

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

NTHATISI METSING

Appellant

v

REX

Respondent

HELD AT MASERU

Coram:

MAISELS, P

SCHUTZ, J.A.

GOLDIN, J.A.

J U D G M E N T

Maisels, P.

The appellant was indicted in the High Court on a charge of murdering one Tsabalira Thotsela. She pleaded not guilty but was found guilty and no extenuating circumstances having been found was sentenced to death. She has appealed to this Court against both her conviction and sentence. Although it was common cause that the appellant stabbed the deceased 13 times with a knife and that he died as a result of and within a short time after the injuries inflicted on him by the appellant it was contended by counsel who appeared on her behalf that the appellant stabbed the deceased in self defence - when she was defending herself from being assaulted or raped by the deceased, and that the Crown had failed to negative the defence. Alternatively it was contended that she should not have been found guilty of murder but of culpable homicide. It was further contended that even if the appellant was correctly convicted of murder the trial Court should have found that extenuating circumstances existed which reduced her moral blameworthiness to such an extent as not to warrant the extreme penalty imposed on her. The evidence showed that the appellant had been married under customary law in 1967 to one Tsokolo Lephole. There were two children born of this marriage, but it broke down in 1975. She subsequently had a child by another man. In 1979 she and the deceased became lovers. They lived together for several months but parted company towards the end of that year.

The appellant earned her living selling fruit bread and vegetables by the side of the road at a place called Mazenod.

Another person engaged in the same trade and at the same site as the appellant was the witness Mamatseliso Molise. On the 9th August 1980, the day of the killing, the latter spent her day as usual, trading in the company of the appellant. When it became late she cleared her boxes and took them to a nearby shop owned by one Timello where it was her practice to store her boxes overnight. When she was at the shop the deceased arrived. He appeared to this witness to be drunk. He asked those present in the shop to tell him the whereabouts of the appellant. 'Mamatseliso saw that the deceased was holding an unclasped knife in his hand which she described as "a small Okapi knife". She asked him why he went about with an unclasped knife in his hand and remarked that people might think he was a tsotsi. To this the deceased made no reply. 'Mamatseliso considered the deceased's behaviour strange but as she said "I saw that he was drunk". She was however alarmed, although the deceased did not then appear to be in a fighting mood. Nonetheless she was afraid that the deceased might well harm the ~~appellant and went off in a hurry to warn the appellant of this~~ danger. She stated she advised the appellant not to go home but to report to the Chief's place, stating that the appellant had told her, apparently on some previous occasion, that she no longer loved the deceased. It is not inappropriate to mention that according to this witness the deceased was a man of medium height who could easily overpower the appellant. I should however state that the appellant who was in Court when her appeal was argued appeared to the Court to be herself fairly well built if somewhat stocky.

It must however be said that 'Mamatseliso testified that when she advised the appellant to go to the chief's place and not to go home the appellant replied that she would not go to the chief's house, that she was not afraid of the deceased and that she would go to a shop and get her own knife. That she did later that evening indeed go to a shop and buy a knife is clear. Her evidence which I need not repeat here that she bought it at the deceased's insistence for some strange man was correctly in my opinion rejected by the learned trial Judge as false. It is an utterly improbable story. The knife she bought was sold to her by one Likotsi and was identified by the latter in evidence as similar to the knife admittedly used by the appellant to stab the deceased.

It is not necessary to detail the evidence as to how the deceased eventually caught up with the appellant who was on

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her way home where she had a sick child nor the argument between the deceased and the appellant about a radio. Nor do I think it necessary to set out the evidence as to the various places the appellant and the deceased went to. The appellant at the deceased's insistence agreed to have intercourse with him provided it was not in her house where her child was sick. There was also according to the appellant a search for beer; and the evidence indicated the deceased was still sporting his knife.

According to the learned trial Judge's note the appellant stated:

"We came to where there were block bricks. He told me to sit on one brick while he sat on another. The deceased said 'I want to speak to you'. He asked me if I still loved him. I told him that I did because I was frightened. He said he knew that I did not love him any longer. I asked him if I would have come with him if I did not love him. He said he knew that he had forced me as I was not willing.

The deceased asked if I knew that in Maseru women have been found dead with their private parts excised. He said I should stand up. He also stood up. He took a knife out of his pocket and he unclasped it with his teeth. He said I should take off my panty. There were people about. They passed us. He put the knife on a block brick. When they came towards us deceased said that I should keep quiet. 'If you speak I will cut your throat'. The people passed by. I kept quiet as I was very frightened. I snatched the knife from the brick. I cried out in the hope that the people near could help me. The deceased lifted me up. He held me below the breasts and lifted me up with his hands at my back. I then struck him on the shoulders with the knife. I did so until he let me down.

He pulled at me with his left hand while his other hand held my blanket. He held me tight. I tried to free myself. I again stabbed him to break his grip. He stumbled, but, still held me tight. We fell down together. I got up before the deceased. He still held me as before. I again stabbed him while he was pulling me towards him. I stabbed him in the region of the chest. I was then in front of the deceased. I managed to free myself from him and I ran away. I saw a light from a car. As I ran I closed the knife and threw it before me. I did this because I still feared that the deceased would get up and chase me and I did not want him to find the knife.

A man spoke from inside the vehicle. He opened the door and got out. He asked me what was wrong. He chased after me and called me back. I came back to the man. He held me by the hand and asked me what was wrong".

The appellant also said that she told the man who caught

/her

her that she did not want him to take her back to where the deceased was as he would beat her. This man the appellant admitted was the witness George Kou.

If what was said by the appellant in the passage quoted above might reasonably have been true then of course the appellant was entitled to be acquitted. There was no onus on her to prove it was true, the onus rested on the Crown to prove beyond reasonable doubt that it was not true.

It is necessary to consider at this stage certain evidence given by impartial witnesses as to what they saw. They were three in number : George Kou, Keketso Morojele and Mpho Motaung. The evidence of these three witnesses is correctly in my opinion summarised by the learned Judge a quo as follows :

"George Kou(PW2) was driving along the main road between Maseru and Mazenod. When approaching Borokhoaneng he saw something happening on the left hand side of the road off the tarmac. It ~~appeared as if someone was hitting something~~ which was lying on the ground. This witness was about to take a turn to the right in the direction of Ha Seoli. He decreased his speed and turned his vehicle towards the incident which had attracted his attention. He then saw somebody lying face down on the road. He saw three blows being struck. He stopped, got out of his vehicle and shouted 'What are you doing?' A woman ran away. He chased after and caught up with her. It was the accused. Other people arrived on the scene including Morojele (PW3) and the police. Kou brought the accused back to the place where he had seen her hitting the person on the ground. He saw that that person had many stab wounds on his back. He asked the accused to produce the knife. Instead of answering the accused cried and said 'What did this man want with me?' They looked around for a knife. The police had arrived by this time. A knife was found about 20 metres from the body. This witness did not remember who picked it up from the ground. The accused was handed over to the police.

In cross-examination Kou put the time at between 9 and 11 p.m. When he first saw the couple he did not see any other people in the vicinity. He did not see a knife in the hand of the accused at the time that she appeared to be hitting something on the ground. He saw her stooping down. He denied that he saw the women being held by the person on the ground. He was able to see what was happening in the headlights of his vehicle. According to this witness the area is flat without obstruction. Before he alighted from his vehicle he knew that there was a person lying on the ground. He did not notice when Morojele and a person called Abel(not a witness) arrived on the scene. They came and asked Kou what was happening. The witness said that the accused did not want to return to where the body was. Instead she wanted to flee. He had to force her to return.

/Keketso

Keketso Morojele(PW3) was also driving along the road that night. He put the time as somewhere between 7 and 9 p.m. He was travelling in the same direction as George Kou(PW2). He said that on the left hand side of the road he saw two people one of whom was stabbing the other. Morojele and shone his headlights on the couple. He saw a woman stabbing a man with a knife. He saw that the man had fallen on the road and the woman was bending over him still stabbing at him. He saw George Kou(PW2) whom he knew, chasing after the woman. This witness got out of his car. He thought he saw the woman throw something from her as Kou chased after her. He asked the accused why she had stabbed a person. According to this witness the accused replied that she had not done so.

Morojele was present when the knife was found. He examined it and noted that it was blood stained. He got the impression that only one person was doing the striking and that that was the woman. He did not see the man do anything. He wondered at the sight of a man being beaten by a woman.

Morojele was sharply cross-examined as to his observation of the events that he described. He claimed to have seen a total of 6 blows struck, three while the man was still standing and three after he had fallen down. He denied that the man was fighting back. He did not ~~see the accused being held by her arm or by her blanket.~~ He said that after the accused had been caught, she started crying and 'regretting why she had stabbed that man'. He heard her say 'Why did I put myself in temptation over this man?' At first the accused said that it was not her, but other people, who had stabbed him. This was before the knife was discovered.

Another eye-witness Mpho Motaung (PW5) was in the car with Morojele(PW3). He said in his evidence that he saw a person on the left-hand side of the road hitting something or somebody. When he alighted and went near, he found a person lying on the ground. He said that a woman ran away and that Kou(PW2) chased after her and brought her back to where he was standing near the body. He heard Kou ask the accused why she had beaten the man. He said that the accused cried out for forgiveness. Motaung did not hear her being questioned about the weapon she had used. He heard the accused say 'I did not stab him, other people assaulted him and ran away'. He said that Kou slapped the accused when she refused to produce the knife. Later she said 'Let us see where I have thrown the knife'. The knife was found by someone who picked it up. Motaung saw that it was closed and that there was fresh blood on it. The police took the accused away. This witness helped to carry the injured man to the ambulance.

Questioned by defence counsel, Motaung said that the man was lying about 20 metres from the edge of the tarmac which was slightly elevated above the level of the road verge. He insisted that the lights of the car were sufficient to enable a person, sitting in the front, to see what was happening off the road. He could see clearly in the lights. He did not notice what the man was wearing as he was watching what was going on. He did not agree that George Kou was the first person on the scene. He said that they all arrived simultaneously. He did not see a knife in the hand of the accused. It was only when he saw the

wounds on the body that he realised that she must have been using a knife with which to hit the deceased person. Motaung went on to say that the deceased was not still but was writhing on the ground as if in pain. He did not see the accused held by the bottom of her blanket as she hit at the person on the ground".

It should also here be stated that Trooper Mathabe arrived on the scene and later that evening the appellant was seen and duly charged at the charge office. To none of the three persons whose account of what they saw I have quoted above nor to the police did the appellant say anything from which an inference could be drawn that she was being attacked or assaulted or apparently was afraid of being raped by the man whom she stabbed. It is to me quite incredible if indeed the deceased had done what the appellant alleged in her evidence in court he did do, that the appellant would not immediately have told this to at least one of those persons. This as I have stated she did not do. In my judgment the learned trial judge correctly rejected her evidence on the crucial point of the case as false. It might also be mentioned that there is no evidence of the appellant having been injured at all. The consequence of all this is that there is no basis at all for the contention that the appellant acted in self defence. Nor for that matter can it be said that the appellant was not correctly found guilty of murder. She inflicted serious wounds with a lethal weapon on the deceased who was apparently powerless at the time she did so. If she did not actively wish to kill him she was certainly reckless as to whether he would be killed or not. There does not seem to me to be any ground for a finding of culpable homicide.

It remains to deal with the question of extenuating circumstances. I fully appreciate the point made by the learned trial Judge that it is not for him to speculate as to what triggered off the stabbing of the deceased. But what the learned judge seems in my opinion to have done is to have overlooked the fact that from the very beginning of the events of the night of the killing the deceased was the aggressor. He has not referred to Mamatseliso's evidence save in passing. She was afraid the deceased might assault the appellant and took steps to warn her of this. I see no reason for disbelieving the appellant when she says she accompanied the deceased to various places because she was afraid of him. Moreover his finding that the deceased was fairly intoxicated, if anything, lends support to the stupid actions of the deceased in regard to the argument about the radio and the fact that he may well have

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behaved to the appellant in the way she described prior to the actual killing. The fact that the appellant was untruthful in certain and even in the most important part of her evidence does not justify a finding that the whole of her evidence must be rejected. The picture I get from a reading of the whole of the evidence is that it was the deceased and not the appellant who was looking for trouble on the night in question, he was the stronger of the two and it is by no means improbable that the deceased acted in the manner up to the time of the killing as testified by the appellant. I appreciate of course that the onus is on the appellant to prove on a balance of probabilities the existence of extenuating circumstances. This, I consider, starting off with the clear evidence that the deceased went looking for the appellant with a knife in his hand, which he took no pains to conceal, the appellant succeeded in doing, ^{bearing in mind also} his totally disgraceful threat to compel her to have intercourse with her before her children, which threat is testified to as well by the witness Mamonaheng Mothibi, whose evidence on this point the learned Judge seems to have overlooked. I am quite unable to agree with the learned Judge that the appellant accompanied the deceased willingly, nor with respect do I consider there is substance in his adverse finding against the appellant that she failed to summon assistance from anybody. In my judgment therefore the learned trial Judge should have found extenuating circumstances and should not have sentenced the appellant to death.

The appellant has no previous convictions. She was arrested and kept in custody from the 9th August 1980 until she was released on bail in June 1981. She was convicted in October 1981 and has been in the death cell since that date. I consider that these facts should be taken into account in determining the sentence in this case. Having said all this, Murder is the most serious crime in our calendar and a substantial term of imprisonment is undoubtedly called for. In my judgment the sentence of death should be set aside and in lieu thereof the appellant should be sentenced to 5 years imprisonment.

In the result therefore the appeal against conviction fails but succeeds in regard to sentence. The sentence of death ^{is} set aside and the appellant is ordered to be imprisoned for five years, the sentence to commence from to day's date.

I agree

W.P. SCHUTZ
Judge of Appeal

I agree

B. GOLDIN
Judge of Appeal

Delivered this day of October 1982 at MASERU

For Appellant : Mr. Maqutu
For Respondent: Mr. Khaueo