

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

1. LERATO SHATA
2. TSELISO MAPHASA

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 30th day of December, 1986.

The two accused have pleaded not guilty to a charge of murdering Malefetsane Pululu, it being alleged that on or about 10th May, 1985 and at or near Phuthing in the district of Mophale's Hoek they, acting in concert with one Thapelo Maphasa, unlawfully and intentionally killed the deceased.

Mr. Moorosi, who represented No. 2 accused in this case, told the court that by concert with Mr. Klass, counsel for No. 1 accused, the defence would not dispute the depositions of Kakaretso Botsane, Bokang Pululu, D/Tpr Leteba and Dr. Strupowski who were respectively P.W.4, 5, 6 and 7 at the proceedings of the Preparatory Examinations. Mr. Seholoholo, for the crown accepted the admissions made, on behalf of the accused persons by the defence counsels. In terms of the provisions of S. 273 of the Criminal Procedure and Evidence Act, 1981, the depositions of P.W.4, 5, 6 and 7 at the Preparatory Examinations were accordingly admitted in evidence and it became unnecessary, therefore, to call the deponents as witnesses in this trial.

It may be mentioned that at the close of the crown case an application was made for the discharge of No. 1 accused on the ground that no case had been established for him to answer. As it will be shown in a moment, there was ample

2/ evidence

evidence which, on the face of it, clearly connected No. 1 accused with the commission of this offence. I declined to deal with the question of credibility at that juncture and came to the conclusion that merely looking on the fact of it, the evidence did establish a prima facie case against No. 1 accused. For that reason, the application for his discharge was refused.

As he was perfectly entitled to do, Mr. Klass told the court that, in that event, he was closing the defence case. Mr. Moorosi initially elected to call No. 2 accused into the witness box. However, after a short adjournment he told the court that, on second thought, the defence had decided to close the case for No. 2 accused without calling him into the witness box or leading any evidence in his defence. For the decision in this matter we have, therefore, only the prosecution evidence whose credibility I shall now proceed to deal with.

Briefly the evidence of D/Tpr Leteba was that on 12th May, 1985 he received a certain report following which he proceeded to a place in the area of Mekaling within the district of Mphahle's Hoek where he found a dead body of a man. The body was identified to him as that of Maiefetsane Pululu. On examining it for injuries he found that the body had sustained multiple wounds viz. two open wounds on the head, a wound on the right side of the chest, a wound on the lips and a wound on the right ear. He transported the body of the deceased in a police vehicle to the mortuary for Post Mortem examination and it sustained no additional injuries. I shall return to his evidence later in this judgment.

The evidence of Dr. Strupowski was that he was the medical doctor, who, on 13th May, 1985, had performed the post mortem examination on the deceased's body which was identified before him by Bokang Pululu and Chabana Rachabana. This was confirmed by Bokang Pululu who, as has been pointed out earlier was P.W.5 at the proceedings of the Preparatory Examination. As a result of the post mortem examination, the medical doctor found the following: a deep laceration on the

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right cheek, two wounds on the head, a skull impression, a fracture on the left temporal with a sub-arachnoidal bleeding resulting in the death of the deceased. From the above injuries, the doctor formed the opinion that an instrument such as a stick could have been used, with considerable force, to assault the deceased.

I am unable to think of any good reason why the medical doctor should be doubted in his unchallenged evidence that the deceased died as a result of the injuries inflicted upon him. I am inclined, therefore, to accept his evidence as the truth. on this point.

The salient question that immediately arises is whether or not the accused are the persons who inflicted the injuries on the deceased and consequently brought about his death. In this regard, it is common cause, from the crown evidence, that on the day in question, 10th May, 1985, there was a feast at the house of one Tsoabiso at Mekaling, alias, Phuthing. The feast was attended by Kakaretso Botsane, who was P.W.4 at the Preparatory Examination, the deceased himself, Moeketsi Khama, Tseliso Kubetso, the two accused, one Thapelo Maphasa who is the father of No. 2 accused and many other people.

The court heard the evidence of P.W.1, Moeketsi Khama an accomplice witness. It is significant to bear in mind that as such P.W.1 is not merely a witness with a possible motive to tell lies about the accused persons but peculiarly equipped by reasons of his inside knowledge of the crime, to convince the unwary that his lies are the truth. It is of utmost importance, therefore, that his evidence should be approached with great care so that the risk of convicting an innocent accused may be reduced.

In his testimony P.W.1 told the court that during the feast he was with No. 2 accused when Thapelo Maphasa told them that a "dog" which was causing him trouble was present at the feast and invited them to go with him for the "dog". By the "dog" P.W.1 understood Thapelo Maphasa to mean a person who was pestering him. He and No. 2 accused then

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followed Thapelo Maphasa to a person who was walking next to the kraals.

As it was late after dusk and on a dark night that person was carrying a flash light. When he came to that person, Thapelo Maphasa started delivering blows on him with a stick and the person fell to the ground. P.W.1 and No. 2 accused then came and joined Thapelo Maphasa in his assault on that person who was trying to rise up. He (P.W.1) hit that person on the ribs and noticed that one of the blows delivered by No. 2 accused landed on the head. He saw No. 1 accused already delivering blows with his stick on that person although he did not notice when he had arrived at the scene.

After they had beaten him up, P.W.1 and the two accused returned to the feast leaving Thapelo Maphasa standing next to where that person was lying prostrate on the ground. Thapelo Maphasa was at that stage, no longer beating up that person. After they had left him at the scene of crime, P.W.1 did not again see Thapelo Maphasa who had since vanished from the village.

He (P.W.1) later learned that the person they had been assaulting was the deceased who was found dead next to the kraals. He and No. 2 accused then decided to go for hiding at the cattle posts from where they, however, returned after three days. They were persuaded by the chief and elderly people of the village to go and surrender themselves to the police in Mohale's Hoek.

Returning to his evidence, D/Tpr Leteba confirmed that on 14th May, 1985 he met P.W. 1 and No. 2 accused. They handed their sticks to him and made certain explanations. He later met No. 1 accused who also gave an explanation concerning the death of the deceased and handed over his stick. He had, however, not been able to meet Thapelo Maphasa who was still at large. Following their explanations, D/Tpr Leteba cautioned and charged the two accused and P.W.1 with the murder of the deceased. He also took possession of their sticks which he handed in as exhibits at the Preparatory Examination.

5/ The evidence of

The evidence of P.W.1 that it was suggested at the feast that a person who turned out to be the deceased should be assaulted was corroborated, to some extent, by P.W.2, Tseliso Kubetso, who also told the court that during the feast No. 1 accused had told him that there was a person he and others intended beating up. No. 1 accused did not, however, disclose the name of that person.

Later in the night of the same day, P.W.2 received an information that a person was seen lying prostrate next to the kraals. He got the impression that it might be the person No. 1 accused had threatened that he and others were going to assault at the feast. As it was late at night, P.W.2 did not do anything about the information. In the morning of the following day he did, however, go to the kraals where he saw a dead body of a man whom he identified as the deceased. He later reported to the police at Mphahle's Hoek what No. 1 accused had said to him at the feast.

I must say I carefully observed P.W.1 as he testified from the witness box. He impressed me as a witness of the truth. I am prepared, therefore, to accept his evidence, corroborated to some extent by that of P.W.2, that he and the two accused not only agreed to Thapelo Maphasa's suggestion, but actually assisted him, to assault the deceased on the night in question.

That being so, there is not the slightest doubt in my mind that P.W.1 and the two accused, acting in concert with Thapelo Maphasa, did inflict upon the deceased the injuries described by D/Tpr Leteba and Dr. Strupowski. The answer to the question I have earlier posed viz. whether or not the accused are the persons who inflicted the injuries on the deceased and consequently brought about his death must, therefore, be in the affirmative.


In assaulting the deceased in the manner described by the crown evidence, the accused must, in my view, have realised that death was likely to result. They, nonetheless, acted reckless of whether or not it did occur. That granted, I am convinced that the accused acted with the requisit sub-

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jective intention to kill, at least in the legal sense.

From the foregoing, it is obvious that the view that I take is that the two accused are guilty of the murder of Malefetsane Pululu and I accordingly convict them.

My assessors agree with this finding.



B.K. MOLAI
JUDGE.

30th December, 1986.

For Crown : Mr. Seholoholo,
For Defence : Mr. Klass for 1st Accused
Mr. Moorosi for 2nd accused.

EXTENUATING CIRCUMSTANCES

The accused have already been convicted of murder. In terms of the provisions of S. 296(1) of the Criminal Procedure and Evidence Act, 1981, I am now required to state whether there are extenuating circumstances i.e. factors, connected with the commission of the crime, tending to reduce the moral blameworthiness of the accused's act.

In this regard there is evidence that the two accused, P.W.1 and a certain Thapelo Maphasa assaulted and killed the deceased at a feast where they had been drinking beer which was free-for-all.

Granted that they had been drinking beer at the feast, there is no doubt in my mind that at the time they joined Thapelo Maphasa in the assault on the deceased, the accused were under the influence of intoxication.

It is a well-known fact that intoxication affects the mind of a man so that he does the things he would not do when sober. This may properly be taken into account as a factor tending to reduce the moral blameworthiness of the accused's act - vide page 363 of the South African Criminal Law and Procedure(Vo.II) 1970 ed. by Hunt.

From the foregoing it is obvious that the view that I take is that by reason of the accused's intoxication, extenuating circumstances do exist in this case and the proper verdict is that of "guilty of murder" with extenuating circumstances.

My assessors agree.

SENTENCE : Accused 1 : 8 years imprisonment
Accused 2 : 6 years imprisonment.

B.K. Molai

JUDGE

12th January, 1987

For Crown : Mr. Seholoholo,
For Defence : Mr. Klass for Accused 1
Mr. Moorosi for Accused 2.