CRI/T/58/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

LOPE MABEISA

Held at Quthing

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 12th day of December, 1989.

September 10th 1988 was a day of festive activity at the home of a 54 year old lady P.W.1 'Malikhang Maime. The occasion marked the baptism of the children of P.W.1's family.

Much as the Holy Scriptures to whose pronouncements the newly baptised had just dedicated their lives denounce both the brewing and the taking of beer, it was not felt an incongruous occasion by the elders of that family that beer should be made available in sufficient quantities to quench the thirst of ten or so people who were gathered at P.W.1's home at Ha Raliemere to rejoice in the joy of her family. Accordingly the husband of P.W.1 held the distinct honour of laddling out beer from a 20 litre tin to those who were in attendance.

Like the rest of the people who had been there before him the accused when he arrived at about 7.00 p.m. was also

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given his share of the contents of the 20 litre tin by the hospitable husband of P.W.1.

In keeping with the mood of the occasion there was hymn singing amidst which a hearty conversation was going on among those who were seated around the table which was in the middle of the house some seven or eight paces away from the door.

The accused, P.W.5 Likhang Maime and P.W.3 headman Ramahapela Ramabanta were sitting abreast of one another on the one side of the table while the deceased Phakiso Banyane was seated on the opposite side but at an oblique angle vis-a-vis the accused. It was during this conversation that the accused expressed his preference of Sesotho beer to hops.

P.W.1 who was sitting close to the door saw the accused rise and heard him address himself to the deceased as follows :

> "elder brother will you come outside so that we can speak to each other."

This invitation was heard by P.W.5 as well as by P.W.3. Although the deceased's name is not "Moholoane" translated into English as "Elder Brother" it became clear to P.W.5 that the accused was addressing himself to the deceased for he was facing him when he made that utterance.

It seemed to P.W.1 that when the accused arrived he was already drunk for he even spilled beer on other people. More over according to P.W.1 she knows the accused so well that she can tell whether he is drunk or sober for he easily gives himself away by becoming noisy when drunk.

The crown evidence shows that the deceased complied when asked by the accused to go with him outside. This evidence shows that the two went out following each other, the accused leading the way and the deceased bringing up

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the rear.

They later came back into the house. However it appears no attention was paid to the order in which they came back nor to the interval that separated their re-entry into the house.

After some interval the accused once more said the deceased should go out so that they could talk to each other. Once more the deceased complied and the original order in which they went out on the first occasion was maintained.

The door closed behind the deceased and immediately afterwards P.W.1 heard a heavy thud against the door from outside. P.W.1 said this thud was heard five minutes after the two had exited but it turned out that in fact the thud occurred within an interval spanning a count from one to five as this witness satisfactorily did the count. According to my watch at which I was looking as she counted from one to five it seemed that the thud occurrred three seconds after the door closed behind the deceased.

Apprehensive of what could have happened outside P.W.1 opened the door there and then and looking outside she saw the deceased lying face up outside the door while in the same moment she saw the accused dropping his blanket and running away from where the deceased had lain. She there and then shouted P.W.5's name and asked him to come outside to see what had happened to the deceased.

P.W.5 obliged. He found the deceased lying in the position described by P.W.1. He observed that the deceased's head was lying about half a pace from the door step while the rest of the body including the lower limbs were resting on the stoep. P.W.1 and P.W.5 observed that a gurgling sound was produced from the deceased's throat. They helped raise him and supported him on either side into the house. They and

P.W.3 and others observed that he had a cut and open wound around the root of the throat region and that foams of blood were pouring out in rythm with the deceased's respiration.

They also observed that the deceased appeared to have sustained a stab wound that gave the impression that an instrument used pierced one side of the deceased's cheek and came through at the other cheek. The deceased attempted to speak but no voice came out.

The accused's blanket was later retrieved from where it had fallen and eventually handed in in this Court marked Ex."1".

The medical evidence which was admitted on behalf of the accused along with the report Ex."A" is very sketchy and makes no reference to the cheek to cheek wound observed by the eye witnesses including the D/Sgt. Mosifa P.W.7 who testified that on examining the deceased's dead body he observed two wounds below the left eye and another wound below the chin around the windpipe.

P.W.7's observations were not challenged on behalf of the accused. The only challenge of some substance related to his non-observance of the Judge's rules in that he did not caution the accused before the latter gave his explanation but only afterwards in relation to the charge of murder that was given to the accused. Likewise P.W.6 Trooper Motenalapi was challenged for his failure also to observe those rules in that he cautioned the accused only after he had obtained an explanation from him in relation to the charge of the assault with intent to do grievous bodily harm preferred against the accused prior to the death of the deceased.

Although these two officers, despite their long experience in the police force namely ten years in respect of P.W.6 and 23 years in respect of P.W.7, have breached these important administrative rules of procedure the importance of which centres on the fact that the

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accused in giving his explanation should be on his guard and know that what he says may be used in evidence supporting the charge preferred against him they did not hide from him the fact that they were policemen. P.W.6 was in uniform. P.W.7 called the accused to his own office at the police station at Mafeteng.

I should however emphasise that the Judges' rules guarantee an accused person's rights before and during trial. They thus should be observed by police officers for these rules are intended to protect an accused person against being taken advantage of. Where it appears an accused person has been prejudiced because of police non-observance of these rules whether intentionally or by mistake an accused person has often been freed from criminal liability. Police must therefore take note.

After the deceased had been placed in the house, P.W.3 in company of P.W.2 and P.W.5 set out for the accused's place. P.W.3 knocked at the door and was answered by the accused's wife who on being asked where the accused was told a lie that he was not in the house. However after the chief explained that it was necessary that the accused should accompany him to Tumahole's home where it was discovered that the deceased had received injuries immediately after being seen in the accused's company the accused came out wearing another blanket.

When he came next to P.W.5 he delivered a blow at him with a stick. P.W.5 warded the blow off. The accused was heard to say that he was ready to meet his own death. After his blow had been parried by P.W.5 the accused made good his escape into the night and was only seen by these witnesses after his arrest by the police.

He was arrested by P.W.6 on 11.9.88 in connection with a charge of assault with intent to do grievous bodily harm on the deceased before the latter died.

He was subsequently charged with murder by P.W.7

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after the latter learnt and satisfied himself that the deceased had died. This was on the same date i.e. 11.9.88 when P.W.7 found the accused at the police station where he had been kept under arrest by P.W.6.

The accused told this Court that it was the deceased who on the two occasions that they went out, had asked him to go out. He said that the deceased within hearing of those who were in the house said on both these occasions the accused should go away because he was a boy for he had not been to the initiation or circumcision school.

Needless to say the crown witnesses denied these allegations and stated that they would have heard if any such were made by the deceased in the manner and pitch of voice described by the accused.

The accused said the deceased in fact on both these occasions was the one who went out first followed by him. However this was never put to the crown witnesses. Nor was it put to them that the deceased must have been having a sword while he was in the house; yet in Small vs Smith 1954(3) S.A. at 434 it was 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 him 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."

The court heard for the first time when the accused was giving evidence that the deceased was wearing a blanket in the house yet the crown witnesses whose evidence showed that the deceased was on short-sleeved shirt were never challenged.

The accused wants the court to believe that the sword

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used by the deceased was not only on him throughout his presence in the house but was in fact used by the deceased to injure the small finger to his right hand yet hardly five seconds after the discovery of the seriously injured Phakiso outside the door this sword was not anywhere to be found. The accused admits that the sword did not betake itself from the deceased. Likewise if anybody took it away P.W.1 would have seen him for she did not only respond immediately to the thud outside the door but she also saw the accused run away from where the deceased had fallen. By token of this rule the accused himself would have seen the person who removed the sword from where the deceased had fallen.

Faced with this difficult situation the accused suggested that the sword must have been removed by some miracle or some mysterious means. I cannot accept that.

Although the accused says that the deceased after slapping him on the face followed up that action by attacking him with a sword that injured him on the small finger he did not show the chief this injury. He contents himself with saying he told the chief that "that man has also injured me" at the time the chief had gone to fetch him from his house.

He says he failed to show the chief that injury because P.W.5 who was in the chief's company had hit him behind the head with a stick. Yet when he got arrested only a day after the incident he did not show his injury to any of the police who interrogated and arrested him. In fact P.W.6 said that the accused bore no injuries following the fight that the accused told him he and the deceased were engaged in the previous day. The accused said that the injury that he sustained was deep and profusely bleeding and that it took three weeks to heal yet he never asked that he be allowed by his captors to let him have it medically treated.

I have no hesitation in rejecting as false beyond

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doubt the accused's story that the deceased called him a boy or that the deceased sought to expel him from the feast on the grounds that he was not from the initiation school.

I reject his story that the deceased injured him with a sword. I reject his story that P.W.5 hit him on the head with a stick.

The accused was hard put to it to say why he did not complain to the headman who as the lawful authority was the proper person to appeal to if the deceased was tormenting him at P.W.1's house. The headman was present and readily available at this feast and during the alleged occurrences.

The accused said that after the deceased had slapped him on the face and attacked him with the sword the accused in self-defence hit the deceased twice with the timber stick Ex."2". He did not observe where he hit the deceased.

Asked whether, in view of the medical evidence that the breakage of the deceased's collar bone was consistent with the application of a blunt instrument, his timber stick was not the instrument used to cause that injury the accused said he did not know.

There are a number of discrepancies in the crown evidence both among themselves and as regards the evidence some of them gave previously in the court below compared with the one given in this Court.

P.W.1 said the feast during which the deceased was found injured was on 9.9.88 whereas in the court below she had said this feast was held on 10.9.88. In this respect her evidence differs not only from that she gave previously in the court a quo but also from that of P.W.3 and P.W.5 who said it was held on 10.9.88. Some witnesses said the deceased was carried into the house. One said he was only supported on either side but was able to and did walk into the house. Some

/witnesses

witnesses said the wounds seemed to have been caused by a sharp instrument. The doctor said those he described were caused by a blunt instrument. The police Sgt. refers to two wounds on the left cheek. Other witnesses say there was one wound on each cheek.

P.W.5 said the deceased did not drink because he had special duties to perform at the feast but P.W.3 said the deceased indeed drank. P.W.1 also said the deceased was not drinking that day.

P.W.1 said the accused and the deceased appeared to be angry when they left for the door. P.W.5 said they never spoke to each other except for the words addressed to the deceased by the accused. P.W.3 said they were conversing even though they were separated by the table and their conversation was drowned by the noise. The order in which the deceased the chief and P.W.2 were seated is different when described by the chief from the description given by P.W.5. But all these discrepancies are not fatal to the case for the crown. The discrepancies with regard to the date when the assault occurred is not only well covered by possible lapse of P.W.1's memory but the statute itself says the phrase "on or about" as it appears in the charge sheet where time is not of the essence as would be the case where an alibi was pleaded covers three months before and three months after the date specified. The witnesses for the crown were frank and candid showing honesty and readily admitting discrepancies observed in their evidence and betraying no desire to falsely incriminate the accused.

The medical evidence showed that the deceased's mandible was fractured. Further that the collar bone was broken; and that the deceased sustained severe oedema of the neck (meaning severe swelling of the neck) and severe surgical emphysema (meaning severe pockets of air under the skin) and that the surgical emphysema and the oedema were a result of the fractured mandible. Consequently the deceased died through

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asphyxia (meaning deprivation of oxygen or inability to breathe) due to the severe oedema of the neck and the severe emphysema. He concluded that these injuries were consistent with the use of a blunt instrument.

The accused admitted that the deceased could not have sustained the other injuries observed on him except if caused by someone with whom the deceased had had a fight. Indeed nobody saw the accused effect the injuries on the deceased. But the only commmon sense and rational approach dictates that within so short a time as the three seconds at the end of which P.W.1 saw the deceased fallen down and the accused run away from him no one else but the accused would be accountable for the injuries sustained by the deceased. See R vs Mlambo 1957(4) S.A. 737 et seq.

The accused said that throughout the period he was in the house he had his stick on him; but even though he heard P.W.3 when giving evidence say that he had nothing in his hands for P.W.3 would have seen it if he had any weapon for they were sitting next to each other the accused did not gainsay this version. He only decided when it was his turn to give evidence to say that P.W.3 was not telling the truth. See Small vs Smith above.

See also Phaloane vs Rex 1981(2) LL.R. at 246 where Maisels P. as he then was said:-

> "It is generally accepted that the function of counsel is to put the defence case to the crown witnesses, not only to avoid the suspicion that the defence is fabricating, but to provide the witnesses with the opportunity of denying or confirming the case for the accused. Moreover, even making allowances for certain latitude that may be afforded in criminal cases for a failure to put the defence case to the crown witnesses, it is important for the defence to put its case to the prosecution witnesses as the trial court is entitled to see and hear the reaction of the witness to every important allegation."

P.W.1 said she did not bear the accused any grudge. The accused on his part gave no suggestion why P.W.1 or

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any of the crown witnesses could give false evidence against him. The only suggestion made on his behalf was that P.W.1 is related to the deceased and not to the accused. P.W.1 reacted by showing that notwithstanding that this is the position she was not bent on giving false evidence against the accused.

The crown submitted that assuming without conceding that the deceased had a sword hidden on his person he couldn't have inflicted the injuries on himself. The injuries were inflicted by the only person who fought with him on that day and the accused admitted under cross examination that he is the person who fought with him that day. The crown called in aid the authority of Rex vs Blom. 1939 A.D. at 202 for purposes of invoking inferential reasoning. This is spelt out at page 66 of CRI/T/22/88 Rex vs Motamo Sehlabaka (unreported).

The crown submitted that the defence case was shattered under cross-examination. The accused had made out that the deceased was the aggressor but under the heat and pressure of cross-examination he persisted in his notorious assertion that he was telling the truth without saying how that could be so in the face of incontrovertible evidence by the crown witnesses who could have for instance heard when the deceased shouted twice that the accused should go out for he was not circumcised. But the crown showed that P.W.2 is known by accused not to have been to the initiation school yet P.W.2 was not asked by the deceased to quit for reasons advanced against the accused. It is strange that the accused should have kept the question of his injury a well guarded secret confided only to his wife.

I have already indicated that the crown evidence is far superior to that of the accused. I should not be understood to imply that the case is therefore to be decided on preponderances.

But because of the falsity of the accused's evidence

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I wish to refer to the authority of Broadhurst vs Rex (1964) AC 441 at 457 that

> "Save in one respect, a case in which an accused gives untruthful evidence is not different from one in which he gives no evidence at all. ..... But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt ..."

On the basis of the above authority it is important to avoid the natural tendency that because the accused is lying, it must be because he is guilty and accordingly convict him without more ado, whereas the burden of proof of the accused's guilty lies on the crown throughout. In other words the burden is not discharged simply because the accused has been lying for he may be lying for reasons which are not connected with his apprehended or surmised guilt at all. The crown relied on Rex vs Fred Tekane 1980(2) LL.R. at 342 in support of the view

> "that it is not encumbent upon the crown to prove scientific cause of death provided .... it is able to prove that the act that resulted in death was perpetrated by the accused."

Given the estimated size of the sword alleged to have been used against the accused by the deceased i.e. that it was two and half feet long Mr Pitso conceded that the accused may not be entitled to double benefit namely that because the sword was two and half feet long the people inside the house would have seen it; therefore it ought to have been short enough for the deceased to have kept it unseen on his person, while at the same time it should have been as long as the accused gave the court to believe it was in order to justify the accused's vicious reaction towards its use by the deceased. However credible evidence shows that there was no sword of whatever size for had there been one; common sense dictates that it should have been found lying around the deceased where the latter lay mortally wounded.

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Thus the crown's reliance on R vs Ndhlovu 1945 A.D. 369 at 386 is not out of step with acceptable submission that legal authorities disapprove of indulgence in speculation "on possible existence of matters upon which there is no evidence, or the existence of which cannot reasonably be inferred from the evidence."

Buttressing its view on the above authority the crown submitted that the accused came out with fanciful explanations about how he received his injury on the small finger. The crown called in aid the authority of Miller vs Minister of Pensions (1947) 2ALL E.R. 372 and 373 where a warning was given against fanciful explanations being allowed to deflect the cause of justice.

Further reliance was reposed on Mlambo where at 738 it was stated

> "An accused's claim to the benefit of a doubt ... must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence and or gathered from reasonable inferences which are not in conflict with, or outweighed by the proved facts of the case."

It would seem to me that the existence of the deceased's sword is outweighed by evidence showing that there was no such sword.

The crown submitted that it does not rely on what the accused told the police but on independent evidence before court. Thus very properly it concluded that in any case there is no question of any confession before this Court.

The accused maintains that when he and the deceased went out the deceased must have been aware that the accused was carrying Exhibit 2 yet when deciding to take the accused by surprise and assault him he only slapped him on the face and subsequently applied the sword instead of using the sword from the word go especially when he was aware that for any slight mistake the accused would gain the

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upperhand because of the stick in his possession. I find that the sort of possibility postulated by the accused in this connection falls within the four corners of what in Miller vs Minister of Pensions (1947) 2 ALL E.R. 372 at 373 is embodied in the expression "of course it's possible but not in the least probable" in which event it is concluded that the crown's case has been proved beyond reasonable doubt.

Because of the nature of this case I wish to borrow the words of Tebbutt J. in S. vs Jaffer 1988(2) S.A. 84 at 88 et seq. where he said :

> "The story may be so improbable that it cannot reasonably be true. It is not, however, the correct approach in a criminal case to weigh up the State's version, particularly where it is given by a single witness, against the version of the accused and then to accept or reject one or the other on the probabilities."

Indeed arguing in the same vein Van der Spuy A.J. in S vs Munyai 1986 (4) S.A. 712 at 715 said

> "There is no room for balancing the two versions, i.e. the State's case against the accused's case and to act on preponderances."

In S vs Singh 1975(1) S.A. 277 it was said that the proper approach was for a court to apply its mind not only to the merits and demerits of the State and the defence witnesses, but also to the probabilities of the case.

> "This was to ascertain if the accused's version was so improbable as not reasonably to be true. This however, did not mean a departure from the test as laid down in R vs Difford 1937 A.D. 370 at 373 that, even if an accused's explanation be improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

Thus in S vs Kubeka 1982(1) S.A. 534(W) at 537F-H it was said regarding an accused's story:

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"Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State."

In keeping with this view Van der Spuy said at 715G

"In other words, even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false."

I have no doubt that the accused's story is not only palpably false but it is so inherently improbable that it should be totally rejected as demonstrably false beyond reasonable doubt.

Taking the cummulative effect of all the circumstances of this case and weighing them together carefully I find that the inference of guilt is the only one which can reasonably be drawn against the accused for the fatal assault inflicted upon the deceased outside the home of P.W.1 on 10.9.1988. His claim of self-defence cannot stand because it has been shown that the sword he alleges the deceased wielded against him was just a product of the accused's fertile imagination.

I find the accused guilty of murder as charged.

My assessors agree.

J U D G E.

12th December, 1989.

ON EXTENUATING CIRCUMSTANCES

Regard has been had to the accused's background in an effort to find whether or not extenuating circumstances exist in this matter.

The accused's background as an unsophisticated semi-illiterate peasant who herds after stock was a factor which was advanced on his behalf as warranting a finding that extenuating circumstances exist in this case. The court was asked to take into consideration that the accused originates and lives in a rural area where practices of the kind he embarked on are not unusual thus do not incur a moral stigma.

It was submitted therefore that the test to be applied is a subjective one and in doing so the accused's subjective mind being a product of the sort of community in which he lives should not be divorced from the moral attitudes of such a community. The accused had taken beer.

In the same way as was the case in CRI/T/59/88 Rex vs Thembinkosi Yawa (unreported) where an accused who was a Xhosa laboured under a long nurtured dislike of being disparangingly referred to as a Xhosa even though the case showed that it was false that he killed the deceased because the deceased had incensed him by calling him a Xhosa disdainfully, the court nonetheless attributed some weight to not too remote a possibility that psychologically the accused nursed a phobia against being called a Xhosa to the extent that after taking liquor he imagined that the deceased had called him a Xhosa, and thus gave vent to the pent up desire to inflict physical injury on whoever he thought was likely to belong to a group of those who called him Xhosa during his growing up period.

Likewise people from the Circumcision schools are apt to insultingly refer to non-initiates as boys or dogs or as possessed of tails. It is not unlikely that the accused

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was referred to in these derogatory terms one time or another during his growing up process. He must have detested this and looked for an opportunity when he could prove himself a man for the benefit of initiates in a man to man fight, even if unprovoked, against one of the initiates. Hence the fact that after imagining that the deceased who perhaps was given authority to play a distinct role at this feast the accused felt piqued and belittled for the deceased had been so appointed because he was "a man" and not "a boy" by virtue of the fact that he had been to the initiation school.

This pent up dislike for being called a boy, even though he was not called one, combining with the liquor the accused had taken gave vent on this occasion. The unfortunate deceased was the victim.

I thus come to the conclusion that extenuating circumstances are shown to exist in this matter.

No previous convictions.

Sentenced to 11 years' imprisonment.

J U D G E.
12th December, 1989.

For Crown : Mr Sakoane
For Defence : Mr Pitso.