

IN THE HIGH COURT OF LESOTHO
AT QUTHING

In the matter between:

REX

v

TSOTLEHO LILLANE

Before the Honourable Chief Justice Mr. Justice
B.P. Cullinan at Quthing on the 10th day of November,
1988.

For the Crown : Mr. L.L. Thetsane, Crown Counsel
For the Accused : Mr. S. Moorosi, Chief Legal Aid Counsel

JUDGMENT

The accused stands charged on two counts. In the first count it is alleged that on the 7th of March, 1987, at Ha Rasepelemane in the district of Quthing, he murdered Bolaweni Ndamada. In the second count it is alleged that upon the same occasion he assaulted the deceased's mother, Madudure Ndamada with the intention of causing her grievous bodily harm.

On the day in question a group of villagers including the accused, the deceased and the deceased's 70-year old mother were gathered at the house of Hlalaphe

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Kwele attending a wheat-harvesting party. The evidence indicates that those gathered there were later in the evening quite drunk. Difficulties commenced when the accused apparently insulted his host and the latter expelled him from the house.

The accused went out of the house and closing the door thereof said, "None will go out". The deceased went out, in an apparent effort to pacify the accused, his brother-in-law. Madudure also went out. She observed the accused raise a "lebetlela" stick and strike the deceased. The deceased fell down. Madudure went over to intervene and tried to raise the prone deceased. The accused struck again with the stick, breaking Madudure's arm at the elbow. According to Madudure, the accused said, "I am going to kill you." The accused struck once again at the prone deceased. Thereafter the deceased and his mother were taken to Quthing hospital.

Madudure testified that the deceased was alive, "but just slightly." "He was unable to see and speak", she said. Madudure spent some two weeks in hospital, where she was treated for a fractured elbow, as a result of which she is unable to-day to straighten her left arm.

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Meanwhile however, when the deceased arrived in Quthing hospital, an operation on the skull was carried out immediately. He was, apparently, on his mother's evidence, admitted to hospital in a coma. After the operation he remained in a coma, which however deepened on the 10th of March. He never came out of the coma and subsequently died on the 12th of March. The doctor who conducted the post-mortem examination opined that the death was caused by cerebral damage which in turn was caused by multiple fractures of the skull.

The first matter which arises is the possibility of a novus actus interveniens. The evidence however indicates that the cause of death arose not from the disempaction operation, performed in order to relieve the pressure to the brain, but by cerebral damage caused by the multiple fractures of the skull. There is no evidence whatever that such operation combined with the effect of the original injuries to cause death or that the operation aggravated the original injuries and so hastened death. There is no suggestion whatever that the operation was not carried out in good faith and with proper skill.

I am satisfied accordingly that the injuries inflicted by the accused caused the death of the deceased. There is the evidence of the words used

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by the accused, namely "I am going to kill you", but such words are in no way conclusive and are no doubt often used in an excess of anger. The "lebetlela" stick used by the accused is a heavy one, and is quite clearly, when wielded with force, a lethal weapon. There is however the evidence of drunkenness, and the learned Crown Counsel Mr. Thetsane very properly submits that due to such evidence there is no satisfactory evidence that the accused intended to kill the deceased (dolus directus), nor indeed that the accused subjectively foresaw the risk of death but was reckless as to such (dolus eventualis).

The learned Chief Legal Aid Counsel Mr. Moorosi naturally adopts that submission. I find myself in agreement therewith. I am not satisfied beyond reasonable doubt that the accused had the necessary intention, dolus directus or dolus eventualis. I am satisfied however that he killed the deceased unlawfully.

As to the second count, although the accused remained silent in his defence, in his plea to the charge he stated that he aimed the particular blow at the deceased rather than the deceased's mother. Nonetheless the question of transferred malice arises. The aspect of his intention towards the deceased

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is therefore relevant. The evidence of drunkenness is such that I am not satisfied that the accused was capable of forming the specific intent, that is, to cause grievous bodily harm. I am satisfied however that in the least, he intended to assault the deceased.

The Assessors are in agreement with my findings. I find the accused on the first count not guilty of murder as charged but guilty of culpable homicide and I convict him accordingly. On the second count I find him not guilty of assault with intent to do grievous bodily harm, but guilty of common assault and I convict him accordingly.

Delivered at QUTHING on the 10th Day of November, 1988.

(B.P. CULLINAN)
CHIEF JUSTICE