CRI/T/11/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

BORATA TELLANE
RABOTOKO SEFALI

Held at Quthing

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 15th day of December, 1989.

The two accused are charged with the crime of murder of Seboka Mokoai, who died on 9th March 1988.

The crown accepted the admissions by the defence of the P.E. depositions of P.W.1 Dr Mumbere, P.W.5 Nkutu Nthebe, P.W.6 No. 6377 Detective Police-woman Petlane and P.W.7 Mapheko Mokoai.

The crown dispensed with leading the evidence of P.W.2 and P.W.8. The defence intimated that it would make use of P.W.2 for purposes of supporting its case.

The post mortem report admitted by the defence shows that according to P.W.1 who performed the examination on the deceased's dead body the cause of death was severe brain

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damage (apoplexy cerebri). The external appearance showed that the occipito parietal region was bruised and that there was about a three inch diameter depression in that region.

P.W.1 formed an impression that the injury could have been caused by use of a blunt instrument applied with great force.

The accused chose not to go into the witness box to advance their side of the story. Of course this was a matter to which they were perfectly entitled if they so wished, since in any case, a case against them is to be proved by the crown throughout because the onus rests on the crown to do so.

In the submissions made by counsel for the crown it was stated by the eye-witnesses that they saw accused 1 belabouring the deceased with a stick. P.W.3's evidence shows that as the deceased went away as he had seen accused 1 pointing a finger at him he saw accused 1 hit the deceased with a stick. At that stage the deceased is said to have been going away. However accused 1 hit the deceased with a stick but that was warded off by the deceased, and when accused 1 attempted a second blow at the deceased, the deceased grabbed hold of that stick and snatched it from his grasp and fetched accused 1 a blow on the buttocks with it.

The uncontroverted evidence of P.W.4 shows that as the stage when he saw the deceased chase accused 1.

P.W.3 says it was accused 1 who went after the deceased as the latter was going away and heard accused 1 hurl insults at the deceased. The deceased changed direction and it is then that accused 2 moved from where he had been standing with P.W.3. Then P.W.3 at that stage heard accused 2 say "that brother of mine can not be beaten that way by that man." Accused 2 took a stone from the ground and hurled it at the deceased but missed him and then at the second attempt he hit the deceased with that

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stone and fell him to the ground. The spot that was thus struck tallies to all intents and purposes with what is described in the doctor's evidence. Then accused 1, it is said, took a stick from the deceased who had fallen and turned the deceased front side up and belaboured him.

It is important to note at this stage that the deceased is said to have had only a manufactured type of walking stick. It was suggested that accused 2 only went there i.e. to the encounter to intervene, and the crown questions this suggestion in this respect that no how could a man go to intervene between people one of whom was going away, and submitted that an intervention could only be called for when actors were still in combat, But in this instance accused 1 had run away, so that the pretext upon which accused 2 set out for the scene was not called for, or justified. Accused 2, it is said, got to the scene and threw a stone at the deceased but missed him, and having taken from the ground another stone which he hurled with great force, he hit the deceased and fell him. It can be inferred, I think with accuracy that accused 1 then used his own stick which had been grabbed from him by the deceased. Accused 1 says that-or rather gathering from the questions put to crown witness by counsel for the accused, it appears that accused 1's contention is that-he was drunk.

The crown conceded that beer had been taken by accused 1 that day. There is also evidence that supports this view. However, the crown called in question whether the intake of liquor had blinded accused 1's perception to such an extent that he would fail to appreciate consequences of his acts. It was pointed out that at that stage the deceased was still alive, and thus, the crown submitted that given the evidence by the crown witnesses, the picture shows that accused 1 was reckless if not callous to have belaboured the deceased in the manner he did with

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that stick, regard being had to the fact that the deceased was posing no danger whatsoever to him. An allusion was made to an incident referred to through questioning by counsel for the accused whereby it was said that the source of the trouble between accused 1 and the deceased was that the deceased was conversing with accused 1 and took umbrage at accused 1 calling him "mofoba monna" that is "my brother in-law man." However, this was not a serious sort of provocation which emanated from accused 1 uttering a word to the deceased who did not seriously pursue him. The crown further submitted that accused 1 participated in this assault which led to the death of the deceased. I have already referred to the size and nature of the wound that was inflicted through the assault as attested to by the medical evidence. This of course gives a clear picture of the instrument which was used to cause the injury. Submitting that the doctrine of common purpose therefore is relevant here, the crown referred to and relied on the case Rex vs Ngedesi 1989(1) S.A. at 657. The crown submitted to the court that in assessing the applicability of this doctrine the court has to consider each of the accused's defence separately and find the role played by an individual accused in the crime. The court raised its qualms about the applicability as relied on by the defence on the case just cited, regard being had to the fact that, in the present case the accused didn't go into the witness box to advance their side of the story, whereas in the case relied on the individual accused had done so.

But the crown relying on the case of Madlala 1969 2.5 A at 637 which shows that an accused person who doesn't give evidence in his own defence does thereby take the risk in the event that a prima facie case has been made against him by the crown submitted that the prima facie case has been established against the accused at this stage and therefore that prima facie evidence led on behalf of the crown becomes at this stage

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conclusive against the accused.

Mr Pitso for the accused in reply stated that the crown has not shown that there was a clear intention to kill. He submitted that the evidence, and this is common cause, shows that accused 1 had taken drink. He submitted further that accused 2 who hurled the stone which hit the deceased on the head, resulting in injury which in the opinion of the doctor is the one which caused death, did not continue doing so, but only hurled that stone once. Mr Pitso submitted that it could at this stage be inferred that accused 2 though having hit the deceased once felt that it was not necessary to continue hitting him; and thus submitted that this serves as an indication that the accused didn't have the necessary intention to kill.

Taking the individual roles of respective accused, one therefore finds that in respect of accused 1 who belaboured the deceased while the latter was down medical evidence shows that his participation in the act didn't cause the death of the deceased, whereas in respect of accused 2 whose action caused the death of the deceased, the fact that he didn't continue hitting him betrays an intention not to murder. On this basis it was submitted on behalf of the accused that at worst the verdict that the court can return against the accused is that of culpable homicide only instead of that of murder.

Taking into account that accused 1 having done all that has been set out above had taken drink, very reluctantly I come to the view that he is guilty only of culpable homicide. With respect to accused 2 relying mainly on the submissions made by his counsel I find it equally true that, and with equal reluctance that he is guilty only of culpable homicide. This verdict is reached regard having been had to the individual participation of the respective accused in the commission of the crime.

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The court takes a very grim view of the offence you committed, my assessors and I agree that even though accused 1's act doesn't appear to have been the one according to the doctor's evidence which caused the death, a stiffer sentence is meritted on his part than in respect of accused 2.

In the circumstances therefore accused 1 is sentenced to 14 years' imprisonment of which 5 are suspended for 3 years on condition that he be not convicted of a crime involving violence to the person of another, committed during the period of the suspension.

Accused 2 is sentenced to 12 years' imprisonment of which 5 are suspended for 3 years on condition that, he be not convicted of a crime of which violence is an element, committed during the period of the suspension.

J U D G E.

15th December, 1989.

For Crown : Mr Sakoane
For Defence : Mr Pitso