

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

SIMON MABULA

Held at Quthing

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 14th day of December, 1989.

The accused is charged with the crime of murder following the assault on Monyone Tlaitlai the deceased who died on 22nd October 1988.

The defence admitted the depositions of P.W.1 D/Police-Woman Letele and P.W.5 Rasilasi Tlaitlai.

P.W.2 No. 5648 D/Tpr Tseloa gave oral testimony showing that he met the accused at Tsakholo Police post on 21-11-88. P.W.2 was stationed at that Police Post at the time.

He was an investigating officer into the death of the deceased in this case.

When the accused came on that day to report himself P.W.2 cautioned and warned him.

The accused gave his explanation regarding the death of the deceased. At the end of this he was given

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the charge for the murder of the deceased.

Then on 24-11-88 P.W.2 went with the accused to the accused's village at Matsoseng where in the presence of P.W.3 Chieftainess Maborife Matsosa the accused acknowledged the stick brought there by the accused's brother one Motlatsi.

P.W.3 had been sent for by P.W.2 who had asked Tiheli to summon P.W.3 from the communal garden where she had been working to come quickly to her home at the chief's place

P.W.3 then handed the stick to P.W.2 who left with the accused thereafter.

Evidence shows that it was the accused who had asked his brother where this stick was and asked him to bring it along.

An eye witness to the assault is P.W.4 Taelo Mosehle who is an unsophisticated illiterate whose prime occupation consists in tending stock. Although his estimates of the distances are no exception to the usual mind-boggling inaccuracies purveyed usually by Basotho witnesses but more particularly by illiterates of this society I have no doubt as to P.W.4's perception of events which took place on the day in question.

On that day in the afternoon he had been to the mill to grind corn at Lekhalong some 10 km. from this witness's home at Ha Mpele.

A good distance away from Ha Majake P.W.4 saw the accused assault the deceased with a stick on the head. He saw him hit the deceased and felling him though on account of the distance separating this witness from the scene he was not able to see how many times the blows had been delivered before the deceased fell.

However the witness is positive that only one blow

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was delivered after the deceased had fallen to the ground. There after the accused came towards P.W.4 leaving the deceased fallen at the scene.

Then the accused who was pulling a horse walked hurriedly passed P.W.4 in the opposite direction. P.W.4 recognised the accused as the man he had seen once a month back at the latter's home at Matsoseng. Otherwise P.W.4 knows the accused's brothers very well and observed that their features bear some similarity to the accused's.

On the previous occasion when P.W.4 first met the accused at the latter's home he greeted him and the accused requited the greeting warmly. But on the day of the incident they did not greet each other.

P.W.4 testified that from the time he saw the belabouring take place up to the time when he and the accused went past each other heading in opposite directions nothing had obscured his view from the accused nor had there been any people who went past him in the opposite direction before the accused did.

P.W.4 came to the scene where he found the deceased lying on the ground and without touching him observed that he had a wound on the head. Thereafter P.W.4 went to report the matter to one Mr Bulara. The deceased was not responding when P.W.4 tried to speak to him.

P.W.4 had observed that during the encounter the deceased was trying to defend himself though he was unarmed.

When he came to the scene P.W.4 saw a manufacture - made whitish stick lying next to the deceased.

He had not been able to see if the accused was carrying anything in his hands at the point when he and the accused went past each other in opposite directions because the accused was pulling a horse and walking hurriedly. It seems therefore that P.W.4 didn't pay any attention whether the accused was carrying anything.

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The admitted medical report shows that the skull of the deceased had suffered a comminuted depressed fracture that led to massive intracranial haemorrhage. With regard to the external appearance the post-mortem shows that there were bilateral burr hole wounds. There were skin lacerations over the left skull.

From the admitted evidence of P.W.5 Rasilasi Tlaitlai the deceased's son, it appears that the deceased survived the day of the assault and died the following day in Hospital in Maseru.

P.W.4 who witnessed the assault from a distance and identified the assailant indicated that when he first saw the belabouring he was some 4 km away. He could neither at that distance identify the assailant nor the victim. But he took a short time to reach the scene because he was riding on a donkey which raced there and he thus was able to recognise the accused when he came face to face with him some 200 paces away from where the deceased was lying.

The accused gave his evidence in which he denied having assaulted the deceased on the day of the incident or at all. He said it was his brother who had assaulted the deceased. It was however not put to P.W.4 until after the latter was recalled that this was the case. It is thus a clear incident of an after-thought in these proceedings.

In any event P.W.4 stated that he had witnessed this assault and nothing had obscured his view from the assailant and the victim as he was approaching the scene till recognising, when he reached it, who the assailant and the victim were.

The accused suggested that P.W.4 might have mistaken the incident of movements wherein his brother Tiheli and the accused were helping raise the deceased for an assault on the deceased. But P.W.4 had in his uncontroverted

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evidence indicated that apart from the accused and the deceased there wasn't anybody at the scene. He was able to see the scene as he described it because it lay in a horizontal plane obstructed by no objects. Indeed it was never put to P.W.4 that the accused's brother was at the scene of the incident when P.W.4 made his observations.

In fact the accused's version is self-contradictory because he also said through questions put by his counsel and later confirmed by the accused himself that by the time P.W.4 pitched on the scene the deceased had long been removed from there.

I have no hesitation in rejecting the defence version as false beyond reasonable doubt in this regard.

Much was made of the question of the accused's identity by P.W.4. But the accused himself stated that he had seen this witness before at Matsoseng village although he didn't think the witness would have had a lasting impression of him as in any case the witness was still a small boy growing up in the village. He went further to say P.W.4 did at one stage live in this village.

P.W.4 on his part said he had seen the accused a month back prior to the incident. P.W.4 knew the accused's brothers and is able to tell them apart.. The accused admits that although he resembles his brothers in features the one in question i.e. Tiheli is much lighter. Thus it would seem that because P.W.4 in any event said he is more familiar with the accused's brothers than he is with the accused there is no reason why he can mistake the accused for any of them.

Because, perhaps, of over-caution or unease that investigating officers felt an identification parade was conducted wherein P.W.4 was asked if he could point out the man he had seen molesting the deceased.

P.W.4 is said to have done this with ease. He

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actually told me he identified the accused not by his clothes but by the correspondence of the accused's facial appearance with P.W.4's mental picture of him since the day he saw him immediately after the latter's assault on the deceased.

P.W.7 D/Sgt Mofolo gave her evidence as to how she conducted the identification parade. I have no doubt that her manner of conducting the parade conforms with guidelines laid down in Mohajane vs Rex C of A (CRI) No. 7 of 1984 (unreported).

The witness herself gave her evidence in a manner that left me in no doubt that nothing in it could even remotely prejudice the accused in any manner.

Section 238(1) provides that

"any court may convict any person of any offence alleged against him in the charge on the single evidence of any competent and credible witness."

I have no doubt that the evidence of P.W.4 as a single witness who observed the occurrences at the scene was telling this Court the truth. He had no motive to lie. He was candid and frank if rather annoying by having to time and again be reminded to speak up. He bore the accused no grudge.

The accused on the other hand had some motive to assault the deceased who had come there to protest and drive the accused's animals from trespassing in his field and impound them. The deceased had previously impounded the accused's animals.

The accused cut a pathetic figure in the witness box by relating a whole tissue of lies in the strands of which he was inextricably enmeshed.

I reject his evidence as not only improbable but as demonstrably false beyond reasonable doubt. D.W.2 Tiheli Mabula's evidence added nothing of substance to detract from the credible evidence led for the crown on which I

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repose reliance.

D.W.2 satisfied me that P.W.4 knew him very well and that there was no way he could mistake the accused for him. I am satisfied by D.W.2's testimony in support of this view because he furnished the information that P.W.4 was at one time hired as a herd-boy at Matsoseng and that is how he knew D.W.2 so well and his brother Motlatsi. It is clear therefore although he didn't see the accused that often he also knew him well enough not to mistake him for any other person.

I have been referred on behalf of the accused to CRI/T/3//86 R vs Mahase (unreported) by Sir Peter Allen.

But as I have indicated above the identification parade was a superfluous exercise motivated by over-caution on the part of the police because the evidence of P.W.4 was quite sufficient to establish the identity of the accused.

The accused is accordingly convicted of murder as charged.

My assessors agree.

Sentenced to 13 years' imprisonment.

J U D G E.

14th December, 1989.

For Crown : Mr Qhomane

For Defence : Mr Fosa.