

IN THE HIGH COURT OF LESOTHO

In the matter of

R E X

v

MOSANKU MASEKA

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 30th day of March, 1984.

The accused has appeared before me charged with the murder of one Abel Lebaea, in that upon or about the 1st November, 1982 and at or near Roma in the district of Maseru he unlawfully and intentionally killed the deceased.

When the charge was put to him, the accused tendered a plea of guilty but Mr. Molapo, who represented him in this matter informed the court that according to his instructions, accused's correct plea was that of not guilty to murder. All that the accused meant by pleading guilty was that he admitted killing the deceased. Mr. Molapo, therefore, requested the court to enter a plea of not guilty. The request was not opposed by Mr. Peete, counsel for the crown. In my view, the plea of not guilty would, in the circumstances, prejudice neither the defence case nor that of the crown and it was accordingly entered.

It may be mentioned on the out set that the depositions of Maphale Lebaea, Mokhoele Liphoto, D/Sgt Sofeng, D/Sgt. Matlhole and Dr. Moji, respective, PW. 1,3,7,8 and 10 at the proceedings of the Preparatory Examination were admitted and accepted as evidence in terms of the provisions of Section 273 of the Criminal Procedure and Evidence Act, 1981. It

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became unnecessary, therefore, to call the deponents as witnesses in this trial.

It was common cause that, at the material time, the deceased was a student of the National University of Lesotho at Roma. The accused was employed by the same Institution as a security officer and attached to the kitchen block. It was also not disputed that on the Saturday preceding Monday the 1st November, 1982, there was a feast on the University campus when a lot of drinks was available. Some of the drinks were left for the kitchen staff.

According to P.W.1, Mpakase Nkoale, and P.W.2, 'Matsepiso Mohau, when their group started work on the evening of 1st November, 1982, members of the kitchen staff who were finishing their work were served with drinks to take home. The group of P.W.1 and 2 which was commencing its shift was, however, told that it would get its share of the drinks after it had finished its work. They did not, therefore, take any drinks while working in the kitchen. That was, however denied by the accused who told the court that while it was working in the kitchen, the group of P.W.1 and P.W.2 was drinking and noisy. The evidence of P.W.1 and P.W.2 was, to some degree, confirmed by P.W.3, Mahlomola Mohau, another member of the kitchen staff who testified that on the evening in question he was not on duty. He nevertheless came to the University, firstly to accompany his wife (P.W.2) home and secondly to get his share of the drinks. Indeed, as it will be shown later in this judgment, the accused who was admittedly on duty that evening had kept his own can of beer in one of the pockets of his jacket and on his own evidence, he was not drunk.

It was common cause that on the evening in question after all the students had taken their meals but while the kitchen women were still washing dishes, the deceased came to the kitchen. According to P.W 1 and P W 2, on arrival, the deceased asked to be served with food. He was told that he could not be served as it was after meal time. He was, however, advised that he could see the kitchen managers about it. The deceased accordingly went to the office of the managers and returned with

3/ one of the

one of the managers who directed the kitchen women to serve the deceased. He was accordingly served and as it was after meal time the deceased did not even go into the refectory but took his meal in the kitchen still standing.

While the deceased was eating and the women continued washing the dishes in the kitchen, the accused who had been in the dining hall, came in and switched off the lights. P.W.1 asked him why he put off the lights while they were still working. The accused did not reply. The deceased then went to the switch, put on the lights and continued with his meal. The accused walked to the deceased and said to him. "Your mother's vagina, when I put off the lights you switch them on!" The deceased who was holding his plate and still eating, apologised to the accused explaining that he just wanted to finish his meal. P.W.1 then heard a clicking sound. She turned round and saw that the accused was holding up a long knife. She and P.W.2 told the court that they noticed the deceased's plate dropping down while he placed his hand on the chest. They realised that the accused had stabbed the deceased who then ran away from the accused and climbed on the sink. The accused ran round the sink still wielding his long knife. The deceased jumped back from the sink and almost fell on the floor but P.W.2 supported him up. P.W.3 then came in and intervened when the deceased got a chance to run out of the kitchen and through the door of the refectory with the accused in hot pursuit.

The accused told the court that his home was at Tloutle, one of the neighbouring villages at Roma. Although he was allocated a room on the University campus, he intended going home when he knocked off duty on the night in question. For that reason he armed himself with a knife which he carried on his hip but hidden under the trousers. It was a sword-like knife whose blade was pointed and sharpened on either side or what is commonly known as dagger. He conceded that it was not permissible for anybody to go about armed with such a dangerous weapon on the University campus. The question which remained unanswered, therefore, was why the accused did not leave the knife in his room from where he could have collected it when he left for his home.

4/ According to

According to the accused, at the time the deceased came to the kitchen, the kitchen women were drinking wines and beers and were very noisy. Although he himself had taken drinks the accused was, in his own testimony, not drunk and still capable of performing his duties.

I have already found that on the evidence, the accused's story that the women were drinking during working hours was highly improbable and accordingly rejected it.

The accused further told the court that as he was anxious to go home on that night, he switched off the lights while the women were still working in the kitchen. His intention was to warn them that it was late and they should, therefore, hurry up and finish their work. The deceased who had already finished eating came to him and asked why he put off the lights. He told him that it was late. The deceased switched on the lights. He denied that he then swore at the deceased. According to him he only asked the deceased why he interfered in his work but the deceased suddenly hit him a blow on the forehead with a fist when he got a swollen forehead. The blow fell him to the floor. When he got up, the accused pulled out his knife with which he stabbed the deceased on the chest.

I must say I find accused's act of putting off the lights while other people were still working inconsiderate and rather childish. He, himself conceded that after he had switched off the lights, the deceased put them on. If his story that the deceased had by then finished taking his meal were the truth why then did the deceased have to put on the lights. In my view, the only reasonable explanation is the one given by both P.W.1 and P.W.2 that the deceased had not finished eating and the accused's evidence that he had, was clearly false.

Although he denied it, the accused was positively heard by P.W.1 and P.W.2 swearing at the deceased. Bearing in mind that the accused was unreasonably unhappy with the deceased putting on the lights that he had switched off, I am inclined to accept as the truth the evidence of P.W.1 and P W 2 that he did swear at the deceased.

5/ Although he

Although he claimed that the deceased had hit him a blow with a fist and he sustained a swollen forehead, the accused, on his own evidence, did not even report it to either the University authorities or the police or anybody else. Moreover, his story could not be supported by the evidence of P.W.1 and P.W.2 who were present in the kitchen at the time. There is no doubt in my mind that accused's story is a fabrication which I reject without any hesitation.

The accused conceded that after he had stabbed him, the deceased placed his hand on the chest before leaving the kitchen and going out through the door of the dining hall. As he was aware that he had injured him, he followed the deceased up to the door but could not see him outside the house.

As has been pointed out earlier, although he was not on duty, P.W.3 had come to the University kitchen on the evening in question. He went to the office where he was given a can of beer as his share of the drinks that were kept for the kitchen staff. He was enjoying his beer in the office when he heard a commotion from the direction of the kitchen. He put down the beer and went there. According to him, he found the accused and the deceased quarrelling over the lights. He, however, went to accused's jacket from where he got a can of beer in one of the pockets. He opened the beer and started drinking. It was only then that he asked the accused why he could not let the deceased finish his meal since the latter had obtained permission to be served with food. The accused replied that the deceased had no such permission because he (the accused) had not been told about it. The accused then left hurriedly. P.W.3 got the impression that the accused had perhaps been offended as a result of the altercation he had had with the deceased. He then returned to the kitchen office.

Shortly after, P.W.5 again heard some noise from the kitchen and hurried there. On arrival in the kitchen, he noticed the accused holding a home-made knife and the deceased holding himself on the chest. He tried to dispossess him of the knife but the accused ran away with it. He could not assist the deceased because he climbed on the sink and then ran

6/ away He did

away. He did not see the accused chasing the deceased.

It would appear that according to P.W.3, there were two separate quarrels between the accused and the deceased. That could not, however, be supported by the evidence of P.W.1 and P.W.2 who impressed me as reliable witnesses in this case. It is also significant to note that according to him P.W.3 came into the kitchen and found the deceased and the accused having a serious quarrel over the lights. Instead of immediately intervening to stop the quarrel, he had the leisure to go to accused's jacket from where he got a can of beer and started drinking as though nothing serious was happening. Again, on the evidence of P.W.3, it was only after the accused had run away that the deceased climbed on the sink before he started running away. From what the deceased was running away remained a mystery.

I must say I found P.W.3 unimpressive as a witness and was not prepared to accept his evidence unless where it was corroborated by the evidence of other more reliable witnesses.

According to the accused, he was frightened after he had stabbed the deceased and so he went to hide in the village outside the University premises. However, in the morning he went to report himself to the police when he learned that the deceased had passed away. D/Sgt Sofeng confirmed that on the morning of 2nd November, 1982, the accused surrendered himself to him at Roma when he informed the accused that the deceased had, in fact, died as a result of the stab wounds. The accused handed over his knife. D/Sgt. Sofeng took possession of the knife, cautioned and charged the accused as aforesaid.

The evidence of D/Tpr. Matlhole was that on 4th November, 1982 he accompanied the body of the deceased from Roma hospital to Maseru mortuary where a post mortem examination was performed. The body did not sustain any injuries while it was being conveyed from Roma to Maseru

Dr. Moji confirmed that on 4th November, 1982, he carried out a post mortem examination on the body of the deceased who was identified before him by Samuel Lebaea and

7/ another.

another. Maphale Lebaea confirmed that he was one of those who identified the body of the deceased before Dr. Moji on 4th November, 1982 and the deceased was his own son. The medical evidence revealed that the deceased had sustained a stab wound on the chest above the left breast penetrating the apex of the left lung with subsequent haemothorax and collapse of the lung. The doctor formed the opinion that death was due to the stab wound which could have been inflicted by a sharp object.

It was not really disputed that the accused had stabbed the deceased to death. As has been pointed out earlier, the accused told the court that he had been drinking on the evening in question. In his own words he was, however, not drunk. That being so, counsel for the accused conceded, and rightly so in my view, that the special defence of intoxication would not avail the accused.

On the evidence, I have rejected the accused's story that at the time he stabbed the deceased, the latter was assaulting him with fists. The question of self-defence does not therefore, arise.

There was, however, evidence which I accepted that after the accused had put off the lights, the deceased put them on. It was for that reason that the accused inflicted the fatal stab wound on the deceased. The salient question is whether the deceased's action amounted to provocation warranting the accused to act as he did. I have already expressed the opinion that by putting off the lights while other people were still working and the deceased was taking his meal, the accused's act was inconsiderate and childish. Even if I may be held wrong on this opinion and the action of the deceased regarded as provocation, in the circumstances of this case, I am certainly not convinced that the provocation, if any at all, was of such a serious nature as to warrant the accused to attack the deceased in the manner he did. It follows, therefore, that in the circumstances I have no alternative but to come to the conclusion that the stabbing of the deceased by the accused was unjustifiable and for that reason unlawful.

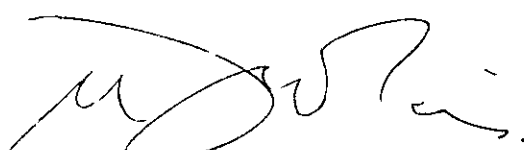
It now remains for court to determine whether or not when he unlawfully inflicted the fatal wound on the deceased

the accused had the requisite subjective intention to kill. It is trite law that intention is not something that we can reach with any of our senses. It is a matter for inference to be drawn from either the words or the actions of the accused person. In the present case I have accepted the evidence which was, indeed, not disputed that the accused had stabbed the deceased on the chest with a very dangerous knife. The chest of a human being protects some of the organs that are essential for his life. It is for that reason a particularly vulnerable part of the body. In stabbing the deceased on the chest with a lethal weapon such as the knife that has been described before this court, the accused was no doubt aware that his act was likely to result in death. He nevertheless, acted regardless of whether or not death occurred. As Hoexter, J.A. once put it in S. v. Mini 1963(3) S.A. 188:

"A person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another may cause death and acts reckless whether death will ensure or not."

I entirely agree. It follows, therefore, that in the premises I take the view that the question whether or not the accused had the requisite subjective intention to kill must be replied in the affirmative and he is accordingly found guilty of murder as charged.

It must be pointed out that my assessors are of the opinion that the correct verdict, in the circumstances of this case, should be that of guilty of culpable homicide. They do not, therefore, share my views in the verdict that I have returned.


B.K. Molai

JUDGE

30th March, 1984.

For the Crown : Mr. Peete,
For the Defendant: Mr. Molapo.


In his own evidence, the accused told the court that although, on the evening in question, he was not drunk and was still capable of carrying out his duties, he had taken some liquor. The evidence was unchallenged and there was, therefore, no good reasons to reject it. Even if he were not so drunk as not to know what he was doing or form the intention to kill it must be accepted that the fact that he had taken liquor may have affected the accused's mind and tended to reduce the moral blameworthiness of his act.

There was also evidence which I accepted that after the accused, who was the security officer at the kitchen block of the National University, had put off the lights the deceased switched them on. I have taken the view that even if that were regarded as provocation, it was not of such a nature as to warrant the accused to stab the deceased to death. The court was, however, invited by the defence counsel to consider this together with the facts that, apart from the drinks he had taken the accused had been on duty for the whole day; he was naturally a tired man at the end of the day and was anxious to get to his home at Thoutle after work on the night in question. The cumulative effect of all these factors rendered the accused very sensitive and capable of being easily provoked even by apparently insignificant act such as the deceased putting on the lights which he had switched off. In my view the point was well taken.

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

Both my assessors agree.

SENTENCE : Ten (10) years imprisonment. We are informed that the accused has been in custody since 2nd November, 1982. The sentence will, therefore, operate with effect from that date.


B.K. MOLAI
JUDGE

30th March, 1984.