

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

TSUPA PAUL KULEILE

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 11th day of September, 1989

The accused is charged with the murder of Seipati Kuleile (hereinafter called the deceased) on the 1st day of January, 1989 at Katlehong in the district of Maseru. The defence tendered a plea of guilty of culpable homicide which was rejected by the Crown.

The deceased was the wife of the accused. It is common cause that the couple originally lived at Ha Thamae. Following a series of quarrels and fights which they had, they finally decided

to go and live at Katlehong at the home of accused's mother-in-law (P.W. 5 'Maseipati Ratsatsinyana). She testified that they came to live at her place towards the end of September, 1988. On the 31st December, 1988 the couple stayed at home. At about 10.00 a.m. the deceased left for Thamae's saying that she was going to borrow money from her sister, Mary Phuza who is the wife of Michael Phuza (P.W.10). She came back at about 2.00 or 3.00 p.m. and it was obvious that she had found the money because she had bought some food.

'Maseipati told the Court that at about 4.30 p.m. the accused and the deceased told her that they were visiting one Mohapi at White City. They went with the three children, namely Nina Phuza, Ntope and Leburu. She remained alone. At about 9.00 p.m. the accused came back home and took the feeding bottle of their youngest child and left. The couple together with the children returned home after 12 midnight. The deceased was still happy and shouting "happy", but the accused was quiet. Immediately after their arrival accused said that they should go and look for tobacco. They left and came back at dawn. The deceased was crying and when she asked her why she was crying she said that the accused had kicked and hit her repeatedly because he found her playing with one 'Mamothibe, a friend of Mary. When she asked the accused why he had assaulted the deceased, he said that was their business and ordered the deceased that they should go and sleep. She refused and knelt on her ('Maseipati's) pillow and continued crying.

The accused went to the bedroom but came back and again ordered the deceased to come to the bedroom. She refused. Before the accused went to sleep the deceased said that on the following day they should separate and that the accused must go to his home. 'Maseipati says that after that she ordered the accused to go and sleep and he complied. The deceased slept with her and the children in the sittingroom. In the morning when she woke up she went to the kitchen and while she was there the accused came out of the bedroom and asked the deceased if she had any coins for tobacco. Her answer was in the negative. At that time she ('Maseipati) took some buckets and went out to draw water leaving the accused standing near where the deceased was sleeping.

While she was at the tap, which is not far from her house, she heard one of the children crying. She immediately returned to the house and when she approached the house all the children were crying and standing at the doorway. They reported to her what had happened. She rushed into the sittingroom and noticed that the deceased was no longer there. She knocked at the bedroom door several times and ordered the accused to open but there was no answer. She got hold of the door handle and turned it so hard it broke. Still there was no response from the accused. She realised that the door was locked.

The accused eventually opened the door and got out of the bedroom. 'Maseipati says that she peeped through the door and saw

that the deceased was lying near the door and her neck was covered with blood. She appeared to be dead. She turned back and caught hold of the accused who was already near the door of the sittingroom. She struggled with him till she finally disarmed him of a tomahawk. (She identified the tomahawk as Exhibit 1). After that the accused went out of the house and walked away. She followed him still shouting and calling for help. A policeman who was passing nearby heard her and the accused was later arrested and taken back to the scene of the crime.

In cross-examination 'Maseipati said that when the deceased arrived from Ha Thamae she took some batteries to the home of one 'Malitaba at Katlehong. She stayed there for a long time till a child was sent to fetch her. She did not come with the child till the accused fetched her. She said that she did not know that the deceased persisted that the couple should go to White City despite the fact that the accused was unwilling. She did not notice whether the accused and deceased were drunk or not when they came back from Mohapi's place because they spent a very short time with her before they left again.

The Crown called as witnesses Nina Phuza (P.W.3), a young girl of seven years of age and Poloko Ratsatsinyana (P.W.4), a young girl of six years of age. They are the children who were sleeping in the sittingroom with the deceased and 'Maseipati Ratsatsinyana. Their evidence is to the effect that when their

grandmother went to draw water the accused came out of the bedroom and asked the deceased to come into the bedroom so that they could talk. She refused saying that she was tired. The accused caught hold of her by the arm and twisted it and held her by the leg and dragged her into the bedroom. Before he closed the bedroom he struck her on the neck with the tomahawk before Court. They cried and went out of the sittingroom. Their grandmother came and they told her that the accused had dragged the deceased into the bedroom and killed her. She ordered the accused to open the door but there was no response till she held the door handle and twisted it till it broke. After some time the accused opened the door.

Detective Trooper Baholo (P.W.2) went to Katlehong on the morning of the 1st January, 1989 and took photographs of the corpse of the deceased and part of the interior of the house. (The photographs (9) were handed in Court and marked Exhibit A collectively). He testified that in the room: things were scattered in a disorderly manner and there were blood stains all over the house. The wounds he found on the corpse appear in photograph no.4 which shows a wound above the left ear; photograph no.5 shows a wound on the back of the head (base of the neck); photograph no.6 shows a wound on the left side of the neck; photograph no.7 shows a wound of the right collar bone. He found a tomahawk on the bed. The corpse was taken to the mortuary.

Dr. Oliver testified that on the 3rd January, 1989 he performed a post-mortem examination on the dead body of 'Matsepo

Seipati Kuleile and formed the opinion that death was due to massive intracranial haemorrhage due to depressed fractures of the frontal, left parietal and occipital bones secondary to incised wounds. Externally he observed the following injuries: Head - depressed fractures of the frontal, left parietal and occipital bones with about 5cm lacerations. Neck - massive and deep laceration of the anterior and left lateral neck; jugular vessels were lacerated; fractures of the 2nd to 5th cervical vertebrae.

The accused's version does not differ from the Crown version on the material aspects of the case. He admits that his marriage to the deceased was not a happy one because the deceased often came home drunk and very late at night. This behaviour started after he had lost his job in the mines in the Republic of South Africa. Because of her behaviour they often quarreled and fought. He came to live at his mother-in-law's place because after one of the usual quarrels they often had, the deceased took all the household goods and went to her mother's place. He followed her and it was agreed that they should stay there. There was still no peace because his mother-in-law was always on the side of the deceased whenever she was called upon to intervene.

On the 31st December, 1988 he remained at home for the whole day while the deceased went to Ha Thamae at about 10.00 a.m. and came back at about 4.30 p.m. On her arrival she immediately went to a party at one house at Katlehong. She remained there for

a long time until about 7.00 p.m. when he fetched her. As soon as they came home she insisted that they should go to White City. He finally gave in and they went to White City with all the children. They drank beer at the home of Mohapi until midnight when he asked the deceased that they should go home. She refused. He slapped her and forced her to go home. They arrived at Katlehong after midnight. The deceased gave the baby to her mother and went out of the house without saying anything. He followed her and found her at party which she had attended during the day. She was drinking beer with some men. He joined them and drank with them.

The accused further told the Court that while they were drinking the deceased went out and after some time he went out and found her standing with a man. He reprimanded for this and said that they should go home. She refused saying she was tired of him and that he was making himself her tail and was following her wherever she went. Again he had to slap her before she agreed to go home. They arrived there between 4.30 a.m. and 5.00 a.m.

When they arrived at home his mother-in-law had already woken up. The deceased sat on a chair in the sittingroom. He went to the bedroom. After about five minutes he came back to the sittingroom and asked her to come to the bedroom so that they could talk. She replied and said that she was fed up and that he was annoying her. At that time her mother had just gone out. He held her by the hand and pulled her into the bedroom. He denies that

he pulled her by the leg. When they entered into the bedroom he closed the door and asked the deceased about the man he had found her with. She again repeated that he was running after her like a tail and she was fed up. He slapped her; she also slapped him in retaliation. They then struggled with each other till he managed to push her away. She fell down.

He took a tomahawk from under the mattress and when she tried to stand up he struck her with the tomahawk. He does not remember where that blow landed because he was angry and drunk. He hit her again but he does not remember where. The next thing he noticed was that she had fallen to the floor and was covered with blood. He became frightened and left her.

When he opened the door he met his mother-in-law. She tried to get hold of him but he managed to pass her. After that the blanket he was wearing fell. She wrested the tomahawk from him. He denies that she knocked at the door and called him.

I have said that there are no serious disputes of fact in this case but there are certain issues on which the Court must make a finding. The first question is whether on the early morning of the 1st January, 1989 when the accused and deceased arrived at home the deceased did, in fact, sleep in the sittingroom or just sat on the chair. 'Maseipati Ratsatsinyana testified that she slept and that she was still sleeping when she went to draw water. She is corroborated by the two children who gave evidence in this case.

'Maseipati struck me as being an honest and truthful witness who answered questions in cross-examination in a forthright manner. I think the fact that the deceased was still lying on the bed or mattress is consistent with the fact that the accused was able to pull her by the leg. It would not be so easy to drag a person who is standing up by his leg. The point is not of any significance because the accused admits that he pulled the deceased into the bedroom against her will.

The second point is whether there was slapping and struggle before the accused struck the deceased with the tomahawk. The two young children who gave evidence in this Court said that there was no such slapping and struggle. According to them as soon as the couple entered into the bedroom, accused struck the deceased with a tomahawk and then closed the door.

It is trite law that the evidence of young children should be approached with extreme caution because children are highly imaginative and also their story may be the product of suggestion by others. It has been stated that the Court is entitled to take into account the falsity or absence of evidence by the accused or any other features which show that the child's evidence is unquestionably true and the defence story false, but it should not ordinarily convict unless there is corroborative evidence which implicates the accused. (R. v. Manda, 1951,(3) S.A. 158 (A.D.).

The children impressed me as being highly intelligent especially Poloko Ratsatsinyana. When they made a report to their grandmother, they said the accused had killed their mother. It seems to me that if they had not seen when the accused chopped the deceased with a tomahawk before he closed the door they would not have said he had killed her. They used the word killed because they saw when he struck her with the tomahawk. Their evidence is corroborated by that of their grandmother that the door was locked and that the accused refused to open it. Their evidence is corroborated by that of their grandmother that the deceased was sleeping and not sitting on a chair when the accused came and asked her to go into the bedroom.

The accused corroborates the evidence of the two children that the deceased refused and said she was fed up or tired. Even on the question of pulling her they agree except that the accused says that he held her by the hand while the children say he twisted her arm and then pulled her by the leg. I have said above that because the deceased was lying on the bed pulling her by the leg would have been easy to do. Although on the question of what happened when the accused pulled the deceased into the bedroom the evidence of the children is not corroborated. I am prepared to accept their evidence for the reasons I have given above inasmuch as on all those things that their evidence is corroborated they seem to have observed the events correctly.

I, therefore, find that the accused is not telling the truth that there was any slapping and struggle before he struck her the first blow.

The third question is whether the door was locked when 'Maseipati arrived. I think it was. The evidence of 'Maseipati and the children was never challenged at all when they said the door was locked and that in trying to open it the handle even broke. The Court is entitled to reject as an afterthought the accused's story that the door was closed but not locked. Even if failure to challenge the Crown witnesses was due to the inexperience of the defence counsel, I have believed the Crown witnesses that the door was locked.

The defence of the accused, as I understand it, is that the deceased provoked him by refusing to go into the bedroom so that they could discuss what happened at the party, i.e. finding the deceased standing outside with a man. The second leg of his defence seems to be that he was drunk.

I shall deal first with drunkenness. Our law regarding the liability of drunken people is to be found in the Criminal Liability of Intoxicated Persons Proclamation No.60 of 1938. Section 2 (2) reads as follows:

"Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -

- (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
- (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission."

The accused has never claimed that he did not know that his act of butchering the deceased was wrong or that he did know what he was doing. In R.v. Krull, 1959 (3) S.A.392 (A.D.) at pp. 399-400 Schreiner, J.A. said:

"I conclude therefore that the trial Court's duty in case of this kind is simply to examine all the evidence which throws light on the mental state of the accused at the time of the killing in order to see whether, having regard to the effect of provocation and intoxication on his powers of understanding and self-control, but excluding mental abnormalities short of insanity and excluding normal personal idiosyncracies, he had the intention to kill."

The accused was not able to ascertain the exact quantity of beer he drank on the night in question. His evidence is to the effect that they shared two bottles of beer with the deceased at about 6.00 p.m. before they went to Mohapi's place where they drank beer until midnight. He does not know how much beer he drank at Mohapi's place. From there they went to a party at Katlehong where they again drank beer until about 4.00 a.m. He is again not sure how much beer he drank at the party.

The evidence of 'Maseipati does not help the Court very much because when the couple returned home from the party in early morning she did not observe them properly because it was dark in the house. She deposed that when they came back from Mohapi's place the accused did not appear to be drunk.

It seems to me to be very doubtful that the accused was drunk. He remembers the events of that night in very minute details. For instance, he remembers that while they were at Mohapi's place he went to the lavatory and that when he came back to the sittingroom, the deceased was not there. He looked for her and found her on the street trying to stop a passing car. When she saw him she ran into the house. She refused to go home till he slapped her. At the party at Katlehong she went out without telling him where she was going. He later found her standing with a man outside. They quarrelled with that man and when they were just about to fight, the deceased intervened and held him (accused). Again the deceased refused to go home till he slapped her.

The accused remembers that when they came home the deceased refused to go into the bedroom and sat on a chair in the sittingroom. He went into the bedroom and after about five minutes he came back and dragged her into the bedroom.

I have formed the opinion that the accused was under the influence of liquor but was not so drunk that he did not know what he was doing or that what he did was wrong. The defence of intoxication is not available to him.

The defence of provocation is also defined in a statute - Criminal Law (Homicide) Amendment Proclamation No.42 of 1959. Section 3 (1) provides as follows:

"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."

Section 4 (a) defines provocation in the following terms:

"The word "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered."

The evidence of 'Maseipati is to the effect that when the couple arrived that early morning the deceased was crying and alleging that the accused had assaulted her by kicking her all over her body. She refused to go and sleep with him in the bedroom. She said that it would be better that on the following morning they should separate and the accused must go to his home. These words were uttered in the presence of the accused but he did not do anything at that time. According to the evidence of 'Maseipati the accused went to bed for about two hours. I am of the opinion that

even if the words of the deceased had angered him his passion must have cooled down during those two hours.

When he woke up after about two hours he again went to the deceased and asked her to go into the bedroom so that they could talk. She repeated the words she had said earlier that she was fed up and that he must stop following her like a tail. According to accused this was not the first time she had said those words to him. She said them at the party after he had found her standing outside with a man. He did not attack the deceased when she said those words the first time. I do not understand how the repetition of words which the accused already knew could be said to have provoked him. The deceased had made it quite clear that on the following morning they had to separate and that he must go to his home. I think she had good cause because during the course of one night he assaulted her several times. It has also been proved beyond any reasonable doubt that their marriage was not a happy one. The accused assaulted her on many occasions.

I am of the opinion that the defence of provocation must also fail.

I have accepted the evidence of the children that the accused never slapped the deceased but struck her with the tomahawk as soon as they reached the bedroom and closed the door. He apparently did not just close the door but locked it so that he could do the butchering of the deceased undisturbed by any person from outside.


The locking of the door is another indication that the accused knew what he was doing or intended doing to the deceased.

Although the evidence of the police officers is to the effect that the articles in the bedroom were in a complete disorder, their photographs do not show that. Take, for instance, photograph no.3. The only thing that seems to have fallen is a basket; the basin stand, the boxes and the dresses are still in what appears to be their proper places. The accused is not telling the truth that there was a struggle between himself and the deceased. It seems to me that the first blow had the desired effect and felled the deceased. After that the accused had all the chance to chop the deceased several times. He did not have a single scratch as proof that the deceased tried to defend herself.

I am of the opinion that the accused had the requisite intention in the sense that he foresaw the death of the deceased as a possible consequence of his assaulting her but he was reckless as to whether it did or not. In his own words the accused says that he pushed the deceased and she fell down. After she had fallen he took the tomahawk and then started to hit her till he saw that she was covered with blood on the neck. He chopped the deceased around the neck and the head until he had nearly completely severed the neck. The weapon he used and the parts of the body he injured show that the accused had the intention to kill.

I find the accused guilty of murder.

My assessors agree.


J.L. KHEOLA
JUDGE

11th September, 1989.

EXTENUATING CIRCUMSTANCES

Although drunkenness failed as a defence to the charge of murder, we think that it is an extenuating circumstance. The accused and his wife had been drinking beer for almost the whole night and we believe that liquor had an influence on his mind. His moral blameworthiness must be reduced by that factor.

That his marriage to the deceased had been an unhappy one is another extenuating circumstance. It was hoped that there would be a reconciliation when the couple came to live at the home of accused's mother-in-law. Unfortunately that did not work.

Verdict: Guilty of murder with extenuating circumstances.

Sentence:- In passing sentence I took into consideration that the accused was a first offender; that their marriage had been an unhappy one for a long time; that he pleaded guilty of culpable homicide as a sign of remorse and to save the Court's time. On the other hand I took into account that this was one of the most gruesome murders to come before this Court. It was an unprovoked murder of a poor woman whose intention was that because the marriage had failed it had to be brought to an end on the following day and that the accused should go to his home. The accused decided that the deceased would not see the following day and brutally assaulted her with a very dangerous weapon, a tomahawk. Having taken all these factors into consideration the accused is sentenced to twelve (12) years' imprisonment.

My remaining assessor agrees.

Order: The tomahawk shall be destroyed by the police.


J.L. KHEOLA

JUDGE

11th September, 1989.

For the State - Miss Moruthoane

For the Defence - Miss Tau.