

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

LIKENKENG NKETU

Held at Quthing

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla  
on the 13th day of December, 1989.

The accused was jointly charged with Motlalekhosi Sehloho for the murder of Tekane Qosane who died in the house of Motlalekhosi on 15th May 1983.

Motlalekhosi has not appeared to stand trial in this Court; hence the application by the Crown for separation of trials. The application for separation of trials was granted by this Court.

The admitted evidence of P.W.1 Semaka Machekane in the court below provides the background for a possible motive in the perpetration of this crime.

The deceased and P.W.1 were members of the Police Volunteer Reservist Group.

The two intended to set out for Motlalekhosi's house to apprehend Motlalekhosi's son-in-law Kelebone in connection with theft of a goat.

/It

It seems P.W.1 and the deceased did not go at the same time to Motlalekhosi's house because at the time that P.W.1 was pursuing the plan to go to arrest Kelebone he was called by Motlalekhosi and informed that his colleague had just been killed by the same Motlalekhosi.

P.W.1 indeed saw for himself that the deceased was dead.

The accused himself stays at the home of Motlalekhosi. The latter is his uncle.

With the exception of the two Crown witnesses namely P.W.3 Malikelenyane 'Mota and P.W.4 Mateboho 'Mota the entire depositions of witnesses who testified before the court below were admitted on behalf of the accused and accepted by the crown including the post mortem report Ex."A".

The facts of this case fall within a very narrow compass.

According to the oral evidence of P.W.3 and P.W.4 who are eye witnesses Motlalekhosi invited them from P.W.3's home after they had been drinking at Jusi's house. They obliged and went along with him to Motlalekhosi's home.

They got in and found the accused, Kelebone and other people in there.

They were treated to some mugful of beer but before they had had any meaningful sips therefrom the deceased came in carrying an iron rod three and half feet in length. This is an iron rod usually referred to as a dropper, used in constructing fences.

Motlalekhosi asked the deceased what he wanted there. The deceased vouchsafed him no reply. The question was repeated and when the deceased remained silent Motlalekhosi hit him twice with a stick on the head. The deceased didn't fall. Then Motlalekhosi addressed himself to the accused and Kelebone to join in the assault.

/The

The two witnesses who gave oral evidence are adamant that they saw the accused belabour the deceased at least twice on the head with his Kolitsana stick.

The deceased fell. There was a general screaming of women who were in there. They were not able to get out of the house because Motlalekhosi deliberately blocked their path to the door. Indeed P.W.3's attempts were thwarted this way, while P.W.4 awaited an opportune moment when Motlalekhosi was busy stopping others from going out, and grabbed hold of the door knob and went out.

These witnesses testified that it was not told to them why the deceased was being thus assaulted.

The admitted medical evidence shows that the deceased's skull was smashed in a manner akin to a smashed egg-shell. The brain tissue and part of the brain were protruding.

In the opinion of the doctor extremely savage force was used in wielding the weapon that effected these injuries.

P.W.3 testified that she didn't know if the belabouring on the deceased continued after he had fallen to the ground because of the commotion which was in there.

P.W.4 said she did not know if it continued because she managed to escape only after she had seen the accused deliver his two blows and the deceased fall to the ground.

The accused gave his sworn testimony in which he told the court that only Motlalekhosi is the man who assaulted the deceased. He said Motlalekhosi hit the deceased twice with a stick on the head and the deceased fell to the ground; and when he was about to deliver the third blow the accused parried it with his stick which he pinned into the wall above the head of the fallen deceased. The stick even broke.

He said Kelebone was not at all in the house nor did he

/participate

participate in the assault.

The crown's version about the presence of Kelebone and his participation in the assault was not challenged when crown witnesses testified to it. Only for the first time when the accused gave his evidence was it said that those crown witnesses should not be believed because they were lying. But the authority in Small vs Smith 1954(3) S.A. 434 at p. 438, read along with Phaloane vs Rex 1981(2) L.L.R. at 246 is sufficient to show that it is grossly unfair to let evidence by the other side go unchallenged and only afterwards argue that it should be disbelieved.

The accused's story in this respect is demonstrably and deliberately false. The eye witnesses told the court that the accused participated in the assault. The accused denies this but fails to say why these witnesses could implicate him falsely in the perpetration of the crime charged. In a lame attempt at giving a suggestion why they implicate him he said P.W.3 had been threatened and thus forced to implicate him. But this version was not put to P.W.3 when she was in the witness box.

He further suggested that P.W.4 was influenced by P.W.3 to implicate him but this was not put to P.W.4 either. It is thus clear to me that the accused was not only fabricating but was intent on misleading this court.

There is authority for the view that an accused who gives false testimony does there by provide a basis the effect of which is to strengthen the case for the Crown.

It is not enough though that even if the accused's story is improbable his is thereby a lost cause. The approach favoured by the authorities is that his story should not only be disbelieved as improbable but must be shown as false beyond reasonable doubt. Thus even if the crown case has no defects in it if there is some reasonable doubt in the totality of the case as it stands

/such

such doubt should redound to the accused's benefit. Indeed the state's case need not be rejected or even be disbelieved to entitle the accused to his acquittal. Even if I subjectively disbelieve him I should nonetheless acquit him if the onus resting on the crown relying on credible witnesses has not been discharged.

The accused made a demonstration of how he leapt to the deceased's rescue. He completed the manoeuvre consisting of sailing across the floor and pinning a stick much shorter than the one he said he used into the wall five paces away in one and half seconds and caught the simulated strokes effected by Motlalekhosi at the fourth stroke. I give him credit for his show of agility.

However the eye-witnesses denied that this is what he did. They say they saw him assault the deceased on the head at least twice. Their reaction to the fact that because of his deformity he could not have been able to wield a stick in the right hand while his left hand would necessarily have to be supported by something firm on account of the paralysis on his left leg was that he is able to effect these movements for he is even a builder who becomes quite speedy in his building business.

Indeed the agility he manifested before this Court while intended to show how he managed to protect the deceased served at once to support the assertions for the eye witnesses that he performs such feats without any difficulty.

I have no doubt therefore that the accused participated in the assault of the deceased.

I further hold that because of his associating himself with those who assaulted the deceased he attracted their criminal stigma.

Medical evidence showed that the assault was effected with a sharp heavy instrument.

/The

The deceased's iron rod is one such instrument. It is inconceivable that he inflicted the injuries on himself with it. Nor has it been suggested he did.

The crown submitted that the accused used his Kolitsana stick thus he did not wield the deceased's iron rod. I agree.

However he associated himself with anyone of those who applied the iron rod in assaulting the deceased. He was present in the assault. He must have realised that the brutal manner in which the deceased was being assaulted would possibly cause his death or serious injury but nevertheless participated in that assault - regardless of the consequences which were more than likely to befall the deceased. The motive for the assault was clearly to help Kelebone escape the arrest that the deceased was lawfully entitled to effect.

I accordingly find the accused guilty of the murder of the deceased as charged.

My assessors agree.

J U D G E.  
13th December, 1989.

EXTENUATING CIRCUMSTANCES

Court found that extenuating circumstances in the respect that the accused being a complete dependent of his roguish uncle Motlalekhosi was virtually his slave who was completely under his influence.

Address in mitigation heard.

Order:- Sentenced to 7 years' imprisonment.

J U D G E.

13th December, 1989.

For Crown : Mr Sakoane

For Defence: Mr Fosa.