

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

MOTLALEFULA LILLANE

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 14th day of August, 1984.

The accused is before me on a charge of murdering one Selebalo Thebane, it being alleged that on or about the 19th February, 1983 and at or near Ha Sebatli in the District of Mafeteng, he unlawfully and intentionally killed the deceased.

Six (6) witnesses were called to testify in support of the Crown case. Although no witnesses testified on behalf of the defence, the accused himself gave evidence on oath.

The court heard the evidence of PW.1, 'Manthabiseng Tefo, who told the court that at about 12 noon on the 19th February, 1983, the deceased and two other men from neighbouring villages called at her home. They were visiting her husband who asked PW.1 to slaughter a fowl for them. PW.1 slaughtered the fowl and prepared it for a meal which she served to the visitors.

According to PW.1, she had about a quarter of a 20 liters tin of beer commonly known as "sekumukumu" which she also served to the visitors. Whilst she, her husband and the three visitors were eating and drinking, the accused came in and on their invitation, joined them at table, i.e. he took part in the eating of the chicken and drinking of the beer. After eating, the accused suddenly took two sticks

2/ one belonging

one belonging to the deceased and another to one of the other two visitors and went out with them. The deceased then followed the accused out asking where he was taking the sticks to. Whilst they were outside, PW.1 heard the deceased saying to the accused : "Motlalepula, you are silly for taking away our sticks." She then heard the accused saying to the deceased. "Do not say I am silly. I shall kick you till you excrete". According to PW.1, it was clear that the accused and the deceased were quarrelling outside over the sticks and her husband went out to intervene.

Shortly thereafter, the accused, the deceased and her husband returned into the house. The deceased was then carrying the two sticks which he placed next to him and the other visitors. After a while, the deceased said as there was no more beer in PW.1's house, he was going to find it at the home of one 'Masekharume in the village and he left. Soon after, the accused also left.

From her house, PW.1 could see the accused walking fast towards his house. He actually entered into the house. PW.1 did not, however, notice the accused leaving his home but a short time thereafter she heard some noise from the direction of 'Masekharume's. It was the noise of someone saying: " Motlalepula what are you doing to Selebalo". She immediately left for 'Masekharume's house. On the way, she met the accused who was walking from the direction of 'Masekharume's house towards the mountain. She did not notice any injuries on him. The accused was then carrying a blanket on one of his shoulders. As PW.1 passed, the accused on her way to 'Masekharume's, she heard him saying : "I told you that I would kick you till you excrete". On arrival at 'Masekharume's, PW.1 found the deceased lying dead outside the house.

Later on PW.1 noticed the accused returning from the mountain and going towards his house. The village men ran after him. He was apprehended and brought back to the scene of crime. It was only then that she noticed that the accused had sustained a bleeding wound on the

3/ forehead.

forehead.

The accused was tied up and spent the night outside the home of 'Masekharume together with the body of the deceased. On the following day, the police arrived and subsequently took away the body of the deceased. The accused was arrested and also taken away by the police.

Although he conceded that on the day in question he came to P.W.1's home and found her, her husband and their visitors at meal, the accused denied that he joined them on the chicken. According to him, he only joined them in the drinking of the beer. He denied that he ever took the two sticks belonging to the deceased and one of the visitors. Likewise the accused denied that there was any quarrel between him and the deceased outside PW.1's house. According to him, he peacefully enjoyed the beer in PW.1's house until the deceased left saying as there was no more beer at the home of PW.1, he was going to find it at 'Masekharume's. Shortly thereafter, the accused also left for his house. He was then drunk. On arrival at his house, the accused started repairing shoes. While he was repairing shoes, the deceased appeared from 'Masekharume's home and called him for a talk. After deceased had insisted and called him on about three (3) occasions, the accused eventually went to him at the home of 'Masekharume. As he believed it was going to be a short talk, the accused carried with him a cobbler's pin, wax and a string which he had been using to repair shoes. He, however, left the shoe that he had been working on. I shall return to his evidence.

Although the accused denied the story of PW.1 that after he had come to her house he joined her, her husband and their visitors not only on the drinks but on the chicken as well, the evidence of PW.1 that he did was corroborated by her husband PW.2, Tseliso Tefo, who told the court that he was present when the accused came to his house on the day in question. After he had come to the house, the accused joined them at table where there was

4/ chicken and beer.

chicken and beer. When they had finished eating the chicken and drinking the beer, the accused then took the sticks of the deceased and one of the other two visitors. According to PW.2, the accused was immediately followed out not only by the deceased but by one of the other two visitors whose sticks had been taken away. PW.2 further confirmed PW.1's evidence that after the deceased had followed the accused out, there was a quarrel between the accused and the deceased when he (PW.2) had to go out and intervene. The accused then gave the sticks back to their owners after which they all returned into the house.

As they returned into the house, PW.2 heard the accused saying to the deceased: "When I play with you, you insult me, I can kick you till you excrete," PW.2 had not followed what the deceased had said prior to the accused uttering those words. After they had returned into the house, the accused wanted to go to the deceased and fight him but PW.2 reprimanded him against it. It was then that the deceased said the accused was clearly after him and it were better that he left. The deceased accordingly went out of the house obviously to avoid the accused. Shortly, thereafter, the accused also went out of the house. PW.2 did not bother to observe where the deceased and the accused went to when they left his house. However, a short while after the accused had left the house, PW.2 heard a scream. He immediately went out of the house and heard that the scream was coming from the direction of 'Masekharume's house. He hurried there and on arrival found the deceased lying on his back outside the house. He was already dead.

At the same time PW.2 noticed the accused walking fast in the direction towards a nearby mountain. As the accused was some distance away from him, PW.2 could not notice if he had sustained any injuries. Later on, the accused returned from the mountain and went to his house. PW.2 and about 20 village men went to accused's house. The accused, however, got out and ran away. He was chased and

/finally

finally apprehended. As he was following behind, PW.2 was not among the first people who actually caught up with and apprehended the accused. He was not in a position, therefore, to know if when he was apprehended the accused was assaulted by his pursuers. Nevertheless, PW.2 noticed that as he was brought back to where the deceased was, the accused had sustained a bleeding wound on the head.

I must say I find it highly improbable that when he came to the house of PW.1, and was invited to join her, her husband and the visitors at table the accused took part only in the drinking of the beer and not the eating of the chicken. He himself could not give the reason why he could not join them on the chicken as well. The fact that as soon as he came to the people who were at meal in the home of PW.1 and PW.2 the accused was admittedly invited to join them at table is, in my view, an indication that they had no ill feelings against the accused. That being so, I find no convincing reason why PW.1 and PW.2 should falsely testify against the accused that he took part in the eating of the chicken and took away the sticks as a result of which a quarrel broke between the deceased and the accused himself. I am inclined to accept as the truth the story of PW.1 confirmed by that of PW.2 and reject as false that of the accused.

The evidence of PW.3, 'Maletete Sebatli, was that on 19th February, 1983 she was visiting the home of one Kabeli whose house was adjacent to the houses of 'Masekharume and PW.2. While she was at Kabeli's, PW.3 also noticed the accused passing in front of the house towards his home. He was walking fast and she heard him saying "These boys from Bereng's village are talking shit."

It is significant to mention that the deceased came from Bereng's village. From what she heard him saying, PW.3 presumed that the accused was angry and she watched what was going to take place. She, therefore, saw the accused entering into his house but shortly got out. As he got out of the house, the accused was holding a screwdriver and something of which she could only see a wooden handle.

6./ The accused

The accused hurriedly walked in the direction towards 'Masekharume's house which was about 40 paces (indicated) away from his home. As the accused approached 'Masekharume's place, PW.3 could see the deceased standing outside the house. The accused went straight to the deceased and hit him a blow on the head. When the accused delivered a second blow, the deceased warded it off and hit him a blow on the head with his stick. However, after hitting the accused a blow on the head with the stick, the deceased himself stuggered and fell to the ground. While the deceased was still on the ground, the accused stabbed him once on the back. When she saw that PW.3 raised an alarm as a result of which many people, including 'Masekharume, came to the scene. PW.3 went to assist the deceased while other people tried to get hold of the accused.

As she was assisting the deceased to a sitting position, PW.3 noticed a cobbler's pin which was implanted on the back of the deceased. Its wooden handle had broken and dropped to the ground. The cobbler's pin had been implanted so deep on the back of the deceased that PW.3 had to use force to pull it out. After she had pulled out the pin a lot of blood came out from where it had been implanted on the back of the deceased. The deceased then belched and passed away. Next to where the deceased had fallen, PW.3 noticed a screwdriver. She took possession of both the screwdriver and the cobbler's pin. The accused who was struggling to free himself from the people who were trying to apprehend him then said to her "You 'Maletere, I shall kill you for taking away my weapons." PW.3 then ran to the chief's place with the screwdriver and the cobbler's pin. She reported to chieftainess 'Malerato Shakhane and handed over both the screwdriver and the cobbler's pin. She then accompanied the chieftainess back to where she had left the deceased. On arrival they found the accused already apprehended. His hands and feet were tied up. On the following day, the police arrived and examined the body of the deceased. It was then that PW.3 noticed that the deceased had sustained a wound behind the ear, on the head, on the chest and on the back.

It may be mentioned right away that PW.3's evidence that the accused had threatened to kill her was denied by the accused nor could it be confirmed by Liphapang Mapepesa (PW.4), one of the people who were with PW.3 at the time. Likewise her evidence that, apart from the injuries on his chest and back, the deceased had sustained other injuries behind the ear and on the head could not be supported by the evidence of Tefo Posholi (PW.6), the police officer who actually examined the body of the deceased. It may safely be inferred, therefore, that in all probabilities, PW.3 was mistaken on these points.

The evidence of PW.4, Liphapang Mapepesa, was that on the day in question he was sitting in the shade under the trees when he noticed the accused hurriedly passing next to Kabeli's house. Accused got into his house and then went out. He walked in the direction towards 'Masekharume's place. As the accused walked towards 'Masekharume's, PW.4 heard him saying "I shall kick him till he excretes". PW.4 wondered whom the accused was going to kick till he excreted and so watched him. According to him, PW.4 did not see the deceased standing outside the house of 'Masekharume at that time. When he came to 'Masekharume's place, accused entered into the house. But before he entered into the house, PW.4 heard him calling out "Hey you man, "I shall kick you till you excrete". Shortly after the accused had entered into 'Masekharume's house, the deceased came out. He was physically struggling with the accused and saying "leave me alone". As the deceased and the accused struggled out of 'Masekharume's house, the accused was delivering blows on the deceased. He believed the accused was hitting the deceased with fists. The deceased then delivered a blow on the accused's forehead with a stick. However, after hitting the accused with the stick, the deceased himself fell to the ground. He fell on his face. The accused then went to the deceased and thrashed what PW.4 thought to be a knife on the back of his shoulders. PW.4 then called out : "Hey, are you stabbing that person".

8/ He rushed

He rushed to the scene. According to PW.4, after stabbing the deceased on the back, the accused walked away in the direction towards his home. PW.4 confirmed the evidence of PW.3 that at the time the accused left she (PW.3) was attending to the deceased. PW.4 then went to help PW.3 to assist the deceased to a sitting position. While they were assisting the deceased, PW.4 also noticed that a cobbler's pin was stuck on the shoulders. He confirmed that it was removed by PW.3. PW.4 also confirmed that a screwdriver was found next to where the deceased had fallen. PW.3 took possession of both the screwdriver and the cobbler's pin and ran towards the chief's place. However, PW.4 did not, at that time, hear the accused threatening to kill PW.3. According to PW.4, while they were attending to the deceased, accused returned to the scene. He was then putting on a blanket and armed with two sticks. The accused then said: "Clear away so that I can finish him". PW.4 reprimanded the accused and asked him how he could finish the deceased who was already dead. When he realised that the deceased was in fact already dead, the accused left. Shortly after, PW.4 also left and went to collect fodder for his house. Is it really possible that PW.4 could have been so insensitive as to go for fodder immediately after he had seen a person being stabbed to death just in front of his eyes?

I must say PW.4 did not impress me as a very reliable witness. He, himself admitted that during the adjournment for lunch he took some beer. That clearly affected him for he was often evasive in his reply to some of the questions that were put to him before this Court. I am not prepared, therefore, to accept his evidence save where it has been corroborated by the evidence of more reliable witnesses.

The evidence of PW.5, 'Masekharume Mosakeng, was that on the 19th February, 1983, there was beer selling at her home. In the early afternoon of that day, the deceased came to her house. At the time the deceased arrived, she was being called outside for a snuff by one 'Mabafokeng. As there were no customers at the time, PW.5 went out to 'Mabafokeng. According to PW.5, as she went out the deceased was going into the house. She, however, passed the deceased

9/ at the door and

at the door and went to 'Mabafokeng with whom she chatted and enjoyed the snuff.

As she sat outside with 'Mabafokeng, PW.5 was facing away from the door of her house and could not tell if the deceased actually entered into her house. Similarly she did not see the accused entering into her house. Although her hearing was still good PW.5 neither heard the accused calling out from outside her house nor heard the deceased and the accused struggling out of the house. However, while she and 'Mabafokeng were sitting outside the house, PW.5 heard PW.3 raising an alarm. She turned round **and noticed the deceased fallen down on the forecourt** of her house. The accused was walking around while PW.3 was attending to the deceased.

PW.5 and 'Mabafokeng rushed to help PW.3. She (PW.5) brought some water that was poured on the deceased. It was all useless for the deceased was already dead. PW.5 confirmed the evidence of PW.3 and PW.4 that whilst they were attending to the deceased, a cobbler's pin was found implanted on his back. It was pulled out by PW.3. At the time, PW.5 did not notice any injuries on the accused. She, however, noticed a wound on his forehead after the accused had been apprehended and brought back to where the deceased was lying dead.

I find some difficulty with the evidence of PW.5. She was admittedly selling beer on the day in question. When the deceased came to her house, she should have suspected that he was her potential customer. Instead of waiting to serve him, PW.5, however, went and sat with 'Mabafokeng outside the house. This is not what a person who is selling beer would normally do. One would expect PW.5 to have waited a little to find out if the deceased wanted to buy some beer so that she could serve him. She did not do so.

Be that as it may, I shall now return to the evidence of the accused. According to him, on entering the house of 'Masekharume, the accused found the deceased standing alone behind the door so that after entering into the house, the deceased was towards the door whilst he was

10/ more inside

more inside the house. The deceased then asked him what he had said to PW.3. Accused replied that he had said nothing to her. Without further ado, the deceased hit him a blow on the forehead with a stick. The accused then moved backward to get out of the house but the deceased caught hold of him by the skipper. He struggled to go out but the accused again hit him another blow on the left side of the forehead.

Now, if when he hit the accused the first blow the deceased was more towards the door and the accused more inside the house I fail to see how the accused could have moved backward to get out of the house. Again, if the first and the second blows delivered by the deceased with his stick landed on the forehead of the accused it is clear that the two men were facing each other. The accused could not, in the circumstances, have moved backwards to get out of the house.

In any event, the accused told the court that after the deceased had struck him the second blow, he managed to escape and run out of the house. He was immediately followed out by the deceased and their physical struggle continued outside the house. In the course of the struggle, the deceased delivered several blows which he (accused) warded off with his bare hands and arms.

It is worth noting that the accused himself conceded that he was later referred to a medical doctor for treatment. According to the accused the medical doctor told him that he would treat only one of his wounds. That, in my view, is inconceivable of a medical doctor and I have no hesitation in rejecting it right away. The truth is that the accused had sustained one wound on the forehead as described by the crown witnesses. That explains why the doctor had to treat only one wound on the accused.

Be that as it may, according to the accused, after he had been hit the blow on the head he stabbed the deceased once on the back with the cobbler's pin. The accused contended,

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therefore, that he stabbed the deceased in self-defence.

In the first place, I fail to understand what the deceased could have been doing in the house of 'Masekharume at the time the accused says he found him there. There is evidence which I accept that the deceased left the house of PW.1 and 2 in order to avoid the accused who was clearly bent on picking up a fight with him over the question of the sticks. I also accept the evidence that there was beer selling at the home of PW.5 on that day. The probabilities are high, therefore, that when he went to PW.5's house the deceased wanted to buy himself some beer. But if when he came to her house PW.5 went out without serving him, I see no reason why the deceased should have remained in the house. He probably went out and waited for PW.5 to return into the house so that she could serve him. PW.3 may well have been testifying to the truth, therefore, when she said at the time the accused arrived at PW.5's house the deceased was standing outside. If that were accepted as the correct position there would be no doubt that when the accused attacked the deceased in the manner described by PW.3 the attack was unprovoked and the question of self defence could not arise. If on the other hand the evidence of accused confirmed by that of PW.4 that the fight had started inside the house of PW.5 was correct the evidence of PW.3 and PW.4 himself is that at the time the accused stabbed the deceased on the back, the latter had fallen and was lying prostrate on the ground. Taking into account the position in which the cobbler's pin was found implanted on the back of the deceased, PW.3 4 and 5 may be telling the truth on this point. If at the time the accused stabbed him the deceased had fallen, the accused was faced with no danger that would have justified him to act in self defence.

The evidence of PW.6 Tefo Posholi is that he has now retired from the police force. However, on 19th February 1983 he was still in the police force and stationed at Matelile

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police post when he received a report following which he proceeded to Ha Sebatli. He found a dead body which was identified to him as that of the deceased. He examined the body and found that it had sustained a stab wound on the chest and another on the back. The screwdriver and the cobbler's pin before Court were handed to him. They were claimed by the accused as his property. He took possession of the two weapons and kept them in the police custody until he handed them in as exhibits at the proceedings of Preparatory Examination. He formerly handed them in as exhibits in this trial and they were respectively marked exhibits 1 and 2. The accused whom he found already apprehended at the scene of crime was also handed to him. He, in turn, handed the accused and the body of the deceased to Mafeteng police who were, however, not called to testify before this Court. The medical officer who had performed the post mortem examination was also not called as a witness.

Although the medical officer who performed the post mortem examination was not called to testify on the cause of death in this trial, there was, in my view, ample evidence not really disputed by the defence, that the deceased had died as a result of the injury inflicted upon him by the accused. As has been indicated the question of self-defence raised by the accused had no evidential support and could not stand.

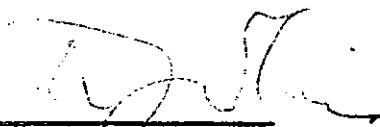
There was also evidence that before he assaulted the deceased, the accused had been drinking beer and might well have been intoxicated. However, on the evidence his intoxication could not have been such as to render the accused incapable of knowing what he was doing.

There is not the slightest doubt in my mind therefore, that when he stabbed the deceased on the upper portion of his body with the lethal weapon such as exhibit 2, the accused was aware that his act was likely to result in death. He, nonetheless, acted regardless of whether or not death occurred. That granted, I have no alternative but to come to the conclusion that in assaulting the deceased, as he did,

/the accused

the accused had, to say the least, the legal intention to kill. I accordingly find him guilty of murder as charged.

My assessors agree.



J U D G E.

14th August, 1984.

EXTENUATING CIRCUMSTANCES

Having convicted the accused of murder, it now remains for the court to determine whether or not there were any factors tending to reduce the moral blameworthiness of his act.

On the evidence, it was common cause that prior to inflicting the fatal injury on the deceased, the accused had been drinking beer commonly known as "Sekumukumu". Although it was found as a fact that the accused was consequently not so drunk as to be unable to know what he was doing or form the intention to kill it was not really disputed that he was somewhat intoxicated by the beer.

As Holmes, J.A. once put it in S. v. Ndlovu (2), 1965(4) S.A. 692 at p. 695 - 6:

"Intoxication is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the thing which sober he would not do. On the other hand intoxication may, again depending on the circumstances, aggravate the aspect of blameworthiness as, for example, when a man deliberately fortified himself with liquor

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to enable him insensitively to carry out a fell design. In the result, in seeking a basic principle in regard to intoxication and extenuation in murder cases, it is neither necessary nor desirable to say more than that the court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence one is weighing the frailties of the individual with the evil of his deed

There was no evidence in the present case that the accused had deliberately taken beer with the purpose of fortifying himself in order to insensitively kill the deceased. Rather than regarding it as an aggravating aspect I am prepared to regard the accused's intoxication as a factor tending to reduce the moral blameworthiness of his crime.

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

My assessors agree.

SENTENCE

10 years' imprisonment, to operate with effect from the 20th February, 1983 the date from which the accused was kept in custody.



J. U D G E.

15th August, 1984.

For the Crown : Mr. Peete

For the Defence : Mr. Moiloa.