

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

v

TAELE SEKONYANA
SETSOKOTSANE SEKONYANA

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K Molai
on the 2nd day of March, 1984

The two accused pleaded not guilty to a charge of murder on the allegations that on or about the 17th December, 1982 and at or near Ha Sefoli in the district of Maseru they each or both unlawfully and intentionally killed one 'Mapuseletso Motja.

At the commencement of the trial, Mr. Kolisang, for the defence, admitted the depositions made by Ts'eliso Motja, Puseletso Motja, Piti Taole, D/Sgt Polanka and Dr. Jagues who were respectively P.W 1, 3,5,6 and 7, at the proceedings of Preparatory Examination. The admissions were accepted by Miss Moruanoane, Counsel for the crown, and it became unnecessary, therefore, to call the deponents as witnesses. The report of one L.P. Neethling, a Major-General in the South African Police attached to the Forensic Science Laboratory in Pretoria was also admitted and accepted as evidence in terms of the provisions of Section 273 of the Criminal Procedure and Evidence Act, 1981 He too was not called as a witness.

It was not really disputed that the deceased and the two accused lived in the same village of Ha Sefoli and the deceased was in fact a relative of the accused who were the children of her cousins. On the afternoon of the 17th December, -1982, the deceased left her house without disclosing to Puseletso Motja, her daughter who was at the time a nursing mother and with whom she lived, where she was

2/ going to.

going to. When she left home, the deceased was wearing a blue shirt (blouse), a greenish dress, a shawl and a doek.

According to Puseletso, her mother, the deceased, did not return home until it was bed time and she was already in bed at night when she heard the voice of the deceased calling out her name outside the house. She, at the same time, heard footsteps and something like a stone hitting the roofs of the house. Someone caught hold of the handle of the door of the house in which she was sleeping. She screamed, presumably out of fear, and did not dare go out of the house. It was not until dawn of the 18th December, 1982 that she ventured out and noticed the doek which the deceased had been wearing when she left home on the afternoon of the previous day lying in the open in the vicinity of the house. It was then that she started making inquiries about the whereabouts of the deceased.

Later that morning, Puseletso had to go to relieve nature when she saw a person lying next to the graveyard at a stream. She raised an alarm. Of the people who responded were Tseliso Motja (the younger brother of the deceased's husband), PW 2, Mosiuoa Sekonyana (the father of accused 2), Piti Taole (The Chief of the area) and PW 1, Nketsoane Makheneng (the brother of the deceased). They came to deceased's house where they found her children weeping. In the vicinity of the house, they noticed, apart from the doek, a sjambok and a cordroy hat which were identified as the property of accused 1. When they came to the person who was lying next to the graveyard at the stream, they identified that person as the deceased. She was already dead. The spot where the body of the deceased was lying was over 200 yards or about a mile away from her house and out of view from the house itself.

The body of the deceased was lying in a pool of blood. It was resting on its stomach with the head facing down the slope. Her legs were stretched apart, the panty was torn and together with the dresses lifted up so that the buttocks were exposed. There was some

3/ discharge coming out ...

discharge coming out from the vagina thus suggesting that the deceased had been raped. There was also faeces from the anus. Her clothes and buttocks were soiled with faeces all over. She had weals on the body, scatches on the neck and an open wound on the mouth. She was bleeding from the mouth and nostrils. It was simply a horrible sight and Ts'eliso Motja's testimony was that he had to get a blanket with which he covered the body.

The evidence of P.W.1 was that on the 17th December, 1982, there was beer selling at his house in the village. The deceased and the two accused were among the people who came for drinks at his house. He confirmed the evidence of Puseletso Motja that among the clothes that the deceased was wearing on that day were the blue shirt (blouse), the greenish dress, the shawl and the doek. He remembered that accused 1 was wearing a cordroy hat, a pair of blue jeans and its shirt. He was also carrying a sjambok. The sjambok and the hat were the ones which were found in the vicinity of the deceased's house on the morning of the 18th December, 1982. Accused 2 was wearing a khaki dust coat.

After sun set people started dispersing from P.W.1's house but the deceased and the two accused remained behind. When the accused were eventually leaving that night, the deceased suggested to him that as it was late she would go in the company of the accused whose homes were not far from hers. PW.1 was positive that there was no quarrel of any sort between the deceased and the two accused while they were at his house and the three left together peacefully. I shall return to his evidence in a moment.

The evidence of accused 1 who testified on oath before this court was slightly different. He denied that while at P.W.1's place on 17th December, 1982, he was wearing the pair of blue jeans. According to him he had put on the jeans before going to P.W.1's place while he was removing stones which had fallen into his kraal. The stones were heavy and he had to place them on his laps to lift them on to the kraal. In the process his jeans and

4/ its shirt respectively

its shirt respectively got soiled from the zip down to the knees and the sleeves with cow dung. When he went to P.W.1's place, he therefore, had to change the geans and put on a pair of velved trousers. He conceded, however, that he was wearing the blue shirt. The reason for not changing it was that the sleeves which were soiled with cow-dung could be folded up.

As it will be shown later in the judgment, on 18th December, 1982, accused 2 handed the pair of geans to D/Sgt Polanka and told him that he had been wearing it on the previous day. All the witnesses who saw the pair of geans and its shirt in the morning of that day and while the stains were still fresh testified positively that they were soiled with faeces and not cow-dung. I have no good reason to doubt their evidence which I, therefore, accept as the truth.

Regarding P.W.1's evidence that until they left his house on 17th December, 1982, there was no quarrel between the two accused and the deceased, accused 1 told the court that after he and accused 2 had come to P.W.1's place, he bought 6 cans of beer which he placed next to where they were seated. The deceased then came and took one of the cans of beer and drank it without permission. He (accused 1) did not like what the deceased was doing. It was accused 1, however, who reprimanded the deceased for having taken the can of beer without permission. Notwithstanding his disapproval of what the deceased was doing, accused 1 did not even report the instance to the owner of the house. Indeed, accused 1 confirmed the evidence of P.W.1 that when at the end of the day they left in the company of the deceased, they were all three talking cordially. In the circumstances I find accused 1's story highly improbable and am inclined to believe P.W.1's version that there was no quarrel between the accused and the deceased while they were at his house on 17th December, 1982.

Accused 1 further told the court that when they left P.W.1's place, it was about 10.00 O'clock at night. There was no moonlight and it was a dark night. While they were at P.W.1's place the deceased had been asking accused 2,

who worked at a place where they sprayed maize crops, to buy her an empty tin of insecticide. Accused 2 told her that he had no money with which to do so. After they had left, P.W.1's place and were on their way home, the deceased persisted in her request for an empty tin of insecticide and eventually threatened accused 2 with the words : "Motho o tla holela mobung joaloka tapole" i.e. "a person will grow in the soil like a potatoe". By that accused 1 understood the deceased to mean that she would kill accused 2 or a member of his family. Accused 2 was apparently offended by those words and wanted to assault the deceased. Accused 1, however, intervened and stopped him.

When they came next to her house, the deceased again pestered accused 2 about the empty tin of insecticide and repeated the threatening words. She also called accused 2 a rug. It was then that accused 2 hit the deceased a blow on the mouth with a fist. The deceased fell to the ground, accused 1 tried to intervene but accused 2 pushed him away and he also fell to the ground. As he got up from the ground accused 1 saw accused 2 kicking the deceased on the face. The deceased got up and he intervened. He noticed that the deceased was bleeding from the mouth and not through the nose. It was at the time he was intervening between the deceased and accused 2 that his shirt got some blood stains. He then took accused 2 to his home after which he also went to bed. They left the deceased standing on the forecourt of her house shouting and hurling insults. He told the court that it was at the time he took accused 2 home that he forgot his sjambok and hat next to the deceased's house. He denied that he had anything to do with the death of the deceased. Accused 1 himself conceded that if there were a person inside the deceased's house that person could have heard the deceased shouting and hurling insults on the forecourt.

It is to be remembered that Puseletso was in the house on that night. Although she heard some scuffle and the voice of the deceased calling her name only once she certainly did not hear the deceased shouting and hurling insults on the forecourt

Assuming accused 1 was telling the truth when he said they left P.W.1's place at 10 O'clock and there was no moonlight, and I have no reason to doubt him on this point, the question is how could he be so positive that the deceased was bleeding from the mouth and not through the nostrils. As it will be seen later in the judgment, accused 1 told people, including a police officer who questioned him about his sjambok and the hat found in the vicinity of the deceased's house, that he had lent the hat and the sjambok to accused 2 and not that he had forgotten them. Although accused 1 was aware that accused 2 had injured the deceased he did nothing to assist the latter. He could not even report the incidence to the chief of the area. Instead he just took accused 2 to his house and he himself retired to bed as though nothing had happened. In my view, accused 1's story is palpable with so many improbabilities that it would be unreasonable to accept it as the truth.

Now, coming back to his evidence, P.W.1 confirmed that following a certain report, he proceeded to the deceased's home and the spot where her dead body was found on the morning of the 18th December, 1982. He informed the people who had gathered around the body of the deceased that he had last seen the deceased going in the company of the two accused on the previous night.

The accused were sent for and P.W.1 was one of the people who went for them. He found accused 1 at his parental home and brought him before the chief at the deceased's home. Questioned about his hat and sjambok that were found next to deceased's house, accused 1 explained that he had lent them to accused 2. When P.W.1 pointed out that he had been wearing a pair of blue gears on the previous afternoon, accused 1 denied it.

When P.W.1 and P.W.2 came to his home, accused 2 was still in bed. P.W.2 got into the house and pulled him out of the bed. He noticed that accused 2's khaki dust coat which was placed on the chair had faeces and blood stains. He took it to the chief. It was also

7/ noticed that there

noticed that there were blood stains on one of the heels and hands of accused 2. He was asked about the whereabouts of the shoes he had been wearing on the previous day. He said they were under the bed. P.W.2 brought them and it was found that there was some blood stains inside one of the shoes. Questioned about the blood stains and faeces on his clothes, accused 2 explained that he got them at his place of work where he had been slaughtering sheep. P.W.2 pointed out that accused 2 was working where they were spraying maize crops and not at a butchery.

It may be mentioned at this juncture that accused 2's blood stained khaki dust coat and shoe together with deceased's blouse which also had blood stains were subsequently sent by D/Sgt Polanka to the Forensic Science Laboratory in Pretoria for blood analysis and the results of the test carried out by the expert, one L.P Neethling, were that the stains on the articles were those of human blood and belonged to blood group A. There can be no doubt, therefore, that accused 2 also lied when he said the blood stains on his clothes were those of sheep blood. It would be naive to suggest that rural people living in the villages where they daily see cow dung and sheep excrement cannot differentiate between human faeces and cow dung or sheep excrement, I am inclined to accept the evidence of the witnesses who positively testified that what they saw on the deceased and accused's clothes was faeces and not cow dung or sheep excrement. The accused were, in my view, not telling the truth when they said their clothes had been soiled by excrement of sheep or cow dung I find it difficult to believe that the fact that the deceased and accused's clothings were soiled with faeces could have been a mere coincidence. It obviously arose a suspicion that the accused were connected with the killing of the deceased. The police were, therefore, sent for.

D/Sgt Polanka confirmed that he received a report following which he proceeded to Ha Sefoli where he found the dead body of the deceased. It was in the condition that has already been described. He noticed some ground disturbances around the spot where the body was lying. There was also a spoor from the place where the body of the

8/ deceased was lying

deceased was lying up to the deceased's house. He confirmed that a sjambok and a hat claimed by accused 1 were found in the vicinity of deceased's house. He also found the deceased's doek, some faeces, blood stains and a sum of 40^c. He was shown a khaki dust coat and a pair of black shoes which were claimed by accused 2. They all had blood stains. He went with the accused to search their homes. In accused 2's house he found a belt which was somewhat twisted as if though it had been used to tie something. It had blood stains. At his house, accused 1 gave him a pair of blue jeans which he said he had been wearing on the previous day. It was clearly soiled with faeces which as already pointed out the accused said was cow-dung. The police officer took possession of all those articles, cautioned and charged the accused as aforesaid.

It was common cause that the body of the deceased was subsequently conveyed to Queen Elizabeth II Hospital. Ts'eliso Motja identified the body before Dr. Jagues who performed the post mortem examination on 21st December, 1982. He found that the deceased had a small cut and bruises on the upper lip, some abrasions on the left side of the face, large bruises underneath the sculp, swelling of the brain on the occipital region. As there was neither a fracture of the skull nor any laceration of the skin of the skulp, he formed the opinion that the deceased had received a heavy blow from a blunt instrument with the resultant brain damage which was the cause of death.

From the evidence, it is clear that there is no direct evidence of who has killed the deceased. The decision on this point depends entirely on circumstantial evidence. The cardinal rules of logic which govern the use of circumstantial evidence in a criminal trial are, as Watermeyer, J.A. once put it in R. v. Blom 1939 A.D. 188 at pp. 202, 203

"(1) The inference sought to be drawn must be consistent with all proved facts. If it is not, then the inference cannot be drawn.

- (2) the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

In the present case there is evidence that on the night of 17th December, 1982, the deceased left P.W.1's house in the company of the two accused and was consequently assaulted outside her house. When it was found next to the graveyards at the stream the body of the deceased had sustained the injuries already described. It was bleeding through the nostrils and soiled with faeces which was also oozing from the anus.

On the morning of 18th December, 1982, some faeces and blood stains were found outside deceased's house. There was also a spoor leading from the vicinity of the house up to the spot where the dead body of the deceased was found, thus suggesting that the deceased, who was bleeding and excreting, was carried from the vicinity of the house to the spot where her dead body was found. There is, therefore, the possibility that whoever carried the deceased from the vicinity of the house to the spot where her dead body was found could have got soiled with blood stains and faeces.

Accused 1 conceded that the blood stains found on the shirt he had been wearing on the night in question was that of the deceased. I have, however, already expressed the opinion that his description of how the deceased was assaulted outside her house and he himself got the blood stains on his shirt could not be the whole truth.

Although accused 2 is alleged to have claimed that the blood stains found on his clothes were those of sheep blood the expert, L.P. Neethling, admittedly found that they were not. They were in fact the blood stains of human blood belonging to the same blood group A as those found on the blouse that had been worn by the deceased.

Moreover, there was evidence which I have accepted that the clothes which the two accused had been wearing on the night in question were also soiled with faeces. I find

it difficult to believe that the blood stains and faeces found on the clothes of the two accused and the deceased were mere coincidence. Considering the evidence as a whole, therefore, I am convinced that the two accused are the persons who, acting in concert, have assaulted and inflicted upon her the injuries that result in the death of the deceased.

The only question remaining for the determination is whether the accused had the requisite subjective intention to kill. That cannot, however, be reached by any of our five senses. It is a matter to be inferred from either the words or the actions of the accused.

If the deceased was brutally assaulted and sustained injuries on the upper portions of her body in the manner described by the evidence of the medical officer and the other witnesses, there is no doubt in my mind that the accused were aware that their action was likely to result in the death of the deceased. They nonetheless acted regardless of whether or not death occurred. That being so, it must be accepted that they had at least the legal intention to kill.

The question of provocation which was raised by the defence, in my view, depends on whether or not the court accepted accused 1's version that there was provocation by the deceased. I have found accused 1 to be unreliable as a witness and it would be illogical to say I now believe his uncorroborated evidence that the deceased had provoked the killing. Likewise, on the question of intoxication, I have accepted the evidence of P.W.1 who actually saw the two accused and the deceased at the time they left his house on the night of 17th December, 1982. In his evidence, P.W.1 told the court that the three were not very drunk. That in my view, is no evidence to substantiate the suggestion that the accused were so drunk as not to be able to form the intention to kill. My view in this regard is fortified by the fact that having assaulted her, the accused subsequently had the wisdom to carry the deceased about half a mile away where she could not be easily seen from the house. That, in my opinion, is not consistent with the suggestion that the

accused were people who were so drunk that they did not know what they were doing or could not form the intention to kill.

In the light of all that has been said it is clear that I take the view that in assaulting her, the accused had the requisite subjective intention to kill the deceased and accordingly convict them of murder.

Both my assessors agree.

D. R. MOLAI

JUDGE.

2nd March, 1984.

For the Crown : Miss Moruthoane,

For the Defence: Mr Kolisang.

EXTENUATING CIRCUMSTANCES

There was some evidence suggesting that the deceased had been raped. That was, however, not conclusively proved. Although it is sincerely hoped that the accused did not rape the deceased and subsequently try to cover their beastly act by killing her, the possibility that they did so remains. A salient question is whether or not people in their sober senses normally do things like that. In my view, the reply is in the negative.

On the evidence, I have rejected the contention that the accused were, on the night in question so drunk as to be incapable of knowing what they were doing or form the intention to kill. There was, nonetheless, evidence which I accepted that the accused had been drinking at P.W.1's place and as they left were to some degree intoxicated.

It is trite law that in murder cases intoxication may be taken into account as a factor tending to reduce the moral blameworthiness of the accused person or an extenuating circumstance warranting a lesser sentence than that of death - see S.v. Ndhlovu 1965(4) S.A. 692 at p. 695. In the result I come to the conclusion that extenuating circumstances do exist in the present case and the proper verdict is that of guilty of murder with extenuating circumstances.

My assessors agree.

SENTENCE .

Each 9 years imprisonment.

B.K. MÓLAÍ,
JUDGE