

CRI/T/5/87

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

V

RAMANAKA MOTHIBETSANE
MOQHOBELA PETLANE

Before the Honourable the Chief Justice Mr. Justice B.P. Cullinan
at Quthing on the 22nd day of September, 1989.

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

JUDGMENT

Cases referred to:

- (1) Tsomela v R (1974/75) LL.R. 97;
- (2) R v Motaung (1961)2 S.A. 209.

The two accused stand jointly charged with the murder of Seetseng Makume at Ha Ramatlepe in the district of Mafeteng on the 23rd November, 1985. The second accused was hitherto the fourth accused, as originally both accused were jointly charged with two others, Mphonyane Lefereferere and Noosi Mothibetsane as the second and third accused respectively. All four accused were granted bail. The case was called on, on the 30th of May, 1988, at the Sessions in Quthing, on which occasion the first and third accused were at large. Before the trial could proceed however, the second

accused also disappeared. Since then the first accused has been re-arrested. The Court ordered separation of trials at these Sessions and proceeded with the joint trial of the first and fourth accused. Although the fourth accused now appears as the second accused on the indictment, it will be convenient to refer to him throughout as the fourth accused.

The deceased met his death at a stokfel arranged by 'Masupang Lefereferere on the date in question. Guests started arriving at 8 a.m. in the morning, and drinking commenced shortly thereafter. 'Masupang had arranged a large quantity of beer for sale. The third accused was one of the first to arrive at the stokfel. The deceased arrived thereafter. None of the other accused were present at that time. The third accused left before 11 a.m. Around noon, the deceased purchased a four-gallon tin of Sesotho beer and invited a number of friends to drink with him. The beer was consumed outside 'Masupang's house, in the forecourt thereof.

Gerard Mpela, a guest at the stokfel, testified that he left the party before 11 a.m. and returned before 1 p.m. At that stage he found that the third accused had returned to the party, but, as the witness testified, he was "standing away from those people", and again, "he was going up and down some distance away".

Sometime between 3.30 and 4.00 p.m. the fourth accused arrived. There was still some beer left at that stage. The

deceased offered the fourth accused some beer. The fourth accused drank from the container offered to him by the deceased, but when he went to hand it back, the deceased insisted that he drink it all, which he did. Another guest at the stokfel, Rethabile Leferefere, testified however that the fourth accused spilt some beer on himself when drinking it, and the deceased admonished him, saying, "Drink nicely, don't spill it on yourself". The deceased went to purchase some more beer, but apparently there was none left in the house to purchase.

Gerard Mpela testified that the first accused then arrived. He came past where the witness was sitting, in a hurry, a stick in his hand. He approached the deceased from behind. The deceased was not aware of his approach. The first accused struck the unsuspecting deceased once on the back of the head. The deceased fell on the spot. Rethabile Leferefere however testified that the first accused struck the deceased on the back of the head and that the deceased staggered some ten to twelve paces before collapsing, when the first accused struck him again. Gerard Mpela testified that when people tried to rush to the deceased's assistance, they found the second accused, who had suddenly appeared at the stokfel, and the third and fourth accused, already around the fallen deceased, belabouring him with sticks and even with the deceased's own knobkerrie, which had been taken from him by the third accused.

As to the fourth accused, there is some contradiction as to

the nature of his participation. Gerard Mpela testified, as I have said, that the fourth accused also belaboured the fallen deceased. He observed him, standing over the prone deceased holding a sword in an upraised hand. 'Masupang arrived on the scene however, and snatched the sword from him. The transaction took everyone by surprise and was of the briefest duration. All accused suddenly desisted, and departed, going down the slope from the stokfel, the third accused, apparently in jubilant mood, blowing a whistle.

'Masupang testified that she was inside the house when the assault commenced. She heard a noise. When she emerged she saw the fourth accused chasing Rethabile. The latter outran the fourth accused, who returned. She followed the fourth accused to "where he was returning to". She observed him

"coming to the place where the first accused was killing the deceased. When I came there I saw the fourth accused raising up the sword. I saw him arrive at the place where the first accused and some others were hitting the deceased. The others were the third accused and the second accused."

She testified that the fourth accused was trying to hit the prone deceased with the sword, but she caught hold of his wrist and prevented him doing so. The fourth accused asked the third accused to assist him by hitting 'Masupang, but the third accused replied:

"No, we have finished him". It was then that the assailants desisted and they departed, the third accused blowing the whistle.

Rethabile Leferefere testified that when the fourth accused arrived at the party, he bore a cardigan, which was seemingly wrapped around something. When the first accused suddenly arrived on the scene, he passed the witness hurriedly, without greeting him, holding a stick in one hand with his blanket wrapped around the other arm. Rethabile then observed the third accused moving behind the house, where the deceased stood. The witness was alerted and moved to a position to see behind the house, in time to observe the assault upon the deceased by the first, second and third accused. The witness tried to intervene, but at that stage the fourth accused arrived on the scene, clutching a sword, and chased him away, to a point where the witness could not observe the assault on the deceased.

The fourth accused asked Rethabile why he was attempting to restrain the first accused. It was at that stage that 'Masupang intervened and wrestled for possession of the sword from the fourth accused. The witness testified that he then "went to where the first accused and others were. I was going to intervene. They were still belabouring the deceased, the first accused, the second accused and the third accused." He went back to the house to get a stick to intervene. "On my way", he said, "I passed 'Masupang and the fourth accused struggling over the sword, a little below

where they had earlier been". The witness fetched a stick and returned. He was but ten paces from the first accused, the second accused and the third accused, when they desisted in the assault and went away, one blowing a whistle. 'Masupang and the fourth accused were "inside the yard near the house". He continued,

"When the others left 'Masupang left the fourth accused alone and he went downwards to where the others were and they went along together. He was still carrying the sword."

Rethabile testified that he approached the deceased and placed him in the shade of the house, when he expired almost immediately. The doctor who conducted the post-mortem examination observed "lashes under left armpit and left shoulder, small burstwound, head, right side, two small graze wounds right arm". On examination of the skull he found, "impression fracture skull, bloodclots". He opined that the cause of death was "brain damage". Paragraph 8 of the post-mortem report form, headed "Remarks", is not completed at all. Neither are paragraphs 13 to 21. Strangely enough, with regard to paragraph 12, the doctor entered "chest no rib fractures", which to me suggests that the doctor possibly expected to find fractures of the ribs.

The witness who identified the body at the post-mortem examination testified to observing a wound on the deceased's head,

another at the back of the head, and a wound on the left thigh near the knee. In particular he observed that, "All over the body he was bruised". Again, a police officer observed that, apart from the open wound on the head, the deceased was "bruised at the back of the head". It was not possible to call the doctor to give evidence, as he has left the country. I consider the post-mortem report to be somewhat unsatisfactory. The learned Senior Crown Counsel Mr. Thetsane refers to the case of Tsomela v R (1), where Cotran J. (as he then was) held that the lack of medical evidence, or inconclusive medical evidence, as to the cause of death, does not preclude the court from making a finding thereon on the basis of evidence aliunde. But that case can be distinguished, as here the cause of death has been given, though somewhat tersely, in layman's language, as "Brain damage". One can say that the post-mortem report is inconsistent with the other evidence. But the safer position, which I adopt, is that the prosecution evidence of continued assault is inconsistent with the post-mortem report. Clearly the assault upon the deceased must have been, as Gerard Mpela testified, of the briefest duration.

Both accused remained silent in their defence. While there were contradictions in the prosecution evidence, the witnesses were all completely consistent as to the role played by the first accused. While there is the inconsistency as to the proximity of the fourth accused, to the assault upon the deceased, there is no inconsistency whatever as to the role played by him. Considering

the lapse of time involved, three years and ten months, inconsistency is inevitable. I find the three eyewitnesses to be credible and impressive witnesses and I accept their evidence.

As to the role played by the fourth accused, I must, in his favour, accept that the struggle for possession of the sword took place at some short distance removed from the assault on the deceased, rather than beside the deceased. Nonetheless, here is the evidence of a guest at a stokfel, arriving apparently unarmed, subsequently producing, of all things, a sword. The sword was produced at the trial, having been surrendered by the fourth accused to the police when questioned thereupon. It is a "home-made" weapon, some 18 inches in blade, sharp and very pointed.

To be a *socius criminis*, the accused must in some way make common cause with the actual perpetrator and thus participate in his crime (R v Motaung (1961)2 SA 209). Whether the fourth accused was one pace or more from the prone deceased, the possession of the sword, 'Masupang's courageous struggle with him for possession thereof, his calling to the third accused for assistance, and his subsequent departure in company with the other accused, in particular a jubilant third accused, all point inevitably to his association and common purpose with his fellow accused.

The fourth accused's presence at the scene cannot by any stretch of imagination be said to constitute a mere failure to

prevent the commission of the crime. He was present at a distance where he could physically assist the assailants if necessary - and there was clear intention on his part to do so. Further, his struggle with 'Masupang in effect prevented her, in her preoccupation with wresting the sword from him, from restraining the other assailants, had she wished to do so. Again there can be no doubt that his efforts while brandishing a sword, can only have encouraged the others in their assault upon the deceased.

The remaining issue is one of intent. The evidence points to pre-meditation, a pre-conceived plan to assault the deceased. There was a suggestion made in cross-examination by the learned Legal Aid Counsel Mr. Moorosi, to Gerard Mpela and Rethabile Lefereferere, that the deceased had assaulted the third accused at the party, and that the first accused had sprung to the latter's defence. The suggestion was promptly refuted by the prosecution witnesses, and there is simply no evidence of such assault before the court. 'Masupang testified that the second accused had informed her that the deceased had insulted him some months previously. That may suggest a motive, but hardly a defence for the accuseds before the court. The accuseds have remained silent, and the question of the motive for this cowardly and senseless killing must remain unresolved.

That does not affect intent. Premeditation there may have been initially, but the actual intent can only be judged by the

ultimate actions of the accused. Though some evidence of premeditation is there, and though the fourth accused produced an extremely lethal weapon, I am not satisfied beyond reasonable doubt that either he or the first accused intended to kill the deceased. I cannot however see how the first accused in a joint assault, with the other accuseds upon the deceased, with heavy lebetlela sticks and even a knobkerrie, could not foresee at least the possibility of death resulting to the deceased. There is the medical evidence that the deceased was struck but once in the head, but there is the nature of the weapons used, the remark by the third accused that "we have finished him", and the jubilation thereafter. It may be, as Mr. Moorosi suggests, that 'finished' meant nothing more than "incapacitated", but such incapacitation must, if anything, indicate that the first accused subjectively foresaw the possibility of death resulting to the deceased and was nonetheless reckless thereto.


As to the fourth accused, he witnessed the fatal assault and wished to take part therein, with a weapon even more deadly than any possessed by the other assailants. He was but a few paces from the actual assault, in a position to render physical aid to the assailants and, as I have said, clearly intending to do so. Indeed, struggling with 'Masupang, as I have said, he thus engaged her attention and prevented her, had she wished, from restraining any of the other three assailants, thus clearly aiding and abetting the commission of the offence. Again, he only desisted in his

efforts when advised that the deceased was "finished". Masupang was obviously alarmed at the assault, to the extent that she was inspired to display great courage. In all the circumstances I cannot but see that the fourth accused in turn subjectively foresaw the possibility of death resulting to the deceased and was nonetheless reckless as to such.

I am thus satisfied beyond reasonable doubt that both the accused in this trial subjectively foresaw such possibility, but acted recklessly nonetheless. The Assessors agree with my findings.

I find both accused guilty of murder as charged and convict them accordingly.

Delivered at Quthing this 23rd day of September, 1989.


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B.P. CULLINAN
CHIEF JUSTICE