IN THE LESOTHO COURT OF APPEAL

In the matter between:

LEFU MALATA	First Appellant
LETOALA MALATA	Second Appellant
versus	
THE KING	Respondent

Held at Maseru

Coram:- Schutz P.
Mahomed J.A.
Aaron J.A.

JUDGMENT

Schutz P.

The appellants, two brothers, appeal against their convictions of murder with extenuating circumstances, and their sentences of 15 years imprisonment.

The deceased, Thabiso Mokoma, died on 9th July, 1984. The cause of his death was severe loss of blood through the numerous wounds inflicted upon him. Some of these were inflicted with a sharp instrument, others with a blunt one. At least fifteen wounds were recorded at the post mortem. The stab and cut wounds ranged from the head to the ankles. Detective Trooper Ntlaloe who saw the body where it was found said that the muscles at the back of both knees and the tendons of both feet were cut. Judging by the injuries the attack which caused them was brutal and sustained.

The Crown case rests principally upon two eye witnesses, Lebohang Polane and Malefetsane Matsietsa, both of whom were believed by the trial court.

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Polane was herding cattle together with the deceased. At about 1 o'clock No.1 appellant came up to the deceased. Polane was some 15 to 20 paces distant at the time, and could not hear the conversation that then ensued between the apair, although he could say that they were not shouting. After a time No.2 appellant arrived accompanied by a pack of dogs. He immediately struck two blows at the deceased with a stick, but the deceased, who was bearing a cane and a "lesiba" stick, managed to ward off the blows. Appellant No.1 then also struck or struck at the deceased, who ran away into a mealie field in which the stalks were still standing. Both appellants chased after him, and, as he was outdistancing them, they set the dogs on him. The dogs felled him in the field and both appellants then beat him. At this stage the deceased was some 30 to 40 paces distant, and mealie stalks made it impossible to see all that was happening. As to his statement that both appellants beat the deceased after he had been brought down, the following was said: "Counsel asked you that you could not say that, because you said at the P.E. that the stalks were tall, so you could not have seen where he fell down? I saw sticks being raised. But actually you did not see A.2 delivering any blow on the deceased? Yes". It was put to the witness that No.2 appellant's stick was being used to drive off the dogs. In a somewhat inconclusive passage the witness agreed with this, but also in answer to the question, "And in doing so (distracting the dogs), he was using his stick?" said "Yes it was when he had already fallen down, and they were beating him up." The net effect of his evidence in this regard is, therefore, that although appellant No.2 may have driven off the dogs, he also participated in the further attack on the deceased. The witness further stated that both appellants then left, only to return after a time. Upon their return they laid the deceased's body upon mealie stalks. In cross-examination it was put that this return to the site would be denied.

Matsietsa's account is similar to that of Polane, but by no means identical. He was further away from the deceased than Polane, some 80 to 90 yards distant. According to him,

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before appellant No.1 went up to the deceased he first approached the witness and asked if the deceased had dogs. He also could not hear what passed between the deceased and No.1, but described the discussion as appearing to be conducted in normal tones. According to him also, when No. 2 reached the deceased he hit him with a stick and set dogs upon him: and No.1 then joined in and delivered blows. He saw the deceased fall down and the appellants beat him, but could not say where they were beating him. He did not see the appellants return to the scene where the deceased had been left prostrate. Like Polana, he did not report the attack due to fear.

The first appellant did not dispute that he used a stick and a knife on the deceased. According to him his object was not to kill but to maim. On his behalf it was argued that the conviction should be reduced to one of culpable homicide on the ground that a subjective intention to kill had not been proved beyond reasonable doubt. According to him he met the deceased by chance. The conversation related to the deceased's having allegedly threatened No.2 appellant with a gun on a prior occasion, and to the mixing of No.2's cattle with those of the deceased on another occasion. He conceded that on No.2's arrival the latter struck at the deceased with a stick, and that the deceased ran away: but denied that he, No.1, struck a blow at that stage or that No.2 set his dogs upon the deceased. The dogs were said to have chased the deceased when he ran away, and No.2 was cast in the role of trying to prevent the dogs attacking the deceased. Indeed according to both appellants, No.2, who had initiated the attack, from this stage on took no further part in it and had his energies fully absorbed in restraining the dogs.

Appellant No.1 claimed that in the mealie field the deceased produced a pistol, upon which No.1 hit him with a stick. The story about the pistol was rejected by the trial court, and in my view correctly so. This important fact was not put in cross-examination and bears the marks of an afterthought. Moreover I find this story of a man armed with a pistol having injuries of the kind described inflicted upon him without his firing a shot somewhat bizarre. Needless to say, no pistol was found at the scene.

As already stated, appellant No.1 claimed that his object was to maim rather than to kill. There is some support for this in the form of the unusual injuries to the back of the legs already described. On the other hand the injuries show a deliberation that

discounts the submission that No.1 acted in a mindless frenzy. But even if such a view as to No.1's purpose should exclude a finding of dolus directus, as I think it should, it does not exclude a finding of dolus eventualis. The wounds were numerous and some were deep. It did not require a medical doctor to realize that unhelped, and unable to help himself, the deceased must have been in danger of bleeding to death. Having brought him to this state the appellant simply left him to his fate. Extensive bleeding must have been apparent. In these circumstances I am satisfied that the Crown has proved dolus eventualis against No.1 in the sense that he subjectively foresaw the possibility of death and acted with a reckless disregard for whether it sould ensue or not. Accordingly, he was correctly convicted of murder.

For the second appellant it was contended that he should not have been convicted of murder but only of some or other species of assault. The basis for this contention was the suggestion that a distinction should be drawn between the roles of the second appellant in the two phases of the attack. At the beginning, it was said , he initiated the attack. Thereafter, it was said, he was merely the dog-tender, trying to keep them off the deceased. I consider that the trial court was correct in rejecting this version and am of the view that there was only one transaction, albeit an extended one. No.2 initiated the attack. He left the deceased together with No.1 without any attempt to assist him when he must have appeared to be in great distress. Why there should have been a change of heart in between is not apparent. According to him he saw No.1 hitting the deceased with a stick in the mealie field and called on him to stop. And this was the man who had initiated the attack with a heavy stick! He was most evasive as to what he saw, or rather did not see, when No.1 was butchering the deceased. According to him the dogs so fully absorbed his attention that he did not know what No.1 was doing. I find this incredible. Moreover, he contradicted himself as to whether a stick broken in two which was found on the scene was his. The impression of the two eye witnesses was both persons beat the deceased with sticks while in the mealie field. The sight described must vary considerably from the one

described by the appellants, the one assailing the deceased, the other warding off the members of a pack of dogs. Although the eye witnesses were far from perfect I accept their version and reject that of the appellants as wholely implausible. For this reason I think that No.2 must also be convicted on the basis of dolus eventualis in the same way as No.1, for his own participation throughout the attack. He too was rightly convicted of murder.

I turn now to the question of sentence. This Court was grievously hampered in dealing with this question as there was no record of the facts found as constituting extenuation. Nor was anyone able to tell as to what these facts were. It is to be emphasized that there are two stages to a murder trial: the first leading to the conviction or acquittal on the murder charge, and the second leading to the finding on extenuation. In some cases no further evidence may be led at the second stage as the evidence led at the first stage may be sufficient. In others further evidence may be led. Whichever happens there should be a proper record of the second stage, whether of new evidence, or agreed facts, or both: and there should be a clear finding by the Court. All this lacking, we must do the best we can.

The evidence led in the first stage shows that there was a long-standing and bitter feud between the respective families of the deceased and the appellants, and that the appellants had some basis for feeling that their complaints were not properly heeded by the authorities. In this case I think that this is a basis for a finding of extenuation when taken together with other factors. Secondly, the conviction is arrived at on the basis of dolus eventualis, which may constitute extenuation when taken together with other factors. The finding of dolus eventualis, means that I have concluded that premeditation has not been proved beyond reasonable doubt. We do not know what the trial court found in this regard at the second stage, but there is a passage in the record of the first stage that indicates that that Court did find premeditation. There is much reason to suspect that there was premeditation such as No.1's immediate joining in upon No.2's attack, but I do not think that premeditation has been proved so as to lead to that moral certainty needed in a criminal

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case. Accordingly I consider that the Court a quo erred with regard to the ground of extenuation. This Court is thus at large on sentence.

The murder was a brutal one and such as calls for a severe sentence. Nonetheless I think that in the light of the findings that I have made on extenuation, a sentence of 12 years in each case is appropriate. I do not find merit in the submission that there should be a differentiation between the sentences of the two appellants.

Accordingly the convictions of murder with extenuating circumstances are confirmed, but the sentences of 15 years are set aside and replaced by sentences of 12 years impresonment in each case.

Signed W. P. Schutz
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W.P. SCHUTZ
President

I agree I. Mahomed
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I. MAHOMED
Judge of Appeal

I agree S. Aaron
.....
S. AARON
Judge of Appeal

Delivered at Maseru this 13th day of October, 1987.

For the Appellants: Mr. C. Edeling
For the Respondent: Mr. G.S. Mdhluli

13th October, 1987

9.35

Appellants : N/A

For Respondent : Mr. Thetsane

Mr. Thetsane : Will investigate whereabouts of appellants

Court adjourned

B.P. Cullinan
Chief Justice

12,35

A1)
A2) before Court
)

Mr. N.V. Qhomane for Crown

A2 : I was at work in fields this morning. On 17th November 1986. I was granted bail. I was convicted on 16th January, 1986. I was made to sign documents in jail. Mr. Khauoe was my Counsel - he made application in the High Court.

A1 : I didnt apply for bail. I was in jail this morning

Judgment delivered.

Appeal against conviction dismissed. Appeal against sentence allowed. Sentence of 12 years imprisonment substituted in respect of each appellant.

Ct. to A2 : How long were you in prison before you were released?

A2 : Convicted on 16th January, 1986 - released on 17 November, 1986.

B. P. Cullinan
CHIEF JUSTICE