

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

TSIETSI PHOMANE

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 23rd day of June, 1986.

The accused in this case appears before me charged with the murder of 'Mamoloantoa Moloantoa on the allegation that on or about 6th May, 1984 and at or near Ha Tsoene in the district of Mafeteng, he unlawfully and intentionally killed the deceased. He has pleaded not guilty to the charge.

Mr. Kabatsi, who represents the accused in this matter, and Mr. Lenono, counsel for the crown, have respectively admitted and accepted the depositions of Tpr. Morahanye, Dr. J. Westerhuis and Seeiso Moloantoa who were respectively, P.W.1, P.W.4 and P.W.7 at the proceedings of the Preparatory Examination. In terms of the provisions of S. 273 (1) of the Criminal Procedure and Evidence Act, 1981 the depositions became evidence and it was, therefore, unnecessary to call the deponents as witnesses in this trial.

The court then heard the evidence of P.W.1

/D/Tpr. Thoahlane,

D/Tpr. Thoahlane, who testified that on 7th May, 1984 he received a certain report following which he proceeded to a house in the village of Ha Tsoene in which house he found the body of a dead woman identified to him as that of the deceased. The body was dressed in a full dress and a skipper.

On examining it P.W.1 found that the body of the deceased had a single stab wound between the breasts. He conveyed it in a police landrover to Mafeteng Government hospital and it sustained no additional injuries.

The evidence of Dr. J. Westerhuis was to the effect that he was the medical doctor who, on 9th May 1984, performed a post mortem examination on the deceased's body which was identified before him by Seeiso Moloantoa and Thuso Chalatsi. This was confirmed by Seeiso Moloantoa. The external examination revealed one small wound on the left chest. On opening the body, the witness found that the wound penetrated right through the left lung tearing, as it did, large blood vessels (aorta). In his opinion the wound was consistent with the use of a long sharp instrument, such as a screw driver, and death was due to loss of blood resulting from the rupture of the large blood vessels.

I can think of no good reason why Dr. Westerhuis's evidence, which was common cause, that the deceased died as a result of the injury inflicted upon her should be doubted, and I am prepared, therefore, to accept it as the truth. That being so, the salient question for the determination of this Court is whether or not the accused

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is the person who inflicted the injury on the deceased and, therefore, brought about her death.

In this regard the crown adduced the evidence of P.W.2, 'Mamoeketsi Monyake, who told the court that she was the daughter of the deceased. She was married and had two children. At the time of the death of the deceased P.W.2 was, however, not living with her husband. They had separated or she had "ngalaed." The reasons thereof are not so material for the decision in this case. What is important is that whilst she was already married in 1982 P.W.2 fell in love with the accused. When she left her husband P.W.2 went to her maiden home and stayed with the deceased. The deceased bitterly disapproved of the illicit relationship between P.W.2 and the accused who then took P.W.2 to his home at Ha Ramorakane where they lived together as husband and wife. Although the accused denied it P.W.2 told the court that her stay with the accused at the latter's home was not always a happy one. They often quarrelled when she would "ngalaed" to her maiden home at Ha Tsoene. The accused would then go to Ha Tsoene, beat her up and forcibly return her to Ha Ramorakane. She did not, however, personally report this to either the chief or the police for fear of the accused.

I must say I find P.W.2's story that the accused was assaulting and taking her to Ha Ramorakane by force and yet she never reported this to the chief or the police for fear of the accused some what strange. If she really feared the accused who was often assaulting her, P.W.2 needed the protection of the chief and the police. One

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would have expected her to bring the matter to the attention of the chief and the police for her own protection.

Be that as it may, it is common cause that, on the day in question, P.W.2 was again at her maiden home when the accused arrived in the village. The deceased and another of her daughter, P.W.4 'Mamokholutsoane Matube, had on a previous day went to Maseru on a visit leaving P.W.2 alone at home. On his arrival the accused found P.W.2 in one of the houses in the village from where they went to deceased's house. Whilst at the deceased's house P.W.2 heard something making noise in the pockets of accused. She became worried and insisted on seeing that thing. This, according to P.W.2, was because she felt afraid of the accused. The accused then produced from his pocket a knife and a nail clipper which he showed to P.W.2. She was still not happy to stay alone with the accused in the house and so she went to a neighbouring house from where she asked P.W.3, 'Maseapei Moilola, to come and keep her company whilst the accused was in the house. This is confirmed by P.W.3 who told the court that she accordingly went to the deceased's house.

It is common cause that at about 8 p m and whilst the accused, P.W.2 and P.W.3 were chatting normally in her house the deceased and P.W.4 arrived home from Maseru. There was a candle light in the house. According to P.W.2 as soon as she arrived home and found the accused, the deceased ordered him out of the house. This was because the deceased, as has been pointed out earlier, disapproved of her illicit association with the accused. When he was ordered out the accused did leave the house and the deceased

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closed the door behind him. P.W.2 denied the suggestion that at any time, the deceased assaulted the accused with an umbrella. After a short while, however, the accused returned, knocked at the window and called out the name of P.W.2 whom he said should hand over the keys of his tin trunk. When P.W.2 replied that she did not have the keys the accused told her to hand over his clothes. The deceased asked P.W.2 what clothes the accused was referring to and the latter replied that he (accused) was perhaps referring to the ones she was wearing for he had brought them for her. The deceased then ordered P.W.2 to put off the clothes and hand them over to her so that she (deceased) could give them to the accused. P.W.2 complied.

The accused's version as to what happened when the deceased arrived home is slightly different. According to him when the deceased and P.W.4 arrived home they stood for a short while outside the house and talked to themselves before moving into another of the deceased's huts. P.W.4 then came into the hut in which the accused, P.W.2 and P.W.3 were sitting. Whilst P.W.4 was looking for something on the shelves the deceased came in and was carrying an umbrella with which she immediately started bashing him on the head, at the same time telling him to leave the house. He denied, therefore, the evidence of P.W.2 that there was a time when he went out of, and later returned to the house. He denied that he ever knocked at the window and called out the name of P.W.2 whom he asked to hand over clothes and the keys to his tin trunk. According to accused while the deceased was bashing him with the umbrella he noticed P.W.4 approaching

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with a table knife. He then caught hold of the deceased, pulled and kicked her on the leg when she flew over his shoulders and fell to the floor. According to accused, he then left the deceased's place and later returned to Maseru where he normally worked. This seems to find support in the evidence of Tpr. Morahanye who said on 14th May 1984 he arrested the accused at the Building Section of the Ministry of Public Works here in Maseru. Accused believed that the deceased was accidentally stabbed by the knife which P.W.4 was holding in the house.

The evidence of P.W.2 in this regard was, however, corroborated by that of P.W.3 and P.W.4 who impressed me as more reliable witnesses than the accused. Although P.W.2 was, herself, not a very impressive witness I am, however, prepared to accept her story, which was, in this regard, corroborated by that of P.W.3 and P.W.4. In her evidence P.W.2, again corroborated by P.W.3 and P.W.4 whose evidence I am prepared to accept as the truth, went on to tell the court that after she had handed the clothes over to the deceased the latter opened the door intending to give them to the accused. As soon as the door opened the accused rushed into the house and met the deceased at the door way. He then struck the deceased a blow on the chest with a glittering object which P.W.2, P.W.3 and P.W.4 could not clearly identify. As she was struck the blow the deceased staggered backward and sat in a chair clearly in pains. P.W.3 said when she saw the accused striking the deceased and the latter staggering into a chair she immediately went out of the house intending to raise an alarm. She did not see what then

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happened in the house. On her way to Seeiso Moloantoa's place where she intended making the report P.W.3 was joined by P.W.2 who came running in her direction. They took cover behind the house of one Thuso Chalatsi. The accused noticed only P.W.3 and asked her where P.W.2 was. She deceived him by saying P.W.2 had run downwards. The accused then left. P.W.2 entered into the house of Thuso Chalatsi whilst she (P.W.3) continue on her way to Seeiso Moloantoa's place where she made the report.

P.W.4 confirmed that after the accused had struck the deceased a blow the latter staggered into a chair. According to P.W.4 after striking the deceased the accused went straight to P.W.2 who then stumbled over a chair and fell to the ground in an attempt to run away from the accused. The accused then caught hold of P.W.2 and pressed her to the floor. At that stage P.W.4 ran out of the house. P.W.3 had already gone out. After she had run out of the house P.W.4 noticed the accused following in her direction and she screamed loudly. The accused then returned. She denied to have at one time armed herself with a knife with which she attempted to stab the accused.

P.W.2 confirmed that after he had stabbed the deceased the accused rushed at her and in trying to clear out of his way she stumbled over a chair and fell on the floor. As the accused tried to press her to the floor she managed to escape and run out of the house. She confirmed P.W.3's evidence that after she had joined her they were running together when they noticed the accused following in their direction. They then took cover behind Thuso's house

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where the accused saw and spoke to P.W.3. After the accused had left, she ran into the house of Thuso Chalatsi. P.W.2, P.W.3 and P.W.4 testified that they, later that night, returned to the deceased's house, where many villagers had already gathered, and found the deceased dead.

Although the accused has suggested that the deceased could have been accidentally stabbed by a knife which was held by P.W.4, the evidence is simply overwhelming, in my view, that there is no such thing and the truth of the matter is that he stabbed the deceased in the manner described by P.W.2, P.W.3 and P.W.4. Indeed, D/Sgt. Thoahlane's evidence which I accepted as the truth was that on 14th May, 1984 the accused took him to his house at Ha Ramorakane and produced, in the presence of the village headman the screw driver, exhibit 1, which he said he had used it on the deceased.

I have not the slightest doubt, therefore, that the answer to the question I had earlier asked viz. whether or not the accused is the person who inflicted the injury that resulted in the death of the deceased must be in the affirmative.

In stabbing the deceased on the chest with such savage force that the stab wound penetrated right through the lung the accused must have realised that death was likely to result. He nonetheless acted reckless of whether or not it did occur. That being so, I am satisfied that in assaulting the deceased, as he did, the accused had the requisite subjective intention to kill.

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

My assessors agree.

J U D G E.

23rd June, 1986.

EXTENUATING CIRCUMSTANCES

It is clear from the evidence in this case that the accused was, at the material time, visiting P.W.2 with whom he had an illicit love affair. When the deceased, who disapproved of their illicit relationship, and rightly so in my opinion, expelled him the accused must, naturally, have felt offended or provoked even if it were not to the extent that his crime of murder could be reduced to a lesser offence.

I concede, it may have been unreasonable for the accused to feel offended or provoked in the circumstances, but the test to be applied is subjective and not objective. Moreover, there is nothing in the evidence, considered in its totality, to show that the accused had planned or premeditated the killing of the deceased.

The presence of provocation and the absence of premeditation in this case have, in my view, the cumulative effect of lessening the moral blameworthiness of the crime committed by the accused. That granted, it must be accepted that extenuating circumstances do exist in this case and I so find.

SENTENCE : 12 years' imprisonment.

My assessors agree.

J U D G E.

23rd June, 1986.

For Crown : Mr. Lenono

For Defence: Mr. Kabatsi.