

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MPAKA MALEPA
SELELU RAMAJOE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 22nd day of February, 1989.

In the course of this trial accused 2 failed to turn up and the crown made an application for separation of trials whereupon it was decided to proceed with this matter in so far as it affected accused 1 only as he was before court.

The indictment charged the accused with the murder of one Hlakametsa 'Mou who died on 4th April 1987 at a place called 'Muela in the Butha-Buthe district.

Both accused had pleaded not guilty to the charge.

P.W.1 'Mamabusetsa Mosoeunyane testified for the Crown that she lives at Moholeng. She told the court that accused 1 is her son. She is semi-illiterate.

In April 1987 P.W.1 had organised a sale of beer at her house. On that day many people had gathered at her place to buy beer which she had brewed. Among those present were P.W.2 Mankobane Chejane, P.W.3 Chiribone Chejane and P.W.8 Rankane Ntlaba whose evidence was admitted on accused's behalf by their counsel. Accused 1 was also present.

/Then

Then a stranger to the party who were there arrived later. It turned out that this stranger was the deceased Hlakametsa 'Mou. After deceased arrived accused 2 also arrived and asked P.W.1 to serve him with beer. Even before she could comply she heard accused 2 utter these words and directing them to the stranger: "where are those cattle of mine which you stole?" The reply that accused 2 was vouchsafed by deceased was that deceased was not the only one who had taken those cattle. Deceased went further to explain that in taking the cattle he was with one man from Ha Molapo and the other from Palehong.

Accused 2 countered by saying to deceased "You have come to collect the remaining cattle then?" Whereupon he hit deceased on the head with a stick. Accused 1 then entered the lists against the deceased and said "this man is a thief brother-in-law. He takes our cattle". When accused 2 hit the deceased P.W.1 screamed and tried to grab hold of accused 1 who slipped from her grip and made good his exit through the door and there to join accused 2 who was belabouring deceased outside. Because of the rush with which these men moved out of the house the witness said when they reached outside they all fell to the ground before hitting the deceased with their sticks. P.W.1 shouted for the chief to come but he didn't. She was shouting for help from the chief to separate these accused for she couldn't with her own strength prevail against them.

Deceased rose and asked for pardon from accused 2 for stealing his cattle but also repeating that he was not the only one who stole them. P.W.1 was adamant that the two accused were beating the deceased.

It appears that P.W.1 even fainted when the beating was going on because she later regained consciousness when she discovered that she had been doused with water.

Under cross examination she testified that she saw accused 1 part-taking of the beer that was sold but not

/accused 2

accused 2 who had just arrived. She also stated that accused 2 arrived just before sun set. She conceded that she learnt previously that accused 2's cattle went missing.

Asked if she drank the beer that she was selling she stated that she didn't take much for she was selling thus all she took was just for taste. I may just add that indeed this is the normal practice that a lady selling beer which she has brewed takes a sip or two for taste.

She denied that she was intoxicated. She explained that when deceased was being belaboured some people who were there ran away but that those who tried to intervene were not successful because they were either too old or just women.

She conceded that P.W.2 and 3 tried to intervene but failed because they were drunk. She also pointed out that though accused 1 had taken beer he did not appear drunk. As for accused 2 she observed that although he was drunk it was not to the extent that he would not know what he was doing. She stated that she did not see what part of deceased's head accused 2 struck with his stick blow that he delivered at the beginning of the encounter. I may observe that this witness impressed me as truthful and honest. She neither exaggerated nor minimised the role played by either of the accused in this episode notwithstanding that they are related to her: accused 1 is her own son while accused 2 is married to accused 1's sister.

P.W.2 Mankobane Chejane said she lives in the same village with both accused and knows them very well. Accused 1 is her grandson.

On the day in question she went to P.W.1's place. She found a man being belaboured by both accused. She intervened by reprimanding them for hitting the man who was a stranger to her. This man had stated that he was not the only man who had stolen accused's cattle. She

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disapproved of their belabouring deceased despite that he had already spoken. She however did not observe anything on deceased and only learnt the following day that he had died.

Under cross examination she said she was attracted to P.W.1's place by the alarm that P.W.1 had raised. She discovered on reaching P.W.1's place that the fence pegging out P.W.1's forecourt had already fallen to the ground though she didn't know what had caused it to fall thus. She denied ever going to P.W.1's place to drink and insisted that the occasion she is supposed to have gone to P.W.1's place to drink fell within the time frame of P.W.1's absence from that place. This aspect of the matter is well corroborated by P.W.3 Cherebone Moeti who said on the day in question he had occasion to travel together with P.W.1 from Mosolotsoane to P.W.1's place i.e. 'Muela which by all accounts is no more than two hundred paces away from Mosolotsoana. She was insistant that P.W.1 raised the alarm following which she proceeded to that place from which the alarm emanated. She corroborated P.W.1's version that when she came to P.W.1's place she found accused 1 and 2 belabouring deceased with sticks. Further that those who were trying to intervene were disadvantaged by age and the question of being powerless females. She only knew that P.W.3 Cherebone Moeti had been there at the time witnesses were relating their observations of the events to the police. Thus she got to know he was there when he said it to the police. It was her further testimony that both accused hit the deceased without being restrained by anybody until they left him be where he had laid when being assaulted.

P.W.3 Cherebone Moeti who is illiterate and does not know his age testified that he knew both accused for they are fellow villagers.

On the day in question he and P.W.1 set out for Moholeng proceeding from Mosolotsoana.

After he and P.W.1 arrived at P.W.1's place deceased

/also

also arrived. When P.W.3 and P.W.1 arrived there they found nobody except children.

On arrival at P.W.1's place deceased asked for a scale of beer from P.W.1. Then accused 2 said to deceased who was holding the scale of beer "bring those cattle of mine." Then accused 1 whom P.W.3 says was present though he didn't tell us at what stage this accused 1 pitched on the scene joined accused 2 in fighting deceased whereupon P.W.3 seeing that "they were killing him" ran away. At some stage P.W.3 testified that he tried to intervene but was overpowered by the two accused. He remembered trying to restrain accused 1 first by getting hold of him to no avail. Indeed this witness had scant if any regard to the sequence of events which he swore that he had witnessed. He appeared to me to be obsessed with the fact that he ran away. He later qualified his earlier statement by saying he did not try to restrain accused 2.

Asked by defence counsel what he had gone to Mosolotsoane for he replied that he had gone there for communal crop gathering.

P.W.3 manifested not only the type of handicap that characterises illiterates generally but deplorable lack of intelligence and presence of mind. He said that he saw a strange man from Mosolotsoana at P.W.1's place even though he did neither see this man at Mosolotsoana immediately before he and P.W.1 left that place nor did he see him coming from that direction while proceeding along the way to P.W.1's place. When asked whether he volunteered or was led to give the statement appearing as record of his evidence before the magistrate at Preparatory Examination he told me that this was the statement which he gave when asked by police. When pressed further to say why he said deceased came from Mosolotsoana he said he did for he was riding on horseback.

He then testified that he saw accused 1 at Mosolotsoana where he and accused 1 were drinking beer

/at some

at some place.

Asked why he said he saw accused 2 and 1 killing deceased he said it was because he had never seen them beat a man in that manner before. Asked if he had seen them hit anybody before he said "no". He denied that P.W.1 was selling beer that day. Accordingly it was put to him by counsel for defence that he only imagined he had seen P.W.1 and accused 1 at Mosolotsoane that day. He however conceded that he was not certain that deceased came from Mosolotsoane that day for it is possible for anyone coming from elsewhere going to P.W.1's place to follow or even join the path leading from Mosolotsoane.

The evidence of Lithole Mphafolane P.W.4 in this Court was admitted on behalf of the accused by their counsel. This was merely to the effect that the deponent was present when the post-mortem examination was performed on deceased's body. The deceased had some head injuries; further that deceased was P.W.4's nephew.

The evidence of P.W.5 Puleng Mofokeng in this Court was also admitted and read into the record of the instant proceedings. Those depositions were to the effect that her home is at Mosolotsoane near Moholeng. That she knows both accused. That in April 1987 she had beer for sale at her own home. Then Accused 1 who was among those present and enjoying beer with them hit deceased with a stick and thereafter ran out. The assault was preceded by no quarrel. The deceased stood up but a lot of blood was coming from his head through a Balaclava hat he had on. P.W. 5 then detailed someone to go and report to the chief who later came and said to Hlakametsa the deceased that he would confront him with accused 1 the next day. Deceased said he was going to Moholeng. However the next day he was reported dead.

P.W.6 Detective Trooper Toloane testified that on 5th April 1987 while at his station at Butha-Buthe he received a report following which he proceeded to 'Muela

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at Moholeng where he met the headman who pointed out to him a man who seemed to have fallen and was lying near the outside of a house in the area. This witness observed that a scuffle must have occurred in the vicinity of that house for there were drops of blood on the ground. The wall of a near-by rondavel was sprinkled with what appeared to be splatterings of blood. The thatching constituting the enclosure of the forecourt also had some blood drops. There were blood drops also on grass blades within that enclosure.

P.W.6 observed pieces of sticks lying on the ground. He undressed the body of the deceased and examined it. He observed fourteen open wounds on the head of deceased. He also learnt that deceased was not known in that village. P.W.6 observed a lot of blood on deceased's head.

The two pieces of stick were handed in by this witness and collectively marked exhibit "1". The two pieces however do not fit in evenly to each other. The body is said to have been dressed in a green pair of trousers, man's overalls, a pair of grey socks two green blankets and a grey one; a pair of gum boots. There was also a read and green woollen hat which P.W:6 said deceased was not wearing but was said to be his also. A good many of these trousers deceased was wearing were shown to the court and appeared to be tattered underneath. It may well be that they supplemented one another as gaiters to cover portions of the flesh of the wearer which otherwise their mates would leave bare. The above items were collectively handed in as exhibit "2".

The body was conveyed to the Government mortuary at Butha-Buthe. It is P.W.6's testimony that the body did not sustain any further injuries when thus being conveyed.

P.W.6 was referred to part of exhibit "2" especially the hat on which he said he observed no blood stains.

/Asked

Asked whether he would say deceased had this hat on when injuries occurred P.W.6 stated that he wouldn't for the hat was not on the body when he examined it. Regard being had to the fact that P.W.5's evidence which made mention of the fact that blood was coming through the Balaclava that deceased had on was admitted, nothing can turn on the cross-examination that seeks to show that the woollen hat, found by P.W.6 and reputed to belong to deceased, has no blood stains. Moreover there is a difference between what is commonly known as balaclava hat and the type of woollen hat before court. And this one is not a baraclava hat. My assessment of P.W.6's evidence is that it is very satisfactory and credit-worthy. I have no hesitation in accepting it as unshaken by the cross-examination.

P.W.7 Trooper Molaoli's evidence was directed at the task he had been assigned of arresting accused 2 who is not before Court. Apart from making a fleeting observation that P.W.7's evidence lacked the self-commending quality expected of a man of his nineteen years' experience in the police force I need not make any further comment on it.

P.W.8 Rankoane Ntlaba's evidence at P.E. was admitted on behalf of accused 1 only because it was at this stage that it was discovered that accused 2 had absconded.

In his evidence in the court below P.W.8 had deposed that his home is at Moholeng. That in April 1987 he was at P.W.1's place when a stranger came there followed by accused 2 who accused the man of stealing the cattle. The man denied stealing the cattle but qualified his denial later by saying he did not steal those cattle alone. Then accused 2 belaboured the stranger. P.W.8's efforts to intervene were foiled by accused's 2 assaults on him.

P.W.9 Dr. Krick's evidence was also admitted in terms of section 227(1) of the Criminal Procedure and Evidence Act 1981 because this witness was said to have left

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Lesotho for good and gone overseas at the end of his contract with Lesotho Government.

He testified at P.E. that he is a medical officer in Butha-Buthe Government hospital. That on 24-4-87 he performed a post mortem on a dead body of Hlakametsa 'Mou. The man was obviously assaulted on the head. He had injuries caused by a blunt object. The right scalp was peeled and the bone exposed. The wounds were open and not sharp. There was blood in the brain. There was severe trauma on the brain due to severe bleeding in it.

P.W.9's report was handed in as exhibit "A" in the court below and was handed in by consent in the instant proceedings and marked exhibit "A".

From what I have been able to decipher of this witness's handwriting in exhibit "A" it appears that the body was identified to him by 'Mou Chere and Lethole Mphafolane. That death occurred on 6 - 4 - 87 according to the opinion formed by this witness. Further that death was due to intracranial haemorrhage and (diffuse) brain contusion. That there wasn't any fracture on the body. As to external appearance the observation entered in the form by P.W.9 is that there were "lacerations of both parietal regions with exposed bone there." With regard to the skull and its contents P.W.9 filled the following remarks : "Blood in between the gyri parieto-occipital region more than frontally."

Accused 1 testified that on the day of the incident he had gone to Mosolotsoana for beer drinking. While he was drinking this beer deceased asked him what he wanted at the beer drinking place. Accused 1 did not know deceased before. Accused 1 tried to adopt an indifferent attitude to these remarks but was pestered even the more by deceased's repeated utterance thereof. Accused 1 stated that this was the only question that was put to him by deceased. A quarrel ensued because accused 1 says he was hurt by those words. Asked what was offensive in these words he said he was offended for he

/is not

is not a boy but a man. It is significant to note that up to this stage of his giving evidence accused never alluded to deceased having called him a boy.

Accused who is illiterate and gave his age as at the time of the incident in April 1987 as 21 years (but the age given in the charge sheet then is 24 years) told the court that this is the 5th year since his graduating from boyhood to manhood. From purely arithmetical point of view he became a man when he was 18 years of age if his statement as given by him is correct. Alternatively he must have reached manhood at 21 if the age given in the charge sheet is the correct one. However he explained that he reached manhood on graduating from the circumcision or initiation school some years back. Accused testified that deceased was far much older than himself.

I may just round off this question of age by making an observation that although it is an accepted norm in areas which practise circumcision in the traditional method in this territory that regardless of age, one who has been to that type of school, is regarded as a man nevertheless this does not detract from the fundamental cornerstone of the Basotho culture that juniors in age must respect seniors at all hazards.

Introducing a completely new complexion to the turn of events accused 1 said deceased hit him with a sjambok. It is doubtful whether if this is true and accused had related it to his counsel it could not have been put to Crown witnesses; constituting, as it appears to me, what would amount to an important factor in accused 1's defence.

He proceeded to say that in response to the lash with a sjambok he delivered a stick blow at deceased but that deceased blocked it with his hand.

In reference to the admitted evidence of Puleng P.W.5 in this court, accused said she was not telling the

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truth in saying she saw blood flooding the balaclava hat deceased was wearing and referred to the woollen hat (part of exhibit 2) which has no blood on it.

Accused 1 further stated that after this quarrel that he had with deceased at Mosolotsoane he went to the headman of that area and was told by that headman to leave in order that he would confront this accused with deceased the following day. Thereupon accused left for his home at Moholeng. This evidence seems to be corroborated by the admitted evidence of P.W.5 which is to the effect that "the chief came and told deceased that he would confront him with accused 1 the following day. Whereupon deceased said he was going to Moholeng. It is common cause that deceased and the two accused had a fight at P.W.1's place at Muela in Moholeng.

It is however strange that if P.W.5 's version is true that deceased sustained bleeding injury at Mosolotsane P.W.1 should not make mention of the fact that at the time of the encounter between the attackers and deceased at her (P.W.1's) place deceased was already injured to the extent that blood was plainly visible on his head or through the hat he might have been wearing if he was wearing one at all. None of the crown witnesses who gave evidence made mention of this important aspect of the case.

I may just point out that the crown in admitting evidence that conflicts with that given orally in the proceedings before court does so at its own peril, for the admitted evidence which corroborates that of the accused cannot be ignored.

However as stated above the evidence of P.W.6 Detective Trooper Toloane was impressive. He had made close observation of the area surrounding P.W.1's place and had noticed drops of blood that lay in the vicinity of the area. No doubt if P.W.5's admitted evidence was true that a lot of blood was flowing through the balaclava hat P.W.6 would have been able to trace drops of blood

/which

which would in the circumstances be reasonably expected to be visible between the two places Mosolotsoane and Muela which are very close to each other.

Accused's version becomes again suspect and leaves a ringing hollow to the listener when he narrates for the first time when giving evidence a new and startling tale that he saw deceased come in through the door at his (accused 1's) own home (not parental) in a manner that left no doubt that deceased was after him; for in his own words "it was while I was waiting to get a message from the chief".

He went further to denounce P.W.1's statement that he asked accused 2 to help him kill deceased for stealing cattle. Accused reiterated that he hit deceased for the latter was fighting him and that deceased started the fight by whipping him without saying anything when he entered the door. One would have expected this version to have been put to the crown witnesses. But it was not. It is as startling as it is incredible that a man who has stolen a relative's cattle can make so bold as to suddenly attack another without saying anything in a place where he is surrounded by total strangers. This aspect of the matter coming from accused's own mouth conflicts with his story that deceased had offended him by asking him what he wanted at a beer drinking place when he should be tendering cattle which version was further improved upon by stating that accused was incensed by deceased calling him a boy when he was not a boy but a married man with a child at that time and who had been to the circumcision or initiation school.

Accused conceded that he and deceased went outside the house grappling at each other through the door.

He again introduced a new story that deceased pinned him to the ground in the forecourt of P.W.1 's home. Strangely accused said P.W.1 must have seen him when being whipped by deceased in the house yet it was never put to her that this occurred at all. There was never even a suggestion that deceased was holding

/anything

anything with which to either attack anybody or defend himself.

Accused 1 said he was assisted by accused 2 who took accused 1's stick which was lying in the house and beat deceased with it on the head with the result that accused 1 was freed from the position where he had been pinned to the ground by deceased.

He further stated that as he was drunk he could not remember the events related by P.W.1 who said he joined in the belabouring of deceased outside. For the same reason he could not recall being grabbed by P.W.1 in her effort to prevent him joining in the fight against the deceased. Surprisingly though he remembers that after being freed from deceased's grip he was standing by; watching accused 2 belabour deceased. He could not restrain accused 2 because the latter commands some form of reputation that once he is on the war-path nobody can restrain him without peril to his own safety or life. He lacked the presence of mind to seek the chief constable nevertheless. The fact according to him deceased slipped off and ran away and because it was then dusk he didn't know what happened to him. With regard to a man who is said to have suffered severed brain trauma to suggest that he could run away makes little of all intelligence and logic.

Relying on the evidence of P.W.1 and P.W.2 who are eye-witnesses to the event and who were not drunk I have no doubt that accused 1 took part in the unlawful attack that resulted in deceased's death. The sheer savagery of the attack is bespoken by the number of wounds coupled with various blood-splattered spots in the vicinity to which P.W.6 testified. That exhibit "1" even broke in the process of the assault on deceased is comment enough on the disregard shown by the two accused on whether deceased would live or die. Credible evidence shows that they mocked all attempts at restraining them from their relentless and merciless assault on deceased.

In any case a man who participates with another in

/carrying

carrying out an unlawful act is tainted by the stain of criminality in the same way as that other. It was for accused 2 an unlawful albeit understandable thing to assault or even kill deceased for the motive is there to see: namely suspicion that deceased had stolen his cattle; but, for accused 1 to join in the act of the attack leaves me with no doubt that he thereby rendered accused 2's wrongful acts ascribable to him too. The lame attempt at raising a defence of self defence cannot stand in the light of the number of wounds i.e. 14 found on deceased. I cannot see that a plea of guilty to culpable homicide would stand because even the provocation that accused 1 aired for consideration so late in the day consists of words which support none. I have no doubt that on the basis of evidence led accused was not so drunk as not to appropriate consequences of his act. His mother negated any evidence to the contrary. See Rex vs. Tanganyika 1958(3) SA. at 7.

What is clear and reasonable to my mind, and what militates against all inclination to tread on realms of conjecture is that accused 1 had a motive to assist his brother-in-law assaulting deceased who in his plea stated that he was not the only one who had stolen accused 2's cattle. The combined and severe assault by the two accused led to deceased's death. Intent to kill has been proved hence provocation cannot be invoked with a view to reducing the crime from murder to culpable homicide. See Krull vs. R. 1959(3) 392.

I come to the conclusion that the crime committed in this instant is murder. I accordingly find accused 1 guilty of murder as charged.



J U D G E.

22nd February, 1989.

EXTENUATING CIRCUMSTANCES

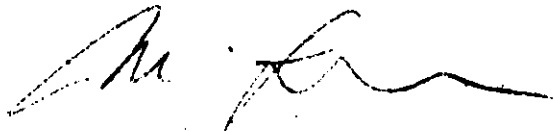
Drink is found to constitute extenuating circumstance in this case. See S. vs Ndhllovu 1965(4) SA. at 692. I take into account that accused had genuine grievance that deceased had stolen a relative's cattle.

Argument in mitigation advanced as follows :-

1. Accused is a first offender.
2. Uncertainty as to his age. Court invited for his benefit to regard him as having been below 21 when crime was committed.
3. He has a wife and minor children to support.

The sentence of the Court is that you will serve eight years' imprisonment.

My assessors agree.



J U D G E.

22nd February, 1989.

For Crown : Mr. Mokhobo
For Defence : Miss Lelosa.