CRI/T/6/85

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

LIMPHO DAEMANE
MOLELENGOANE THOABALA

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. MOlai
on the 16th day of December, 1986.

The two accused are before me on a charge of murdering 'Mamohlabane Makoanyane, it being alleged that on or about 16th June, 1984 and at or near Koalabata in the district of Maseru, they both or either of them unlawfully and intentionally killed the deceased. They have pleaded not guilty to the charge.

At the commencement of this trial Mr. Mokhobo for the crown accepted the admissions made by Mr. Sooknanan and Mr. Matsau, counsels for accused 1 and accused 2 respectively, that the defence would not dispute the depositions of Majoele Makoanyane and Jack Mopeli who were respectively P.W.3 and P.W.5 at the proceedings of the Preparatory Examination. In terms of the provisions of Section 273 of the Criminal Procedure and Evidence Act, 1981 the depositions of 'Majoele Makoanyane and Jack Mopeli were admitted as evidence and it became unnecessary, therefore, to call the deponents as witnesses in this trial.

I may, perhaps, mention at this juncture that after the crown had closed its case, Mr. Sooknanan, counsel for No.1 accused, applied for his discharge on the ground that no prima facie case had been established against him by the crown evidence. I pointed out that a clear distinction had

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to be made between two situations viz. the situation where an application is made for the discharge of an accused person at the close of the crown case and the situation where at the end of the Defence case the court is asked to find the accused not guilty and acquit him.

In the first situation the court has to ask itself whether or not, on the evidence adduced by the crown, a prima facie case has been established for the accused to answer the charge against him. In the second situation, the court has to consider the evidence as a whole and determine whether or not it has been proved beyond a reasonable doubt that the accused has committed the offence against which he stands charged. The test to be applied in the first situation is a more lenient one of whether or not a prima facie case has been established whereas in the second situation a more stringent test of proof beyond a reasonable doubt is to be applied.

There is no law that binds a court of law to deal with the question of credibility of evidence where an application for the discharge of an accused person is made at the close of the Crown case. This the court is entitled to reserve to the end when it will be applying the more stringent test of proof beyond a reasonable doubt to decide whether or not the accused has committed the offence charged against him unless, of course, it can be said that the evidence adduced by the crown is so hopeless that to refuse the application and require the accused to answer the charge will amount to asking him to help build a case which the crown itself has failed to establish.

However, it must be emphasised that where the court refuses the application for the discharge of the accused person at the close of the crown case and hold that a prima facie case does exist there is absolutely nothing that compels the defence to lead evidence in defence. The defence is perfectly entitled to tell the court that, in that event, it is closing its case without calling the accused person into the witness box or leading any evidence in his defence. It

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is only then, I repeat, that a court of law is bound to deal with the question of credibility of evidence and apply the more stringent test of proof beyond a reasonable doubt to determine the question whether or not the accused has committed the offence against which he stands charged.

Now, in the instant case there was evidence adduced by the Crown that on the night in question, 16th June, 1984, two persons were seen pulling and pushing a third person outside the house of the deceased where her dead body was later found. One of the two persons ran away and was not identified. The other person did not, however run away and was identified as No. 2 accused. There was, nevertheless, evidence that on the following morning No. 1 accused said he had been with No.2 accused at the home of the deceased on the previous night.

It seemed to me, therefore, that on the face of it, i.e. without going into the question of its credibility, the evidence established a prima facie case against the two accused. That being so, I had no alternative but to refuse the application made at the close of the crown case for the discharge of No. 1 accused.

As he was perfectly entitled to do Mr. Sooknanan, for No.1 accused, told the court that, in that event, the defence was closing its case. On behalf of No. 2 accused, Mr. Matsau, also decided to close the defence case without calling the accused into the witness box or leading any evidence in his defence.

As has been pointed out earlier, it now becomes mandatory for this court to deal with the question of credibility and apply the more stringent test of proof beyond a reasonable doubt to determine whether or not the two accused committed the offence against which they stand charged. In this regard we have only the evidence adduced by the crown to rely upon.

The court heard the evidence of P.W.1, D/Sgt. Molefi, who, in short testified that on 17th June, 1984 he received a certain report and as a result drove in a police vehicle to the village of Koalabata where he found a dead body of a woman outside one

4/ of the .....

of the houses. The body was identified to him as that of the deceased, 'Mamohlabane Makoanyane. On examining it for injuries he found that the body had sustained a stab wound on the left arm, on the chest above the left breast and some minor abrasions on the chest. As there was grass and many people had crowded outside the deceased's house he was unable to observe anything of interest to this case. He however, went into the deceased's house where he noticed a general disorder of article,blood stains, a number of stones and a broken window pane on one of the windows. For obvious reasons he got the impression that a scaffle had taken place inside the house. P.W.1 then transported the dead body of the deceased in a police vehicle to the mortuary. It sustained no additional injuries.

As has been pointed out earlier, the deposition of Jack Mopeli, P.W.5 at the proceedings of the Preparatory Examination, was admitted in evidence in terms of the provisions of the Criminal Procedure and Evidence Act,supra. It was to the effect that he was the person who identified the body of the deceased before the Medical doctor who performed the post mortem examination at Queen Elizabeth II hospital on 18th June, 1984.

During the course of this trial, Mr. Mokhobo for the crown informed the court that the medical doctor, one Dr. Abdullah who performed the autopsy on the body of the deceased, was an expatriate and had since returned to his home abroad. The defence was, however, not disputining his post mortem examination report. This was confirmed by both Mr. Sooknanan and Mr. Matsau for accused 1 and accused 2 respectively. The post mortem examination compiled by Dr. Abdullah was accordingly handed in from the bar as exhibit "A" in this trial.

According to his medical report (Exh. A), Dr. Abdullah confirmed that the body was identified before him by Jack Mopeli as that of the deceased on 18th June, 1984 when he performed the post mortem examination. His findings on the external examination of the body of the deceased corroborated the evidence of P.W.1 in that they revealed a wound about 1 cm.

5/ on the .....

on the left upper arm and another also about 1 cm, on the left anterior chest over the upper outer quadrant of the left breast. On opening the body, the medical doctor found that there was some blood in the plueral sac and the left lung had collapsed. The pericardical sac was filled with blood and a huge blood clot had formed around the heart causing cardiac tamponade with the resultant death of the deceased.

It is to be observed that whilst P.W.1 mentions minor abrasions on the chest of the body of the deceased the medical report makes no mention of it. Instead the medical report refers to a linear superficial scratch ± 5 cm on the right cheek. There is therefore a discrepancy in the evidence of P.W.1 and the medical report on this point. The discrepancy is, however, insignificant in as much as the minor abraisions or the linear superficial scratch cannot have caused the death of the deceased. What is of importance is that the evidence of P.W.1 and the medical report are ad idem in that the body of the deceased had a stab wound on the chest. To my mind the stab wound on the chest was, in all probabilities, the injury that brought about the death of the deceased.

The question that immediately arises is whether or not the accused persons inflicted the stab wound and thus killed the deceased. In this regard the court heard the evidence of P.W.2 Ntsienyane Tsatsi who testified that on the night in question he was driving his two cattle through the village of Koalabata on his way to the fields when he noticed the cattle taking a fright. He suspected that there was something ahead of the cattle and so took cover under the shade of a house which was not very far from the deceased's house.

From where he stood and watched P.W.2 noticed that the cattle had taken fright at three persons of whom one appeared to be pulling and the other pushing a third person. They were going in the direction towards the back of the deceased's house. The third person was not uttering a word as he was being pulled and pushed and so P.W.2 had a feeling

6/ that he .....

that he was in trouble. He, therefore, decided to go to his rescue.

On approaching those persons, the one who was in front dropped the third person and took to his heels. P.W.2 did not, therefore recognise who that person was. When he came to the two remaining persons he, however identified the person who was behind as No.2 accused and the other person who had been dropped on the ground as the deceased. 'Mamohlabane Makoanyane. She was lying motionless on the ground.

P.W.2 told the court that he had no difficulty in identifying No.2 accused who is a relative of his. He even knew that accused 2 had an illicit love affair of long standing with the deceased - a matter which was at one time the subject of a family meeting. When he came to him, No.2 accused tried to run away but P.W.2 told him that it would be futile for him to do so as he had already recognised him. He ordered No. 2 accused to wait right there while he (P.W.2) was going to report to the chieftainess of the village. However No.2 accused told him that the deceased was drunk and he was going to the home of one 'Matikoe lower down the village. P.W.2 ran to the chief's place, woke up the chieftainess and reported what he had seen. I shall return to his evidence in a moment.

The chieftainess, one 'Majoele Makoanyane confirmed that on the night in question P.W.2 made a report to her. Following that report she woke up one 'Mathato and other villagers with whom she went to a spot behind the deceased's house. She found a dead body of a woman lying next to a "mohalakane" bush. She lit a match and identified the body as that of the deceased. She was dressed in a night dress and already dead. The chieftainess then detailed P.W.2 and some other messengers to go and report to the police. She said she was present when the police examined the body of the deceased for injuries and carried out an inspection inside the house. She confirmed the findings of P.W.1 in all material respects.

7/ Returning .....

Returning now to his evidence, P.W.2 confirmed the evidence of 'Majoele Makoanyane that he and other messengers were detailed to go and report to the police. They first went to Radio Lesotho Tower where they reported the death of the deceased to the police who however referred them to Maseru Police. They accordingly went and reported to the police at Airport Police Station in Maseru.

When he returned home in the morning, P.W.2 found that the police had already arrested accused 1. He did not, however, know how accused 1 had been arrested. He then led the police to the place where No. 2 accused lived. As they approached the house where he stayed at Sekamaneng, P.W.2 saw accused 2 going to a blanket outside the house and hidding something there.

Before they could handcuff him, P.W.2 drew the attention of the police to the fact that accused 2 had hidden something under the blanket. When the blanket was lifted up a home-made knife, commonly known as a sable was found. This is confirmed by P.W.1 who told the Court that he took possession of the knife, handed it in as exhibit at the Preparatory Examination. The knife had, however, disappeared in the exhibit roon at the magistrate court and he was,therefore, unable to hand it in as exhibit in this trial.

I must say I observed P.W.2 as he testified from the witness box. He was rather hasty in his replied to the questions that were put to him i.e. very often he gave answers to question that were not yet asked from him. He did not, however, give me the impression that he was telling a lie to the court when he said he knew No. 2 accused to have been a secret lover of the deceased. I accept his story that on the night in question he identified No. 2 accused as one of the two people who had appeared to be pulling and pushing the deceased. This in my view is evidenced by the fact that immediately on his return from the airport police station, P.W.2 led the police to the place where No. 2 accused could be found at Sekamaneng. I am prepared to accept as the truth his evidence that as they approached the house where accused 2 stayed at Sekamaneng he saw him hidding under a blanket something which turned out to be a home-made knife commonly known as a sable.

8/ In as far as .....

In as far as it is material, the evidence of P.W.3, Lira Tsosane, was that on the night in question accused 1 whom he knew to be a secret lover of the deceased came to his house and borrowed a blanket. He refused to lent him one and the accused then left. Early in the following morning he noticed accused 1 passing next to his house. When he asked him where he was going to so early in the morning, accused 1's reply was that he was going to see how the deceased had slept. Asked why he was doing so accused 1 told P.W.3 that on the previous night No. 2 accused had found him with the deceased in the latter's house when he (accused 2) stabbed her with a knife.

P.W.3 then told the accused that he had just received a message from Koalabata that the deceased was late and he was, in fact proceeding to her home. Accused 1 accepted P.W.3's suggestion that he should go and report himself to the police. Asked if he had 25c bus fare to the police station in Maseru Town , accused 1 replied in the affirmative. P.W.3 then left for Koalabata while accused 1 returned right there taking the direction towards his home.

At Koalabata P.W.3 reported what accused 1 had told him. He was then asked by the police to get into the police vehicle so that he could show them where accused 1 stayed. They first conveyed the body of the deceased to the mortuary after which he directed the police to accused's home at the village of ha Tsosane.

As they approached accused 1's house in the village, P.W.3 saw him crossing the road apparently on his way to a beer house belonging to one Likenkeng. He pointed him out to the police who arrested him.

I have no good reason to doubt P.W.3's unchallenged evidence that No. 1 accused told him that on the night in

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question he was with the deceased at the latter's house when No. 2 accused, who according to the evidence of P.W.2 was also a secret lover of the deceased, arrived. The evidence of P.W.3 that accused 1 told him that No. 2 accused then stabbed the deceased with a knife cannot, however, be used against No. 2 accused, firstly, because it is clearly hearsay and secondly because the two accused are charged jointly in this trial. Even if accused 1 had gone into the witness box and himself testified that No.2 accused had stabbed the deceased his evidence would not have formed the basis for the conviction of No. 2 accused for the simple reason that the evidence of one accused is never used against his co-accused.

Be that as it may, I have already said I accept the evidence of P.W.2 that on the night in question he saw two people pushing and pulling the deceased towards the back of her house where she was found dead. He positively identified accused 2 as one of the two people. Although the second person ran away and was not identified by P.W.2, accused 1 himself told P.W.3 that he was with accused 2 at the house of the deceased on the night in question.

There is not the slightest doubt in my mind, therefore that the two people seen by P.W.2 pulling and pushing the deceased on the night in question were the two accused. It is, however significant to remember that according to the evidence of P.W.2 and P.W.3 the deceased had a secret love affair with both accused 2 and accused 1. I accept the evidence of P.W.3 that accused 1 told him that he was already with the deceased when accused 2 arrived and found them together. It is reasonable to infer from this that when he arrived and realised that the deceased was double crossing him with accused 1 in their lover affair, accused 2 disapproved of it and attacked her with a knife. This, in my view, explains the reason why when he saw the police vehicle approaching his house at Sekamaneng accused 2 tried to hide away the knife.

In my opinion, there is plenty of circumstantial evidence indicating that accused 2 is the one who stabbed the deceased and the answer to the question I have earlier posted

10/ viz. whether or .....

viz. whether or not the accused persons inflicted the stab wound and thus killed the deceased must, therefore be that No. 2 accused did.

By stabbing the deceased with a knife on the chest NO. 2 accused must have realised that death was likely to result. He, nonetheless, acted reckless of whether or not death did occur. That being so, it must be accepted that in assaulting the deceased in the manner he did No. 2 accused had the requisit subjective intention to kill, at least in the legal sense.

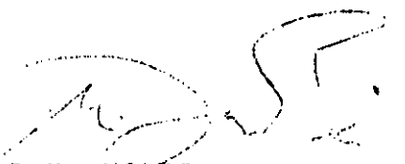
As regards No. 1 accused I find circumstantial evidence against him not very strong. The most that can be said of it is that he was the person who was seen assisting accused 2 to carry the deceased to the spot behind the house where her dead body was found. There is, however, no evidence that the deceased was already dead at the time and accused 1 was therefore assisting accused 2 to cover this offence in which case accused 1 would be convicted as accessory after the fact. It may well be that the deceased had just lost consciousness and accused 1 assisted accused 2 to take her out where she would get fresh air. This may indeed be so for as we have seen P.W.3 told the court that when he spoke to accused 1 on the morning following the night on which the deceased met her death accused 1 said he was going to see how she had slept, thus suggesting that he did not know that the deceased had died. If at the time he assisted accused 2 to take the deceased outside the house No.1 accused did not know that she was already dead it seems difficult to believe that he could have been assisted accused 2 to cover the crime. Accused 1 cannot, therefore, be regarded as accessory after the fact.

I may be wrong in this reasoning and the two accused who, on the evidence had a love affair with the deceased may both have decided to punish her for being in love with them at the same time. I however, feel that the circumstantial evidence against No. 1 accused leave room for doubt the benefit of which must, in our law, be given to him.

11/ In the .....

In the result, I come to the conclusion that there is sufficient evidence to warrant a conviction against No. 2 accused in this case and I accordingly find him guilty of murder as charged. Accused 1 is, however, given the benefit of doubt, acquitted and discharged.

Both my assessors agree.



B.K. MOLAI
JUDGE

15th December, 1986.

For the Crown : Mr. Mokhobo
For the Defence : Messrs. Sooknanan & Matsau

EXTENUATING CIRCUMSTANCES

Having convicted No. 2 accused of murder, we are now enjoined by S.296(1) of the Criminal Procedure and Evidence Act, 1981 to state whether there are any factors, connected with the commission of the crime, tending to reduce the moral blameworthiness of his act.

In this regard the court found on evidence that, on the night in question, No. 2 accused assaulted and killed the deceased, his secret lover, when he found her with another man i.e. No. 1 accused, who was also a secret lover of the deceased. In other words, No.2 accused considered himself to have a better claim than No. 1 accused to the love of the deceased and he was, therefore, provoked when he found that she was double crossing him with No. 1 accused in their love affair.

As secret lovers of the deceased, the two accused were, so to speak,thieves, stealing the love of another man's wife and No. 2 accused had no better claimn than No. 1 accused to the love of the deceased. It must, however, be borne in mind that the class of community to which No.2 accused and the deceased belong is the rural villages where the question of a woman double crossing men in illicit love affairs may be taken seriously.

Subsection (2) of section 296 of the Criminal Procedure and Evidence Act, 1981 provides that in deciding whether or not there are any extenuating circumstances the court shall take into consideration the standard of behavior of an ordinary person of the class of the community to which the accused belongs. Although the finding of the deceased with another lover by No. 2 accused may not have been such provocation as to reduce the crime of murder to a lessor offence it must, in my opinion, be takinen into account as an extenuating circumstance for No. 2 accused as a person of the community to which he belongs.

We have also found as proven fact that in assaulting the deceased as he did, No. 2 accused had the intention to kill,

at least in the legal sense. That is, he did not plan or premaditate the death of the deceased. It is trite law that, in murder cases, this absence of premeditation is, in itself, an extenuating circumstance.

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

My assessors agree.

SENTENCE : 8 years imprisonment.

B.K. MOLAI,
JUDGE.

12th January, 1987.