CRI/T/44/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

CHUMBESHE MOHAPI

Held at Butha-Buthe

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 23rd day of August, 1989.

The accused is charged with the intentional and unlawful killing of Laka Mataoe who died on 26th May, 1986.

In an endeavour to shorten the proceedings the preparatory examination depositions of P.W.1 Molefi Mohapi, P.W.2 'Manthabiseng Molula, P.W.3 Molise Nyelimane and the post mortem report made by Dr Dilling were admitted on behalf of the accused and the admissions accepted by the crown save that of P.W.1, and only to the extent that the crown wanted the witness to elaborate on certain aspects of his evidence for purposes of clarifying it.

However the admitted depositions were read into the recording machine and made part of the record in these proceedings.

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The evidence of the rest of the witnesses numbering from 4 to 6 was dispensed with as not essential for purposes of proving the crime charged.

The cause of death was also admitted including the possibility that it resulted from one or some of the stab wounds inflicted with a knife or with a knob-kerrie.

The post mortem shows that there were four lacerations on the head. There were further lacerations on upper lip, left jaw, right upper chest, left lower chest and left arm and hand.

The examination of the skull revealed fractures of the right parietales and posterior part of the parietales. There was also the epidural and subdural bleeding into the posterior of the left side of the brain.

The right lung had collapsed as well as the left one which had a laceration on its basal lobe.

The injuries on the head were consistent with use of a blunt instrument. The stab wounds were consistent with use of a sharp instrument. The accused admitted having used a knob-kerrie on the deceased's head and a flick knife to cause the stab wounds.

The deceased is alleged to have been aged sixty-six years. To the doctor who performed the autopsy he appeared to be aged sixty.

The cause of death is reflected as intracranial bleeding.

The admitted evidence of P.W.1 shows that one evening at about 8 p.m. he and his brother the accused before court while watching a cow that was about to slip a calf in a kraal, the accused went to a nearby house of 'Mapaballo their brother's daughter in law.

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The accused had gone there apparently to ask for some matches because P.W.1 stated he didn't have any when asked by the accused to supply him with some.

It seems that 'Mapaballo's house is not far from the kraal where P.W.1 remained standing because he deposed that after the accused had knocked at the door and gained entrance P.W.1 heard him inquire with disapproval "what puts you here". In reply the voice from 'Mapaballo's house was "I have come to fetch my 'scuff-tin'" meaning workman's take-away food package.

Then the accused asked whether 'Mapaballo was doing the cooking for the person whom the accused was interrogating. Then P.W.1 heard the accused's voice saying "Molefi come and help".

P.W.1 Molefi made for the scene only to hear, when he came to the forecourt, the voice of 'Mapaballo who was apparently fleeing.

P.W.1 entered 'Mapaballo's house and there and then saw the deceased Laka pinning the accused to the bed on top of which the two were apparently fast locked in a fight.

P.W.1 pulled the deceased by the latter's right hand and removed him from the bed with the result that the deceased tumbled down on all fours.

Both the accused and the deceased rose to their feet and once more engaged in a close quartered struggle that scared P.W.1 from intervening once more because the accused who was armed with a knife was using it to pierce the deceased with it several times.

However when P.W.1 asked the deceased to let the accused be, he obliged. Seizing on this momentary interval of relief from the stabbings the deceased made good his escape from the house at a run only to fall headlong on an ash-heap some fifteen paces away.

/Then

Then the accused ran to his house and came back armed with a knob-kerrie with which he belaboured the deceased where he had fallen. During the process the deceased was just screaming. Once more P.W.1 approached the two and asked the accused to leave the deceased alone. Again the accused obliged.

The attempt by P.W.1 and the accused to go to the chief's place was foiled by the fact that one of 'Mapaballo's houses caught fire.

P.W.1 further deposed that the accused's wife had long deserted him at the time. He and the accused took refuge into a house part of which was occupied by small children.

The chief came the next morning and the accused handed the knife over to him.

The knob-kerrie which the accused had used was found at the accused's place hidden under his mattress when later the police came there. P.W.1 had noticed that the deceased was not armed at all.

In the viva voce evidence that P.W.1 gave before this Court and upon which he was later cross-examined, he highlighted the fact that the house to which the accused ran and came back from armed with a knob-kerrie lies some forty-five paces from the ash heap where the deceased had fallen. He also testified that though he could not read or write he observed that the accused did not take a long time but was quick to do the trip to and fro.

P.W.1 further testified that to get to that house the accused had to go through a gate which was not closed. He also said he saw the knob-kerrie for the first time when police took it from the accused's house.

He told the court that 'Mapaballo is married but was not staying with her husband because he was away

/staying

staying with another woman.

As for the accused I was told he has a wife but that his wife had deserted him.

P.W.1 was not aware if the deceased was in love with 'Mapaballo. However he knew that the accused was in love with her.

The evidence further revealed that the deceased was still alive where he had fallen and writhing in an attempt to stand up - that when the accused approached him he rose and they met. Then the accused fought the deceased with the knob-kerrie when the deceased went towards him.

Under cross-examination it was put to P.W.1 that when the accused belaboured the deceased with the knob-kerrie the latter was on the ground, and that P.W.1 told a lie by saying the deceased had risen whereas he was still on the ground. P.W.1 replied that the fight was keen and brisk further that it was waged in the dark. He conceded that in the court below he had said the deceased was still on the ground when being belaboured with a knob-kerrie.

It was suggested that P.W.1 was lying in an attempt to protect his brother the accused. Though he denied this suggestion it is noteworthy that with regard to the concession this witness made especially in this only point which I regard as important, his character as a truthful witness remains untarnished.

He denied that the knob-kerrie was his. He denied that the accused snatched it from him before proceeding to the deceased who was lying on an ash heap where the belabouring took place immediately.

His admission that he couldn't deny that the deceased was sleeping with 'Mapaballo in the latter's house is thoroughly neutralised by his statement in re-examination that when he came in there the deceased

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was not naked but dressed.

It is however regrettable that nothing in the evidence shows what P.W.1 remained doing when the accused rushed to his house where he came back armed with a knob-kerrie especially that P.W.1 had noticed that the deceased had fallen, regard being also had to the fact that this witness had seen him being repeatedly stabbed with a knife in the house.

He re-iterated that he had feared that if he intervened during the stabbings he might catch a knife blow and get injured. He also admitted that the deceased's blanket had been made up in the bedding along with 'Mapaballo's blankets.

In his turn the accused gave his sworn testimony wherein he said when he came to 'Mapaballo's house he heard the squeakings of a bed when he knocked on the door.

'Mapaballo opened the door and the accused entered. In there he found the deceased seated on a chair next to the bed. The accused asked him what he wanted there at the time. The deceased replied that he had come to fetch his "scuff-tin". He asked 'Mapaballo to give the deceased the so-called "scuff-tin". When 'Mapaballo said that there was none the accused charged him with a mock serious accusation whether "this is the 'scuff-tin' you have come for at 9 p.m." and further that it was through such adulterous associations that "we have lost our wives."

The deceased rose, fetched the accused a fist blow and told him he was asking him S... . The accused had a knife. He asked for help after he had finished stabbing the deceased three times because the deceased still had a lot of strength.

The accused and P.W.1 are blood brothers. There is

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no enmity or hostility between them. The accused was hard put to it to say why in these circumstances P.W.1 should lie and say he did things he did not do or that he did not do those things which he did. The accused contented himself with saying he did not know why P.W.1 should behave that way.

At page 20 in C of A (CRI) No. 3 of 1984 Thebe vs Rex (unreported) Schutz P. said :

> "To my mind the evidence should be accepted as true. It is very difficult to believe that the witness would have fabricated this story against his own cousin to whom he bore no hostility."

The accused further told the court that P.W.1 was lying when he said the accused and 'Mapaballo were lovers. This assertion by P.W.1 was not gainsaid in cross-examination yet in Small vs Smith 1954(3) S.A. 434 at 438 Classen J. said :-

> "It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."

C/F Phaloane vs Rex LL.R. at 246 by Maisels P. as he then was.

The accused further stated that he didn't think that the deceased would die if hit with the knob-kerrie in the manner in which he was hit. But this is indeed absurd because anybody with the intelligence of the accused would have no difficulty realising that use of as lethal a weapon as a knob-kerrie on as vital an organ of the body as the skull would cause serious injury or possibly death.

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However I was asked to treat this case on the footing that throughout the period when injuries were inflicted the accused was besides himself with anger having been provoked by the deceased who did not only hit him with a fist but also strangled him at the time he had been pinned on the bed where P.W.1 found the two.

Presuming without conceding that when he discovered the scene as he did inside 'Mapaballo's house the accused became angry when strangled by the deceased to the extent that he blindly stabbed him with a knife, the crown argued that because of its brevity the accused might not have had enough time within which to cool down hence his resumption of the attack on the deceased with a knife even after P.W.1 had intervened and removed from him the deceased who had gained the upperhand. Be it noted that this was the second encounter. The first having been the one that was attested to by the accused alone, for 'Mapaballo who could have helped support or deny the accused's story fled during the first encounter and has never been seen to date.

Then came the second interval when once again P.W.1 intervened not physically because he feared that he might get injured by the accused who was wielding his knife dangerously, but by asking him to desist which he did.

It is this period which the crown argued was sufficiently long to have afforded the accused's anger some cooling off interval. It is during this period indeed when the accused ran a distance, contrived at great pain, of between 30 or 45 paces making 60 or 90 paces on a round trip. The crown argued that it could have taken more than seven minutes to complete this trip at the end of which the accused started belabouring the deceased with a knob-kerrie on the head and body.

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The defence argued that the length of time could not have afforded the accused any cooling off period. Moreso because the defence denied that the accused ever ran to his house and back for this was not necessary as he had obtained the knob-kerrie from P.W.1 by snatching it and chasing after the deceased who had run out of the house. This submission much as it cannot be ignored, ignores the fact that credible evidence showed that the accused obliged when asked to desist from stabbing the deceased with a knife while the trio were in 'Mapaballo's house. The defence argued that this shortness of time coupled with the fact that 'Mapaballo was virtually the accused's daughter in law could not have been sufficient to afford him a cooling off period. Thus when he came to the deceased lain on the ash heap the accused was still acting in the heat of passion.

The principle laid down in Regina vs Masakale Mphosi 1963-66 H.C.T.L.R. at 17 is of relevance here for in that case it was held that

> "the interval which elapsed between the quarrel and the stabbing of the deceased was sufficient to neutralise the effect of any provocation."

This conclusion was reached in that case after the court had found at p. 19 that

> ".....It is difficult to estimate the time occupied, but it seems on the evidence that a period of at least five to ten minutes must have elapsed between the departure of the accused from the scene of the fight and his return with the knife. In view of the fact that he had been separated from the deceased and the fight had been stopped by the other people present, there was ample time for any anger which he might have cherished to have cooled, and, assuming there was substantial provocation by the deceased, it seems to my Assessors as well as myself that the effect of the provocation must have worn off. The accused was not acting in the heat of provocation, but he deliberately fetched that knife and came back intending to attack the deceased."

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The defence argued that in the case just referred to above indeed sufficient time to wear off the provocation had elapsed for in contrast with the instant case where even if the accused traversed at most ninety paces at a run, in that case it is reported that the period of time occupied by the accused in going to fetch the knife and coming back to stab deceased with it fell within the time frame of the actions of one of the witnesses who was driving cattle to the home of their owner, had a few words with the owner of the cattle and then headed for the scene where morabaraba was being played.

While the court in Mphosi estimated that the period which elapsed was at least ten minutes, Mr. Maqutu argued that in the instant case the interval between grabbing the knob-kerrie and coming to attack the deceased with it was much shorter. I agree that such time was shorter but I am in difficulty to say how short it is. I agree that the time was rendered shorter by operation of two factors. First that the accused went for the knob-kerrie at a run. Next the distance he had to travel was much shorter than the 150 or so paces that the accused in Mphosi had to traverse.

It is amazing that the age worn nightmare of witnesses being unable to give a fair estimate of time and distance is ever-recurrent to this day. See CRI/T/3/86 Rex vs Mafole Sematlane (Ruling) (unreported) at p. 13-14.

Having considered the two conflicting submissions as to the length of the interval referred to above, I think such a state of affairs would not prevail to this day if where as in this instant case measurement of time based on the distance is of the essence investigating officers had the presence of mind to take the measurements, this night-marish difficulty would come to an instant stop. The onus is on the crown to proof on clear evidence that its version of the estimated

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distance is beyond reasonable doubt the correct one. Even if the accused can deliberately lie about the length of the distance if his story regarding it is reasonably possibly true, in the face of great difficulty that the crown wishes the court to infer from what the crown itself concedes is far from precise information then the problem should be resolved in the accused's favour. It does not augur too well if illiterates who usually are at sea to give an idea of the distances and times should be expected to do more than they are capable of doing. With them usually one finds that their concept of distance revolves around the words far and near. That of time around long and short. How far, how near, how long how short are all questions which fall outside the pale of their cognizance.

In this case P.W.1 said the accused ran to his house and quickly came back to the ash heap where deceased had fallen.

The matrimonial relationship between the accused and 'Mapaballo has been established including the illicit love affair that existed between them.

Among its terms the Criminal Law (Homicide Amendment) Proclamation No. 42 of 1959 section 4(a) provides that in order for provocation to be said to exist the person claiming it so as to reduce murder to Culpable Homicide must show that he was influenced by an insult directed at him or at another person under his immediate care and that the insult was such as would deprive an ordinary person of

> "the power of self control and induce him to assault the person by whom the act or insult is done or offered."

Sub-sections 3(1) and (2) respectively say:

/3(1)

3(1) "A person who

(a) unlawfully kills another under circumstances which but for the provisions of this section would constitute murder; and

(b) does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool, is guilty of culpable homicide only."

I may pause here to say it is significant that in any event the crime charged and proved needs must be murder - unless the crown having considered the facts before drawing the charge of murder was of the opinion that it should be that of Culpable Homicide.

But strictly if the evidence at the trial reveals that murder has been proved then the proof of the existence of provocation would help reduce the offence from that of murder to that of culpable homicide only. To this extent it should be clear that provocation is not a defence but a plea in mitigation. Successfully pleaded it helps an accused charged with murder escape possible prospects of facing the death penalty. Except for the fact that an accused in such a situation is guaranteed the safety from suffering a death penalty the prison term may be as heavy as that which the charge of murder with extenuating circumstances carries if circumstances so justify.

Sub-section (2) says :-

"The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation."

In CRI/T/27/87 Rex vs Lethunya (unreported) at p. 26 it was laid down that :-

"The provocation has to be 'sudden' and there has to be a complete loss of control by the accused."

A point was made in that case that the element of

/suddenness

suddenness would be vitiated by proof that there was an element of planning or premeditation in what the accused did.

In the instant case neither of these alternatives was shown to exist. It would seem that the test to be applied is of a reasonable man in order to avoid the unseemly consequences of letting people who are predisposed to violence because of a variety of idiosyncrasies escape the deserved punishment for their acts.

But without creating in-roads on the standard or yard stick of the reasonable man it is worthwhile observing that in a case where a prostitute had been killed by an impotent man because the prostitute had taunted him with disability the Court having been of the view that the accused's act could not satisfy the reasonable man test, convicted him. On appeal the accused successfully pleaded provocation on the grounds that the reasonable man could not properly place himself in the shoes of the impotent because the reasonable man is not impotent.

With regard to the manner in which the Lesotho Courts have been handling cases involving the element of Provocation either as a plea in mitigation and or as an extenuating factor in murder charges, see CRI/T/48/88 R. vs Lenka (unreported) at p. 20:-

> "Our law with regard to provocation is in keeping with the Transkeian Penal Code which is in contrast to the South African Common Law. It is for this reason that it is dangerous to follow South African case law in this respect for as Schreiner J.A.'s decision in R vs. Krull 1959(3) 392 at 399 shows-:
>
> > 'Under our system it does not follow from the fact that the law treats intentional killing in self-defence, where there has been moderate excess, as culpable homicide, that it should also treat as culpable homicide a killing which though provoked was yet intentional. Since a merely provoked killing is never justified there seems to be no good reason for holding it to be less than murder when it is intended.'"

I would accordingly acquit the accused of the capital charge and convict him of Culpable Homicide only on the basis of provocation.

Sentenced to 10 years' imprisonment.

J U D G E.
23rd August, 1989.

For Crown : Mr. Thetsane
For Defence : Mr. Maqutu.