have seen them. There were no other injuries.

I wish to digress at this juncture and point out that L/Sgt. Peete who identified the corpse of the deceased to Dr. Moteetee noticed that there were bruises on the lateral aspects of the chest. It is surprising that the doctor did not see them. What sometimes happens is that where an inexperienced doctor finds what he regards as "obvious cause of death" he pays little or no attention to other parts of the body. The presence of the bruises on the body is of particular importance in the present case because some witnesses say the accused repeatedly hit the deceased with the spade.

/The main

The main Crown witness is Morongoe Qhojeng (P.W.1). She is a young woman of 20 years of age and was employed as a saleswoman by Sekei at his butchery. She was on duty on the 1st January, 1983 when the deceased came and bought some meat for R4.00. It was at about 4.00 p.m. and he went away holding the piece of meat in his hands. About an hour later the deceased returned to the butchery and wanted to see Mr. Sekei, the owner of the butchery. He was still holding his parcel of meat in his hands. She told him that Sekei was not there. He went away and when he came to the gate about 30 paces from the door of the butchery, the accused came to him and said: "What are you saying to my children, go away; to-day I am going to kill a person and I shall sleep in a cell." The accused uttered the words in a high pitched voice and went on to say: "Come along, I shall teach you a lesson." At this juncture she was standing at the door of the butchery, the accused and the deceased were about 10 paces from him. She was in the company of a small girl of about 8 years or 9 years of age who did not give evidence. The deceased did not say anything in answer to the question put to him by the accused.

P.W.1 says that when the accused invited him to come along so that he taught ~~him~~ a lesson, the deceased followed him towards accused's room which adjoins the butchery. The deceased did not utter a single word. The accused appeared to be neither angry nor happy. When they came near the door the accused entered into his room while the deceased remained standing outside. When he came out of the room the accused had put off the blanket he had been

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wearing and was holding a spade (Exhibit 1) in his hand. He raised up the spade and hit the deceased at the back of his head with it. The deceased fell on the ground and he hit him several times on the head with the spade. She ran away and raised alarm. The first person to arrive at the scene of the assault after P.W.1 had raised alarm is accused's brother, Teboho Lephallo (P.W.4). On his arrival the accused threatened to kill him also. Teboho rushed to the home of Janki Moima (P.W.3) and came back armed with a stick. It was only then that the accused stopped hitting the deceased and ran away still holding the spade in his hand.

P.W.1 did not know if the accused was drunk on the day in question. The deceased appeared to her to be sober and normal. She had known the deceased for some time for he regularly came to butchery where he had a credit account.

After the accused had run away from the scene of the assault the deceased lay prostrate on the ground and bled from the wounds on the head. Janki Moima came and supported him in an attempt to make him sit up but in vain because his neck and arms were loose. Transport was arranged and the deceased was carried to the hospital.

Under cross-examination P.W.1 denied that at the relevant time she was so far that she could not hear what transpired between the accused and the deceased. She said the distance she gave at the preparatory examination was her rough estimate and did not differ from her present estimate of 10 paces. In any case, the accused shouted to the top of his voice making it easy

/for her

for her to hear what he said. She never heard when the deceased called the accused a "ragged person" (sekatana) nor did she see when the deceased grabbed the accused by the collar of his shirt and then hit him with a fist. She says if such things had taken place she would have seen and heard them as the assault was committed not far from her and in her full view. She affirmed that the accused assaulted the deceased without any provocation whatsoever.

'Mantsutheleng Ntene (P.W.2) was also an employee of Sekei and worked with P.W.1. She was at the butchery when the deceased bought some meat. When he later returned and asked where Sekei was, she was already at the residence of her employer which is on the other side of the road about 50 paces from the butchery. The deceased came to Sekei's wife, 'Makefuo, and asked her where her husband was. 'Makefuo said he was at the butchery. The deceased proceeded to the butchery. P.W.2 went to the toilet and remained in there for a while. When she came out the deceased was already lying on the ground about 10 paces from the door of the butchery and the accused was hitting him with a spade all over the body. She did not count how many times he hit him but it was more than twice. She did not see how the fight started.

Janki Moima (P.W.3) is an old man of 72 years of age and was a friend of the deceased. His house is about 30 paces from the butchery. On the afternoon in question he saw the deceased leave the butchery going towards the

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gate. Before he reached the gate, P.W.3 entered into his house. After a very short time Teboho Lephallo (P.W.4) came to him and made a report. When he came out of the house he saw that the deceased had fallen down and his head was in a drum. The accused was already running away and Teboho was chasing him. He rushed to the deceased and tried to prop him but his head sagged.

The evidence of Teboho does not add anything new to what we already know from the other witnesses. He too did not know how the fight started. He was in his house when 'Mantja Faesa (D.W.2) came to him and made a report. He appeared at the door and saw that the accused was repeatedly hitting the deceased with a spade. He rushed towards them but accused attacked him with a spade and chased him as far as the gate. Teboho went to the home of Janki and obtained a stick. He returned to the scene of the fight but this time the accused ran away. He chased him but failed to apprehend him. He says that when he asked the accused why he was killing that policeman; the latter said, "This policeman is arrogant." After the accused had outran him he returned to the deceased and found that P.W.3 was supporting him and he appeared to be helpless but was still able to speak. He then asked him why the accused hit him. The deceased explained that the accused had called him saying that he should come so that they could talk. He came but the accused did not talk but struck him with a spade at the back of his head.

Under cross-examination he revealed that he and the accused were half-brothers but denied that he hated the

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accused and their father. He admitted that on the previous Saturday he had a quarrel with his father because the latter ordered him not to come and give evidence against the accused. He was positive in his assertion that the accused was not drunk on the afternoon in question. He admitted that he (accused) was wild on that afternoon.

The accused's version of what happened before he started hacking the deceased with a spade differs very substantially from what the Crown witness (P.W.1) has told this Court. On the morning of the 1st January, 1983 he went to the home of his uncle Lephallo who had invited him for the festivities of the New Year's Day. He partook about one litre of Sesotho beer at his uncle's place. From there he went to his father's house where he found people drinking beer. They allowed him to share their beer with them but he is unable to estimate roughly how much beer he drank as a result of sharing with those people. After that he asked D.W.2 to give him beer. She told him that there was no beer. When he left his father's place he was moderately drunk and his mind was not so imbued with liquor that he could not remember what he did. He remembers very well that when he left his father's house he met the deceased inside the butchery yard, and not at the gate as the Crown witnesses allege. It was the deceased who spoke to him first and said, "Hi, you "rag" (or ragged person) (sekatana)." He (accused) continued to walk towards his room and ignored the deceased. When the deceased said for the second time that he was a

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"ragged person," he answered him and said, "How dare you call me a "ragged person" when my father, the owner of this yard never calls me that? I am not a "rag" of your house." At this juncture he was about 15 to 20 paces from the door of his room and the deceased left the spot where he had been standing and came to him. He (accused) walked away because he realized that the deceased was in a fighting mood. He was just about to enter into his room when the deceased touched him at the back. He turned. The deceased caught him by the collar of his shirt and said he wanted to lash him till he excreted. He (deceased) hit him with a fist on the cheek and he fell on the ground as a result of the impact.

After the accused had fallen down the deceased kicked him with his shoes. He saw a spade near the door and grabbed it and stood up. He struck the deceased on the forehead but the latter continued to attack him and kicked him again at the kidney region. He struck him for the second time on the head with the spade. The deceased fell down and he stood besides him and looked at him. He denies that he hit him again after he had fallen down. He also denies that he run away when he left the deceased still lying on the ground. He walked away towards the police station and decided to hide the spade, under the bush before he came to the police station. He says he was confused.

The evidence of 'Mantja Faesa (D.W.2) was to the effect that she was working at the residence of

/Mr. Sekei

Mr Sekai when she saw the deceased in the butchery gate while the accused was standing at the door of the butchery. She saw when the deceased turned and walked normally towards the accused. She entered into the house and when she came out the accused was already hacking the deceased with a spade.

As I have already stated there is no dispute that the injuries which caused the death of the deceased were inflicted by the accused. The defence has contended that the accused acted under extreme provocation and in self-defence. According to P.W.1 the accused attacked the deceased without any provocation. Mr. Mofolo has submitted that P.W.1's evidence should not be believed and has pointed out a number of discrepancies in it. He says that at the preparatory examination P.W.1 said the deceased did not utter a single word during the whole episode. However, at the trial she says the deceased said, : "All right, I will go away." If the deceased was on his way and agreed to go away, why then did he return unless he was chasing and did chase the accused to the door? Why are Crown witnesses avoiding or hiding this fact from the Court? These are the questions posed by Mr. Mofolo for the Court to answer.

It is not correct that at the trial P.W.1 said the deceased said something to the accused which could in any way be regarded as provocation to him. P.W.1 ascertained that before the accused attacked the deceased with a spade the latter had not uttered a single word.

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It is correct that the deceased turned and followed the accused and that at the preparatory examination 'Mantja (D.W.2) said she then saw deceased go to the accused queckly. I disagree with Mr. Mofolo that when the deceased went to the accused quickly he was chasing him. It was the accused who invited the deceased to follow him and if the former was walking fast then the latter had to keep the pace. The accused entered into his room and put off his blanket and came out holding a spade with which he attacked the deceased. Even if it can be assumed in favour of the accused that the deceased was chasing him, he managed to get into his room and the deceased who was unarmed did not follow him into the room. He merely stood near the door and waited for the accused to come out. According to P.W.1 the deceased did not raise a finger at the accused till he was struck on the head and fell on the ground.

I do not agree with the defence that the Crown witnesses are hiding that the deceased chased the accused. It is just that the chase never took place.

Mr. Mofolo submits that P.W.1 lied when she said she was the only one who witnessed the fighting for 'Mantja said she called Teboho (P.W.4) when she saw the accused hack the deceased with a spade. It must be remembered that when the attack started 'Mantja was 50 paces away on the other side of the road at the home of Sekei. There were no other people in the butchery yard and it is not fair to say the witness lied when she said she and the young child were the only ones who saw the

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fight. She cannot be expected to have seen people who were standing far away from the butchery. 'Mantja was so far away from the butchery that she did not even hear what transpired between accused and the deceased. She did not even pay much attention to them because she entered into the house when the deceased turned and followed the accused. In my view there is no contradiction in the evidence of P.W.1 and 'Mantja as the latter witnessed only part of the fight.

It was the evidence of the Crown witnesses that the deceased was hit from behind by the accused, and that the accused belaboured him even when the latter had fallen. It was submitted by the defence that this evidence is palpably false and exaggerated in view of the medical evidence which found no wound at the back of the head nor multiple wounds on the body of the deceased consistent with belabouring with the spade. I agree that P.W.1 was wrong to say the deceased was struck at the back of the head. I think this is only a mistake because if you look at Exhibit B (Photo No.1) the wound on the top of the head starts from the middle of the head and extends towards the back part of the head. However, the important thing here which P.W.1 was emphasising was that when the accused got out of his room he went behind the deceased and then struck him. As far as the evidence of the doctor is concerned I have already pointed out that it is probable that having found what he regarded as the obvious or sufficient cause of death he paid no attention to other parts of the body. The defence admitted as evidence the deposition of L/Sgt. Peete

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that there were bruises on the lateral aspects of the chest. Mr. Mofolo cannot rely on the evidence of the doctor alone after admitting the evidence of L/Sgt. Peete that there were bruises. I agree that these two witnesses contradict each other but I have explained the reason for it.

According to medical evidence the accused hit the deceased not more than three times on the head, that is to say, one blow on the forehead and two blows on the top of the head because the two wings of the V-shaped wound indicate two blows as the spade could under no circumstances cause a V-shaped wound from a single blow. P.W.2, P.W.4 and the defence witness 'Mantja all say the accused belaboured the deceased with the spade all over the body. We know that P.W.2 and 'Mantja were 50 paces away from the scene of the fight and could not have seen properly to which part of the body the blows were directed but they saw that he hit him several times. P.W.4 was right at the scene of the fight and saw exactly what was happening. The accused even attacked him and chased him away. I am convinced that the accused belaboured the deceased with the spade on the body.

Mr. Mofolo submitted that the evidence of Teboho Lephallo (P.W.4) cannot be said to have been reasonably true in that there is evidence of bad blood between him and the accused on account of being the off-spring of a polygamous marriage, I entirely agree with this submission and I have approached his evidence with great caution. His evidence is corroborated in all respects by

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other witnesses. He says accused attacked him when he tried to intervene and he is corroborated by P.W.1 on this point. He says he chased the accused, he is corroborated by P.W.3 an old man of 72 years of age. Moreover, his evidence is not so material in this matter. The most important Crown witness is P.W.1 who witnessed the start and cause of the fight.

According to P.W.1 the accused was annoyed when he saw the deceased talk to them and he clearly indicated that he would kill him and sleep in the cell that night. It seems to me that the reason for his attack was that he did not want a stranger to talk to his "children". This may appear to be a very flimsy reason but there is no other reasonable explanation why the accused assaulted the deceased. They both appeared to be strangers to each other and they had never had any quarrel before this incident. P.W.1 struck me as being a truthful witness who was not shaken by cross-examination. On the other hand the accused did not impress me as a truthful witness. His story is far from being reasonably possibly true. He wants this Court to believe that the deceased attacked him without any provocation by first calling him a "rag" and then chasing him till they came to the door of his room where the attack started. He is supposed to have been hit with a closed fist on the cheek. He fell on the ground and was kicked with shoes while he was on the ground. It is significant that no one saw a contusion on the cheek of the accused where he alleges deceased punched him. Nor

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did he complain to anybody and show the contusion. In my view a punch on the cheek ought to have caused a bruise.

He alleges that when he rose and grabbed the spade the deceased attacked him, he (accused) struck him on the forehead with the spade. The deceased kicked him on the kidney region. In other words, the accused wants this Court to believe that after he struck that devastating blow on the deceased's forehead the latter was still strong enough to jump and kick him on the kidney region. This is not only improbable but is outright lie. We know from the medical evidence that that devastating blow caused a depressed fracture of the frontal bone. That blow must have felled the deceased to the ground. In fact that is supported by P.W.1 who says the first blow with the spade caused the deceased to fall on the ground. In my view the blow was so severe that it ought to have stunned the deceased. I come to the conclusion that the accused lied on this point.

The deceased was a policeman and not a lunatic who would just attack a man for no apparent reason and without any provocation. The Crown evidence shows that the accused did not want when the deceased spoke to P.W.1. He was deserted by his wife in 1974 and we do not know what secret intentions he had towards P.W.1 who is a fairly pretty woman. I am surmising because there seems to have an element of jealousy on the part of the accused when he saw deceased, who was much younger than

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him, speak to P.W.1. It may be he intended to propose love to her one day and was annoyed to see the deceased taking that chance from him. I see no other reasonable explanation for the anger when he saw the deceased speak to his "children". Be that as it may the truth is that the deceased ;did not provoke the accused in any way. It has been pointed out in many cases that in a criminal trial the accused bears no onus to prove his innocence and that the burden of proof is on the Crown throughout to prove its case beyond a reasonable doubt. A frequently quoted passage from the judgment of Greenberg J.A. in R. v. Difford, 1937 A.D. 370 at p. 373 reads:

"..... no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

I have thoroughly considered the explanation given by the accused and I have come to the conclusion that it is not only improbable, but that beyond reasonable doubt it is false. He wants this Court to believe that all the Crown witnesses hate him and that they are hiding the truth. There is absolutely no truth in that. I found all the Crown witnesses to be very truthful and there is nothing to show that there was bad blood between them and the accused.

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It is trite law that the intention to kill is judged by the subjective test. The next question is whether the Crown has proved beyond a reasonable doubt that the accused intended to kill the deceased. Actual intention may be divided into two parts:

- (a) Where the accused's aim and object was to do the unlawful act or to cause the consequence; this is called dolus directus (S. v. Sigwahla, 1967(4) S.A. 566 at p. 569);
- (b) Where, although not accused's aim and object, he saw the unlawful act or consequence as certain, or as substantially certain (S. v. De Bruyn en 'N Ander, 1968(4) S.A. 498 at p. 506).

I think the case of the accused falls under (a) above. He clearly told the deceased that he would kill him; he entered into his room and put off the blanket so that the movements of his arms could be as free as possible when he delivered the fatal blows; he took a spade and hit the deceased on the head (a vulnerable part of the body) at least three times; the force of the three blows was enough to cause a compressed fracture of the frontal skull and a committed depressed fracture on the centre of the skull; and, to borrow the words of Holmes, J.A. in Sigwahla's case (supra): there is nothing in the present case to suggest subjective ignorance or stupidity or unawareness on the part of the accused in regard to the danger of hitting a person on the head with a spade. In my opinion the accused actually intended to kill the deceased and I accordingly find him guilty of murder.

My assessor agrees.

JUDGMENT ON EXTENUATING CIRCUMSTANCES.

Under the provisions of subsection (3) of section 297 of the Criminal Procedure and Evidence Act 1981, this Court may pass any sentence other than the death sentence if it finds that there are extenuating circumstances.

It is trite law that the subjective test is applicable when the court considers the existence of extenuating circumstances. In Ramone v. Rex 1967 - 1970 LL.R. 31 at p. 37 Roper, P. said:

"The question was, what was the state of the appellant's mind at the time when he killed the deceased. There is abundant authority to the effect that in determining whether extenuating circumstances exist the subjective test of the accused's mind is more important than the objective test of the factual basis for that state of mind."

Matters for consideration were summarized by Rumpff, J.A. in S. v. Babada 1964(1) S.A. 26 at p. 26:

- "(1) Whether there are circumstances which could have had a bearing upon the mind and mental faculties of accused;
- (2) Whether such circumstances did in fact influence the accused;
- (3) Whether the influence was of a such a nature that the accused's act is in the opinion of the trial Court less blameworthy."

As was pointed out in R. v. Fundakubi, 1948(3) S.A. 810 it is the moral and not legal blameworthiness that the Court must consider. In the present case the accused gave evidence that he was moderately drunk when he assaulted the deceased. But the Crown witnesses said he appeared to be normal. As it was New Year's Day festivities I shall assume in favour of the accused that he had taken some liquor that day and that it had some influence on him. One of the Crown

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witnesses (P.W.4) said the accused appeared to be wild that day. In my opinion it is reasonably possible that the wildness and rage were caused by the intoxicating liquor the accused had take. As there is no defined degree of intoxication demanded before the intoxication can serve as an extenuating circumstance, I am of the opinion that the accused has discharged the onus resting on him on a balance of probabilities that intoxication had some influence on his mind. (See R. v. Babada, 1964(1) S.A. 26).

I find that there were extenuating circumstances.

SENTENCE.

Twelve (12) years' imprisonment.

ACTING JUDGE.

12th November, 1984.

For the Crown : Miss Moruthoane

For the Defence : Mr. Mofolo.