

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MALEKA MALEKA

J U D G M E N T

Delivered by the Hon. Acting Mr. Justice
J.L. Kheola on the 18th December, 1984.

The accused before me, Maleka Maleka, is indicted upon a charge of murdering Masilo Lekhooana (hereinafter called the deceased), on or about the 21st day of January, 1984 at or near Ha Sekoati in the district of Mophale's Hoek.

It is common cause that the deceased died as a result of extensive bleeding mediastinum, both chest cavities. There were five open stab wounds all around the chest about 2 cm. long and deep, two stab wounds on both hands, one at the mouth and one wound on the right thigh.

It is also common cause that on the 23rd January, 1984 when the wife of the accused was examined by the doctor she had a small stab wound on the right upperarm and another wound on the back side of the left thigh. On the 22nd January, 1984 the accused gave to Trooper Maichu the following articles: a blue blanket, black and white "North Star" shoes and a stick. These articles were found in the house of the accused and they belonged to the deceased.

/The star

The star witness called by the Crown is Tankiso Maleka a boy of about 13 years of age. He is the nephew of the accused and lives with him and her maternal grandmother. He looks after the animals of the accused. One day his grandmother told him that the accused wanted to see him. He found the accused and his wife, Matlaleng in their house. The latter was writing a letter and appeared to be frightened. Accused gave him five cents and ordered him to go to the cafe and buy an envelope. He bought the envelope and 'Matlaleng put the letter into it. Accused instructed him to take the letter to the deceased; if he found that the deceased was with some people he should not give him the letter. He went to deceased's home but found that he was not there. He returned to the accused and informed him. Accused ordered him to try for the second time. On this occasion he found the deceased at his home and delivered the letter to him personally and told him that it came from 'Matlaleng. Tankiso told the Court that he had been instructed by the accused to say the letter came from 'Matlaleng. He went back to the accused and reported that he had duly delivered the letter and accused said that he was going to stab the deceased with a knife. He did not inform his grandmother what the accused had said because he did not think he was telling the truth. 'Matlaleng appeared to be frightened because she was shaking.

Tankiso Maleka further told the Court that the accused was no longer married to 'Matlaleng who is now living at her maiden home with her daughter. Accused has now married another woman with whom he is living. Two heads

/of cattle

of cattle were paid as 'bohali' for this woman. Her maiden home is at a village near Tlali's village.

'Mateboho Maleka is the wife of the elder brother of the accused. On the night of the 21st January, 1984 she was called to the home of the accused at about 2.00 a.m. On her arrival there accused told her that on his return from Taung he found the deceased sleeping with his wife and stabbed him several times with a knife.

The version of the accused of what took place that night is to the effect that at about 8.00 p.m. he went to a "stockfel" party at the home of one Mahasele and returned to his house between the hours of 11.00 and 12.00 midnight. He did not knock at the door because he did not want to disturb his wife but merely opened the door and entered. He struck a match because it was dark in the house and walked towards the headboard of the bed to light a lamp. All of a sudden a person sprang from the bed and he became scared and dropped the match on the floor. After that that person struck him on the head with a stick. He rushed at that person and a struggle ensued during which by 'chance he managed to take his knife out of the pocket and stabbed that person several times. His wife tried to separate them by getting between them and by so doing she was accidentally stabbed with the knife. The man escaped and ran away. He later learnt from his wife that the man was Masilo (deceased).

Teboho Tsemane confirmed the story of the accused that on the night of the 21st January, 1984 he (accused) was attending a 'stockfel' party at the home of Mahasele.

/He saw

He saw the accused at about 11.00 or 12.00 midnight and they greeted each other. At about 11.00 or 12.00 midnight he did not see the accused again.

At the close of the defence case Miss. Moruthoane for the Crown applied that she be allowed to call witnesses to rebut the alibi which had not been raised in cross-examination of her witnesses. Mr. Mda for the defence opposed the application on the ground that it would prejudice his client and submitted that the alibi defence had been put to P.W.2 'Mateboho Maleka. I exercised my discretion in favour of the Crown because I did not see how the accused would be prejudiced. To my great dismay Miss. Moruthoane called two people who had been in Court during trial. One of those people is Teboho Lekhooana who is the brother of the deceased. The second witness is 'Manapo Pheko, the headman of the village in which accused lived. His evidence was hearsay. He was informed that the 'stockfel' party had closed at 6.00 p.m. because the villagers had to attend a vigil following the death of 'Masejabakela Lipholo. He further said Teboho Tsemane was not in the village on the 21st and 22nd January, 1984.

Teboho Lekhooana's evidence was to the effect that he saw Mahasele and his wife at the vigil. The evidence of these two witnesses must be rejected in its entirety because (a) they were in Court when the other witnesses, including accused and his witness, gave evidence, (b) the evidence of 'Manapo is hearsay and (c) there is a likelihood of bias on the part of Teboho Lekhooana because his own brother has been killed. Why the Crown

/decided

decided to call people who had been in Court throughout the trial instead of Mahasele at whose house the 'stockfel' was held is beyond my understanding.

The star witness for the Crown is Tankiso Maleka (P.W.1). If his evidence is believed it clearly shows that the accused who suspected that his wife had a love affair with the deceased lured him to come to his home at night on the pretence that he (accused) was not at home. The witness is a boy of about 13 years of age and I was convinced that he knew what it means to tell the truth and admonished him accordingly. Accused instructed him to deliver the letter to the deceased only if he found him alone. He was to tell him that the letter came from accused's wife. After he had delivered the letter and reported back to the accused the latter said he was going to stab the deceased with a knife. I have scrutinised the evidence of this child with great care and found him to be very intelligent and truthful. There are some discrepancies in his evidence but these are not so material as to cast doubt on his veracity in general. The discrepancies referred to are:

- (a) The witness contradicted himself because in his evidence-in-chief he said the accused instructed him not to tell the deceased from whom the letter came. He later said when he came to the deceased he told him the letter came from 'Matlaleng. The Court asked him why he said so. He said he had been ordered by the accused to say so.
- () He said ever since 'Matlaleng left her marital home and went to her maiden home he never saw her. Under cross-examination he said he saw her at the magistrate Court during the preparatory examination.

/(c)

- (c) At the preparatory examination the witness said she was called by the mother of the accused who told him that accused wanted to see him. But at the trial he did not say this.

As I have already said these discrepancies are too minor and the witness's explanation why he made these contradictions was satisfactory. The boy said there was blood on the floor when the accused sent him to deliver the letter to the deceased and that the wife of the accused appeared to be frightened and shaking. To some extent his evidence on this point is corroborated by Tpr. Maichu whose deposition at the preparatory examination was admitted as evidence in this Court. It is most unlikely that the blood could have come from the deceased when he was stabbed by the accused. The struggle lasted only a few seconds and the deceased escaped immediately after he was stabbed. I believe the boy that the blood was there long before the deceased was lured to come to the house. It must have come from accused's wife who was apparently forced to write a letter to her lover (deceased).

Tankiso asserted that after the death of the deceased 'Matlaleng went to her maiden home and that accused married another woman. He went on to say two heads of cattle were paid as 'bohali' and that the cattle are now at the home of the woman's parents at a village near Tlali's village. He was challenged by the defence but later it was conceded by the defence that there is a woman who is now living at the home of the accused. They conveniently call her a domestic servant. But they failed to explain what the two cattle are doing at the home of this servant's parents. Tankiso looks after the cattle of

/the accused

the accused as his uncle and knows that a chit was issued for the transfer of the two cattle. He is the illegitimate son of the sister of the accused and has been living with the accused and his grandmother very happily. I see no reason why all of a sudden this boy can fabricate evidence against his uncle with whom they are still living very happily even at this moment. The chastisement following the incident when the child broke the leg of one of accused's animals has nothing to do with this case nor does it show any animosity against the child.

The accused said that when he struck a match a person suddenly sprang from the bed and struck him on the head with a stick. He sustained no wound, not even a bruise. This is most improbable. We know that a stick in the hands of a Mosotho man is a very dangerous weapon. The deceased must have delivered a blow that would incapacitate the accused and make his escape easy.

It is most improbable that during the struggle that followed after the accused had dropped the match he (accused) was able to put his hand into his pocket and take out a knife and open it. The knife used by the accused to stab the deceased is a clasp knife and it could not have been possible for him to open it while he was struggling with a man in the dark. Accused must have been ready and waiting for the deceased to arrive because he lured him to come to his house. I entirely reject the alibi of the accused not on the basis of the evidence given by the headman and Teboho Lekhooana but on the ground that I believed Tankiso Maleka that accused enticed the deceased to come to his

/house

house so that he could kill him. The boy told this Court that when he reported that he had delivered the letter to deceased personally, he said he was going to stab him. The accused knew very well that the deceased would unsuspectingly come to meet his lover.

I have duly cautioned myself and my assessor about the danger of acting upon the evidence of the child, Tankiso Maleka and I have shown above what features of this case tend to show that the child's evidence is unquestionably true and that the defence story is false beyond any reasonable doubt. In the case of Miller v Minister of Pensions, (1949)2 ALL E.R. 372 at p. 373 Lord Denning expounded the Criminal standard in the following words :

"It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond a reasonable doubt, but nothing short of that will suffice."


The story of the accused is not only improbable but it is false beyond a reasonable doubt. His witness, Teboho Tsemame did not strike me as a truthful witness. He gave me the impression that he and accused prepared the alibi. He was very precise that when he saw the accused at the party it was between 11.00 and 12.00 midnight. It must be remembered that this witness is illiterate. When he was asked why he remembers the exact time he said the owner of the 'stockfel' announced that it

/was

was between 11 and 12 and that they should 'listen to each other.' The accused also conveniently arrives at his home which is about 1 kilometre away between 11 and 12. I do not think the accused could be at two different places at the same time. I reject the evidence of Teboho.

For the reasons stated above I found that the Crown has proved its case beyond a reasonable doubt. The accused person is found guilty of murder.

My assessor agrees.


ACTING JUDGE.

18th December, 1984.

For the Crown : Miss Moruthoane

For the Defence : Mr. Z. Mda.

JUDGMENT ON EXTENUATING CIRCUMSTANCES.

The onus rests upon the accused person convicted of murder to show that extenuating circumstances exist (see R. v. Phaloane, 1980(2) LLR. 260).

In the case before me the accused did not give evidence to show the existence of extenuating circumstances; but Mr. Mda addressed me on this aspect of the case. He submitted that the accused genuinely believed that his wife had an illicit love affair with the deceased and that when he attacked the deceased with a knife he must have been enraged to a great extent. I agree that the accused must have been very angry when he discovered that his wife had an affair with the deceased, but he did not run to the house of the deceased at that moment when he made this discovery, he planned to entice the deceased to come to his wife on the pretext that he was not at home. There was premeditation.

In considering the question of extenuating circumstances the Court must take into account the cumulative effect of all the relevant circumstances (S. v. Manyathi, 1967(1) S.A. 435 (A.D.)). The circumstances in the present case are that the accused suspected that the deceased was in love with his wife; he then enticed him to come to his house at midnight; the deceased actually came to accused's house at midnight and this was conclusive proof that he came for an illicit purpose. There is no doubt that when the deceased entered into his house at midnight this must have been extreme provocation to the accused. I found that there was an

/element

element of provocation despite the fact that there was premeditation (S. v. Arnold, 1965(2) S.A. 215 C.P.D.). The provocation was not of such a nature as to reduce murder to culpable homicide. I came to the conclusion that extenuating circumstances exist.

SENTENCE: Eight (8) years' imprisonment.

G. M. Mda.
ACTING JUDGE.

18th December, 1984.

For the Crown : Miss Moruthoane

For the Defence : Mr. Mda.

IN THE HIGH COURT OF LESOTHO

In the Matter of

SECHABA MATHOKA

Appellant

v

R E X

Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Acting Mr. Justice
J.L. Kheola on the 28th day of December, 1984.

On the 22nd October, 1984, I dismissed the appeal and intimated that my reasons for judgment would follow later. These now follow.

The appellant appeared before the former Resident Magistrate for the district of Mophale's Hoek charged with contravening section 3(1) of Proclamation No. 60 of 1959 as amended, in that from the 19th day of September, 1977 and at or near Taung in the district of Mophale's Hoek the accused, being a person legally liable to maintain Lillo Masienyane, born of him and Moselantja Masienyane, failed to provide the said Lillo with adequate food, clothing and medical aid while able to do so. The appellant was found guilty as charged and was sentenced to pay a fine of R100 or 6 months' imprisonment in default of payment of the fine. The sentence was suspended for 3 years on condition that the appellant is not convicted of any offence under Proclamation 60 of 1959 as amended by Order 29 of 1971.

In addition he was ordered to pay R30.00 every month towards the maintenance of the child, Lillo Masienyane, till she reaches the age of 18 years, payment is to be made to the Clerk of Court, Mophale's Hoek on or before the

2/ last working day

last working day of each month and which payment is to start from the end of June, 1982. The appellant is now appealing against such conviction and sentence.

P.W.1 is Adelina Marake. She is the sister of the complainant. Her evidence is to the effect that one day she was in Mafeteng and carrying Lillo Masienyane in her arms. Lillo was not happy because he was ill. When the complainant and the accused came to her, the latter asked why his child was not happy. The complainant explained to him that the child was not well and that she did not have the money to pay for medical treatment of the child. The accused instructed the complainant to take the child to Dr. G.S. Mohale whose surgery is at the Mafeteng bus stop. He explained that although he did not have money Dr. Mohale was a friend of his and would allow him to pay later. The child was taken to the surgery by the complainant accompanied by the accused. She said that the child was born on the 9th September, 1977.

P.W.2 is Julius Sentje Ntsane. In September, 1976 he was working as a bus conductor of one of the buses of the Lesotho National Bus Service. The driver of the bus in which he worked was the accused. He first met the complainant in September, 1976 when the accused introduced her as the girl he intended to marry. In December, 1976 he and accused were working together in a bus that was supposed to operate between Mohale's Hoek, Mpharane and 'Masemousu. One day before the bus left for 'Masemousu the accused requested him that as he had a visitor that day he (the witness) should remain at his home at Ntjepeleng so that the accused could be alone with his visitor (the complainant). P.W.2 asked the accused why he wanted to be alone with the complainant who appeared to be only a girl. The accused said that the complainant was his wife and that they had already agreed to marry each other. He agreed to the request and when the bus came to Ntjepeleng he alighted leaving accused with the complainant. On the following day he boarded the bus at Ntjepeleng and found the complainant

3/ in the company

in the company of the accused. When the bus arrived at Mohale's Hoek, the accused escorted the complainant to a bus from Quthing to Maseru. P.W.2 explained that at 'Masemousu there is only one room used by the staff of the Lesotho National Bus Service.

On the second occasion, P.W.2 saw the complainant in the company of the accused. They all went to Quthing in a bus driven by the accused. When they arrived at Quthing, the accused and the complainant slept in the same room while he (P.W.2) had to sleep in another room with other employees of the Corporation. On the third occasion the complainant joined them at the Maseru bus stop and travelled to Quthing with the accused. On arrival in Quthing, the complainant and the accused slept in the same room. The normal practice was that he used to sleep in the same room with the accused but on the two occasions the accused requested him to sleep in another room so that he could have a chance to be alone with the complainant to whom he referred as his wife. In 1977 the accused came to him and told him that he had impregnated the complainant and that he (P.W.2) should help him in the denial of the charge. He refused to do so and actually gave evidence in favour of the complainant at Tsoloane Local Court in which the mother of the complainant claimed six (6) head of cattle or R600-00 compensation for seduction of her daughter. The plaintiff won the case (See Exh A).

Under cross-examination, P.W.2 denied that he was in love with the complainant; he also denied that on the occasion they went to 'Masemousu the complainant remained at Ntjepeleng with him. He also denied that at one time he said the complainant was in love with Tsolo Lisene.

P.W.3 is Moselantja Masienyane, the complainant. Her evidence is that she fell in love with the accused in 1976. On the 6th December, 1976 the accused invited her to go to 'Masemousu with him. Arrangements were made that P.W. 2 should remain at his home at Ntjepeleng so that the accused and complainant could have the chance to sleep together. When P.W.2 asked the accused what would happen if she became pregnant, accused said he had decided to

4/marry her

marry her. When they arrived at 'Masemousu she slept with the accused in the same room as man and wife and they had sexual intercourse that night. On the second and third occasions she had sexual intercourse with the accused at Quthing. She confirms that the accused asked P.W.2 to sleep in another room so that he (accused) could be alone with her. About a month after she had had sexual intercourse with the accused she did not menstruate and informed the accused that she was pregnant. He expressed surprise and disbelief because on the occasions he had sexual intercourse with her he had taken some pills. After they had agreed that she should be examined by Dr. Maitin to ascertain whether she was pregnant or not, the accused suggested that she must have an abortion as he had some problems. He had seduced one girl at Morija and her parents insisted that he must marry that girl. The accused threatened to deny paternity of the child if she refused to have an abortion. They parted. She refused to have an abortion.

In March, 1977, she was already pregnant when the accused again invited her to Quthing and they again had sexual intercourse. She totally refused to have an abortion. After the child was born, the accused took the child to Dr. Mohale when it was not well. She handed in a card or receipt with the letterheads of Dr. G.S. Mohale. It is dated 17th July, 1978 and showing R3.00 and the name of the accused and the signature of Dr. Mohale. On the other side there is the name Lillo. It is Exhibit A. She said that Exhibit A was issued by Dr. Mohale on the day the accused had taken the child to him for medical examination.

Under cross-examination the complainant explained that at the time she got pregnant, her mother was working in Bloemfontein. She reported to her elder sister that the accused had impregnated her but she hid her mother's address because she was ashamed of her pregnancy. Her mother came home during the Easter holidays in 1977 and a report was made to her. She sent complainant's aunt, 'Masepinko Ralefifi, to inform the parents of the appellant

of the seduction of her daughter. 'Masepinko went to Motimpose where she met the mother of the accused who was insane at the time. The accused denied that he was responsible for her pregnancy.

The first defence witness is Rasera Sera. His evidence was that in 1977 and 1978 he was the chief's counsellor at Motimpose and that during that period P.W.4 'Masepinko Ralefifi never came to him and complained that the accused had seduced the complainant. He later admitted that during 1977 and 1978 he was in prison and did no administrative duties at Motimpose. His evidence is totally irrelevant to these proceedings.

The accused gave evidence and totally denied that he ever had sexual intercourse with the complainant. On the occasion they went to 'Masemousu, the complainant and P.W.2 alighted from the bus at Ntjepeleng and spent the night together. He picked them up on the following morning. On the occasion the complainant accompanied them to Quthing, she slept in a different room and he never had sexual intercourse with her. He denies that he ever took the child to Dr. Mohale for medical examination.

The learned Resident Magistrate who saw the witnesses believed the Crown witnesses and rejected the denial of the accused. In his grounds of appeal, Mr. Mda who appeared for the appellant at the trial based the appeal on the ground that the accused gave a reasonably true explanation or version, and the Honourable Court could not reasonably hold that accused's story was not reasonably true. He referred me to the cases of Rex v. du Plessis, 1924 T.P.D. 103 at p.124, Rex v. Difford, 1937 A.D. 370 at p. 373 and Mphonyane Leboqo v. Rex, 1981 (1) L.L.R. 163. I think the learned Resident Magistrate was right in rejecting the story of the accused because it seems to me that it was not only improbable but false beyond reasonable doubt. Take one example of the lies accused told: he said the reason why the complainant went with him to Quthing was because when they arrived at 'Malintja bus stop the complainant was the only passenger in the bus and she was the only one to alight there.

6/ She then asked

She then asked the accused to take her to Mohale's Hoek because it was dark and she was afraid of walking alone to her parents' home which was far away. Immediately after saying the complainant was the only passenger when the bus arrived at Malintja bus stop, the accused says from 'Malintja bus stop I went on with P.W.3 and other passengers. If the accused was not lying when he said the complainant was the only passenger, where did the other passengers suddenly appear?

The accused then agreed to take the complainant to Mohale's Hoek which is the home town of the complainant. When they arrived there, she again requested him to take her to Quthing because the people were already in bed and it was dark. I find this story to be most improbable that the complainant could pass her own town and elect to go and sleep with strangers about 50 miles from her home town. She must have known several people in Mohale's Hoek and the accused who appears to have been so kind to the complainant would have taken her in his bus to the home of a person she knew. The truth is that the bus arrived at Mohale's Hoek at broad daylight and the accused decided to take his girl friend to have a nice time with her.

Mr. Mda has argued that assuming that P.W.2 had an interest in the matter and that his evidence was possibly in nature of accomplice evidence, his own evidence required corroboration implicating the accused, on the crucial issue. I entirely disagree with him on this point. I do not see how P.W.2 can possibly be regarded as an accomplice in this case. The charge against the accused is failure to maintain his child in contravention of section 3(1) of Proclamation No. 60 of 1959 as amended. I do not see any circumstances under which P.W.2 could be charged with the same offence.

It is also argued that there was considerable delay in bringing the matter to the family of the appellant although their address was known at all material times.

7/ We are

We are here not concerned with what action the parents of the complainant took to recover their compensation for seduction, but we are dealing with what action the complainant took when she realized that she was pregnant. She informed the accused immediately she missed her menstruation in December, 1976. The accused suggested an abortion which she rejected outright. Even on the side of the parents, I do not agree that there was a long delay. A delay of three months does not appear to be too long especially when it is remembered that the mother of the complainant became aware of her pregnancy in March, 1977 when she came home. She immediately approached the parents of the appellant. The subsequent delay to take the case to a court of law is neither here nor there because we know that the mother of the complainant lived and worked in Bloemfontein.

Mr. Pheko for the appellant referred me to a recent decision of the Court of Appeal in Robert Potlane Ntle v. Khubelu Khaketla, C. of A. (CIV) No. 3 of 1983 where Goldin, J.A. said :

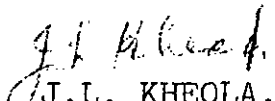
"Fourthly, if it is established, however, that such an illegitimate child who belongs to the mother's family is without adequate means of support because the mother's guardian, or whoever is responsible for his maintenance under customary law, is unable, or cannot be compelled, to support such child, then the mother and father of the child become liable for its maintenance. It would obviously be repugnant to justice or morality to leave a child without adequate provision for its maintenance (cf R. v. Rantsane, supra, p. 286 and Nkoko v. Nkoko, 1967 - 70 L.L.R. 328).

Mr. Pheko has submitted that in the present case there was no evidence that the mother's family were unable to maintain the child. I disagree with this contention because on the occasion, the child was ill, the mother did not have the money to pay for its medical examination and that was the reason why the accused had to go to Dr. Mohale and an agreement was made that he would pay later. It is clear that the mother's family were unable to maintain the child. The fact that the grandmother of the child found it necessary to leave her home and children to go and work in the Republic

of South Africa proves clearly that she could not make ends meet. I am of the view that this is a proper case where the common law should be enforced because those responsible under the customary law are unable to support the child adequately. Although there was no evidence as to the whereabouts of the father of the complainant, it is clear that he does not come into the picture at all as far as the family affairs are concerned. The mother seems to be the sole head of the family and no male member of the family was ever mentioned in the trial as well as the civil case at Tsoloane Local Court.

For the reasons stated above I found no valid grounds to disturb the finding of the trial court. The appeal was dismissed.

The appellant is liable to pay the maintenance ordered by the Resident Magistrate with effect from the date of the judgment of the learned Resident Magistrate.


J.L. KHEOLA,
ACTING JUDGE.

28th December, 1984.

For Appellant : Mr. Pheko
For Crown : Miss Nku.