

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

1. PITSO THEJANE
2. THABO THEJANE

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 19th day of November, 1986.

The two accused are before me on a charge of murdering 'Matsieli Sehapi, it being alleged that on or about 24th December, 1982 and at or near Hleoheng in the district of Leribe they each or both unlawfully and intentionally killed the deceased. They have pleaded not guilty to the charge.

Three witnesses were called to testify in support of the Crown case. The defence called no witnesses and the accused themselves chose to remain silent and close their case without saying anything. We have, therefore, only the Crown evidence to rely upon for the determination of this case.

Very briefly the evidence of P.W.1, Seromo Likoantsana, is that on 24th December, 1982 he was a conductor on one of the deceased's taxis. The taxi ferried passengers between Maputsoe and Peka. It was driven by the deceased himself. Before they left Maputsoe for Peka, the deceased announced that the taxi would be taking only passengers going straight to Peka. Accused 1 was one of the passengers who embarked on the taxi which then left Maputsoe on its way to Peka.

When the taxi came to a place called Hleoheng on its way to Peka, accused 1, who was drinking beer and making a lot of noise in the taxi, insisted that he was alighting.

2/ The deceased .....

The deceased then slowed down the taxi in preparation to stop on the side of the road. However, before the taxi could come to a complete halt, accused 1 opened the door and alighted. In the process he fell down and sustained a bleeding injury on the mouth. When he got up from the ground, accused 1 refused to pay the taxi fare and threatened that the deceased's taxi would never pass at Hleoheng again. After accused 1 had refused to pay the taxi fare, the deceased and P.W.1 left him and continued on their way to Peka.

When P.W.1 and the deceased returned from Peka on their way back to Maputsoe their taxi was following another of the deceased's taxis driven by P.W.2 Mabela Ramalisa. As the two taxis approached Hleoheng bus stop P.W.1 noticed that a large number of people had gathered in the road. The taxis had to stop at the bus stop.

Accused 2 and accused 1 then advanced to the taxi that was driven by the deceased. As they advanced to the deceased's taxi accused 2 and accused 1 were respectively armed with a knife and a tomahawk. On arrival at the taxi accused 2 told the deceased to come out so that they could have a fight.

As he could not drive away the taxi due to the people who had crowded in the road, the deceased alighted from the taxi. The moment he got down from the taxi, accused 2 stabbed the deceased with a knife on the right side of the chest. The deceased tried to move backward but accused 1 also hit him a blow on the chin with a tomahawk. The deceased then fell to the ground. According to him at this stage P.W.1 took to his heels and did not know what then happened.

When he later returned to the scene P.W.1 found that the deceased had already been placed in the taxi that was driven by P.W.2. He did not know how he had been put into that vehicle. He, however, got into the vehicle, noticed that the deceased had sustained bleeding injuries and was unable to speak. The two accused also got into the taxi which P.W.2 then drove to Hlotse Government hospital. The deceased died soon after they had left Hleoheng.

When it was realised that the deceased had already passed away it was decided that there was no longer any need to rush him to the hospital and so the vehicle drove to Maputsoe police station instead of straight to the hospital. At Maputsoe police station they were joined by a police officer with whom they conveyed the body of the deceased to the mortuary at Hlotse hospital. From the evidence of P.W.1, it is not clear as to what happened after the body of the deceased had been left at the hospital. In his evidence in chief he said from the hospital they returned straight to Hleoheng, collected the weapons with which the accused had assaulted the deceased and then went back to Maputsoe police station where the accused were taken into police custody. However, when he was questioned by the court, he said from the hospital they went back to Maputsoe police station, the accused were locked up while he, P.W.2 and a police officer proceeded to Hleoheng where they found the accused's weapons which were taken possession of by the police. Questioned by the crown counsel through the court, P.W.1 turned round and said the two accused were present when the weapons were found at Hleoheng. This clearly suggests that the accused had not as yet been locked up by the police.

In his evidence, P.W.2 confirmed that he was the driver of one of the deceased's two taxis which operated between Maputsoe and Peka. During one of the trips on 24th December, 1982 the taxi driven by the deceased was following him on their way from Peka to Maputsoe. When he came to Hleoheng he found a large crowd of people gathered at the bus stop. The two accused were among the crowd. They were going with one Calvin. They stopped his taxi. When he complied the two accused told him that they were in fact stopping the deceased's taxi which was following vehicle. As they passed next to him P.W.2 noticed that accused 1 was bleeding from the mouth. The two accused then proceeded to the taxi which was driven by the deceased and had in fact stopped just behind his.

According to P.W.2 he did not hear if when they came to his taxi the accused entered into any conversation with the deceased but he noticed the deceased alighting from the

As he did so, the deceased was holding a small bag in which he usually contained money. Just as the deceased got down from his taxi it was accused 1 and not accused 2 who advanced to and stabbed him with a knife on the left side of the chest. He (P.W.2) then went and intervened by holding back accused 1. However, accused 2 came and hit him (P.W.2) a blow on the face with an open hand.

When he was hit the blow with an open hand, P.W.2 left accused 1 and moved backward. He then noticed that the deceased was bleeding profusely from the left side of the chest. It was then that accused 2 advanced to the deceased and started delivering blows on him with a tomahawk. Although the deceased was warding off the blows with his hands, one of them landed on his chin and fell him to the ground.

P.W.2 pointed out to the accused that they had already seriously injured the deceased. He told them to carry the deceased into his (P.W.2's) taxi so that he could be rushed to the hospital. The two accused complied. At this stage P.W.1 who, according to P.W.2, had run away at the time the accused were advancing to the deceased's taxi returned to the scene. He (P.W.1) together with the two accused got into the taxi which P.W.2 drove to Hlotse Government hospital.

Before leaving for the hospital P.W.2 noticed accused 1 throwing away his knife. He (P.W.2) told him to take the knife with him and accused 1 complied. Soon after the taxi had left Hleohen on its way to the hospital the deceased passed away. As there was no longer any reason to rush to the hospital P.W.2 drove the taxi straight to Maputsoe police station where he reported what had happened. A police officer was detailed to accompany P.W.2, the two accused, P.W.1 and the body of the deceased to the hospital mortuary.

Having placed the body of the deceased at the mortuary, they all went straight to Hleoheng i.e. not via Maputsoe police station. They were going to find a tomahawk which accused 2 claimed to have thrown away among the grass at the spot where the deceased had been assaulted and also to look for Calvin following his report to the police that he

5/ (Calvin) was .....

(Calvin) was going with the two accused.

At Hlecheng they did find Calvin and the police officer arrested him. One boy by the name of Moeketsi also handed to the police officer accused 2's tomahawk which he (Moeketsi) said he had picked up amongst the grass at the spot where the deceased had been assaulted. This was said in the presence of the two accused and accused 2 raised no objection. They then returned together with Calvin to Maputsoe police station where the two accused and Calvin were lock up by the police. P.W.2 assured the court that prior to the assault that was perpetrated on him by the two accused on 24th December, 1982, the deceased was a very healthy man.

P.W.3, Samuel Makau, told the court that on 24th December, 1982 he was a police officer stationed at Maputsoe police post. He had since left the police force. On the afternoon of the day in question P.W.2 and P.W.1 arrived at Maputsoe police post. They were in the company of the two accused. P.W.2 then made a certain report following which he went into the taxi which was driven by P.W.2 himself.

Inside the taxi he found the dead body of the deceased who was a known person to him. The body was also identified to him by P.W.2 as that of the deceased. In the presence of the accused he undressed the body and examined it for injuries. He found that the body had two bleeding wounds, one on the left side of the chest and another on the chin.

P.W.3 then ordered that the taxi should transport the body to the mortuary at Hlotse Government hospital. He also got into the same taxi which P.W.2 drove to the mortuary. The body did not sustain any additional injuries. P.W.1 and the two accused were still in the taxi when the body of the deceased was taken down from the taxi at the mortuary.

As the body was being taken out of the taxi, P.W.3 noticed a brown okapi knife under one of the seats. He asked whose knife it was and accused 2 said it was his property.

6/ On examining .....

On examining it P.W.3 found that the knife had what appeared to be blood stains on the blade. He took possession of the knife and kept it in the police station. He handed in the knife which was marked Exhibit 1.

From the mortuary, they drove straight to Hleoheng where he found Calvin and put him under arrest together with the two accused. Whilst at Hleoheng a boy called Moeketsi handed to him a tomahawk which he said he had picked up amongst the grass next to the bus stop. When P.W.3 questioned the two accused and Calvin about the tomahawk, accused 1 claimed it as his property. He took possession of the tomahawk and later handed it as an exhibit at the Preparatory Examination proceedings. He and the clerk of court have searched for the tomahawk in the exhibit room but all in vain. he was therefore unable to hand it in as exhibit in this trial.

From Hleoheng the party returned to Maputsoe police post where P.W.3 caution and charged the two accused and Calvin of the murder of the deceased. P.W.3 later identified the body of the deceased before a certain Dr. Merkens who performed the post mortem examination.

I was not convinced that P.W.1 was a very reliable witness. Without saying he was an outright liar he impressed me as a witness who would readily present his imaginations as the truth where his memory failed him. This explains the reason why he gave a rather confusing evidence as to the sequence of their movement from the hospital mortuary and the finding of the weapons that were allegedly used by the two accused on the deceased. For this reason his evidence must be approached with caution. On the other hand P.W.2 and P.W.3 impressed me as reliable witnesses with whose evidence I have little quarrel if any at all.

According to P.W.1 the cause of the trouble between the two accused and the deceased was that accused 1, who had embarked on the deceased's taxi which was ferring passengers from Maputsoe straight to Peka, turned out to be going to Hleoheng where he alighted from the taxi while

it was still in motion and in the process injured himself. The evidence of P.W.1 that accused 1 sustained an injury is to some extent corroborated by P.W.2 who noticed at Hleoheng that accused was bleeding from the mouth. I am prepared, therefore, to accept the evidence of P.W.1 corroborated by that of P.W.2 in this regard.

It seems clear to me that because of what had happened to him accused 1 made up his mind to fight the deceased on his (deceased's) way back from Peka and accused 2 who is a brother of accused 1, decided to join him in the fight against the deceased. This is evident from what P.W.2 told the Court viz. that as he came to Hleoheng bus stop from Peka the two accused were going together when they stopped his taxi clearly looking for the deceased.

According to P.W.1 it was accused 2 who first attacked the deceased by stabbing him with a knife and only then did accused 1 join in by assaulting him with a tomahawk. This is however denied by P.W.2 who said it was accused 1 who first stabbed the deceased and only then did accused 2 join in by assaulting him with a tomahawk. P.W.2 categorically told the court that at that time P.W.1 had run away and could not have possibly seen who of the two accused actually stabbed the deceased.

I have said P.W.2 impressed me as a more reliable witness than P.W.1. I am, therefore, inclined to accept his version as the truth. I am doing so fully aware that in response to the inquiries of P.W.3, accused 1 and accused 2 respectively claimed the tomahawk and the knife (Exh 1) as their property. As they set out to way lay the deceased at the bus stop the two accused who are brothers, may, for one reason or another, have swapped weapons so that accused 2 was armed with the weapon that was in fact the property of accused 1 and vice versa. That being so, P.W. 2 cannot be said to have lied to the court when he said as they assaulted the deceased he clearly saw that accused 1 and accused 2 were

8/ respectively .....

respectively armed with the knife and the tomahawk.

Even if I were wrong on this point, it seems to me that after accused 1 had injured himself at the bus stop, accuse and his brother (accused 2) had clearly made up their minds to go and assault the deceased so that whether it was accused 1 who first attacked the deceased with a knife and accused 2 then assaulted him with a tomahawk or vice versa it does not really matter because they were certainly acting in common purpose. That granted, it must be accepted that the two accused were equally responsible for the injuries sustained by the deceased.

The question that immediately arises is whether or not the deceased died as a result of those injuries. In this regard the Crown Counsel told the Court that Dr. Merkens the Medical Doctor who had performed the post mortem examination on the body of the deceased, was an expatriate and had since left Lesotho for his home in Germany where he died in a car accident. The Crown Counsel sought, therefore, the admission of the deposition of Dr. Merkens at the Preparatory Examination as evidence in terms of the provisions of S.227 of the Criminal Procedure and Evidence Act, 1981. For this purpose the Crown Counsel called two witnesses viz. Mr. MPhafi, the Resident Magistrate, and Dr. K. Akuoko.

The evidence of Mr. Mphafi was to the effect that in 1983 he was stationed in Leribe. He presided over the Preparatory Examination in this case. He remembered that during the course of the Preparatory Examination Dr. Merkens testified before him and his deposition was correctly recorded as in the Preparatory Examination record. Later on Dr. Merkens was preparing to proceed to his home in Germany on leave when a party was organised for him. Mr. MPhafi participated in that party. He had, however, no personal knowledge whether or not Dr. Merkens had returned to Lesotho.

Dr. Akuoko testified that he was the medical doctor in-charge of the Government hospital at Hlotse. He went to that hospital after a certain Dr. Merkens had left. He did not, therefore, personally know Dr. Merkens. In June last year he was only told by the hospital matron (who did not

9/ testify .....



testify before this court) that Dr. Merkens had died in a car accident. He also read from a post-card which was placed on the matron's notice board that Dr. Merkens had passed away. The card was destroyed together with other hospital documents when the hospital burnt down some time in the beginning of this year.

In my view the hospital administrator who is in charge of the records of all medical doctors in Lesotho could have been easily called from Queen Elizabeth II hospital here in Maseru to tell the court whether according to his records Dr. Merkens was not available to testify before this Court. The evidence of Dr. Akuoko in this regard amounted to inadmissible hearsay evidence and could not be of assistance to this Court. Dr. Merkens may well have returned from his leave abroad and posted in one of the many Government hospitals in Lesotho.

That being so, I was unable to accede to the Crown Counsel's application that the deposition of Dr. Merkens should be admitted in evidence in terms of the provisions of s. 227 of the Criminal Procedure and Evidence Act, supra.

However, there was ample evidence that the deceased, who was a healthy man, died before he could reach the hospital and shortly after he had sustained injuries that were inflicted upon him by the accused persons. Notwithstanding the absence of the medical doctor there is not the slightest doubt in my mind that the deceased died as a result of the injuries inflicted upon him by the two accused acting in concert. The question I have earlier posed viz. whether or not the deceased died as a result of those injuries must, therefore, be answered in the affirmative.

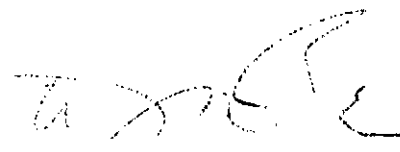
There is the unchallenged evidence of P.W.2 and P.W.3 both of whom impressed me as reliable witnesses, that the injuries sustained by the deceased were all on the upper portion of his body. Considering the fact that in inflicting these injuries the two accused used lethal weapons such as a knife and a tomahawk, I am convinced that they were aware that death was likely to result. They nonetheless acted reckless of whether or not death did occur. In the premises, I come to the

10/ conclusion ....

conclusion that in assaulting the deceased in the manner they did, the two accused had the requisite subjective intention to kill, at least in the legal sense.

I would, therefore, find both accused guilty of murder as charged.

It must be mentioned that one of my assessors does not entirely agree with this decision and is of the opinion that the proper verdict for accused 2 should be that of guilty of assault with intent to do grievous bodily harm. The decision to convict accused 2 of murder is therefore entirely mine and only one of my two assessors.



B.K. MOLAI

JUDGE

19th November, 1986.,

For the Crown : Miss Moruthoane,  
For the Defence : Mr. Matlhare.

EXTENUATING CIRCUMSTANCES

Having convicted the accused of murder we are now enjoined by S.296(1) of the Criminal Procedure and Evidence Act, 1981 to say whether or not there are any factors tending to reduce the moral blameworthiness of their act.

As regards No. 1 accused there is evidence that he was seen drinking beer which is intoxicating beverage. It must have affected his mind so that he would do things that he could not do when sober.

There is no evidence that No. 2 accused had been taking intoxicating drinks. He was, however, seen going together with No. 1 accused in search of the deceased after No. 1 accused had injured himself at the deceased's taxi. It must be inferred from this that No. 2 accused believed, rightly or wrongly, No. 1 accused' story that the deceased was responsible for the injury on his mouth. This must have served as a provocation for No.2 accused.

Although it could not have exonerated No. 2 accused the provocation must be taken into account for purposes of extenuating circumstances. For these reasons I come to the conclusion that there are factors tending to reduce the moral blameworthiness of accused's act in this case. The proper verdict should, therefore, be that the accused are guilty of murder with extenuating circumstances.

SENTENCE:

Each 7 years imprisonment.

My assessors agree.



B.K. MOLAI

JUDGE

25th November, 1986.