

IN THE HIGH COURT OF LESOTHO

In the matter between!

R E X

VS

TOLOANE TOLOANE

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 3rd day of March, 1989

The accused is charged with the murder of one 'Mabakoena Leuta on the 2nd November, 1987 at ha Toloane in the district of Maseru. He pleaded not guilty to the charge.

The defence admitted as evidence before this Court the depositions at the preparatory examination of Maqhomane Leuta (P.W.5) and 'Matlotliso Leuta (P.W.6) who are both the relatives of the deceased. Their evidence was to the effect that they identified the corpse of 'Mabakoena Leuta (deceased) to the doctor who performed the post-mortem examination.

The deposition of Dr. M. Mans of Scott Hospital at MOrija was also admitted by the defence. Her evidence was to the effect

/that on.....

that on the 9th November, 1987 she examined the corpse of the deceased and she formed the opinion that death was due to subdural brain haemorrhage which caused damage to the brain. She found bruises on the face, arms and shoulders. She formed the opinion that the injuries could have been caused by any blunt object.

The first witness called by the Crown in this Court is 'Mateboho Mosehle who testified that she resides in the village of Sekoala. The deceased was her friend and on the 30th October, 1987 she and the deceased went to Thaba-Bosju to attend a funeral. They came back on the 1st November, 1987 and on their arrival in the village they first called at the home of the deceased where deceased left her bag. They then went to her (witness's) place because the deceased had left her children in the care of their grandmother whose home is near her (witness's) home. The deceased intended to collect her children from their grandmother's place; however before she collected the children she went to her (witness's) house where they had a meal. It was at about 8.00 p.m.

While they were eating the accused person arrived. When he entered into the house he did not even greet them but asked the deceased as to what put her there. She explained that she was eating and that after that she would fetch her children from their grandmother's place. The accused ordered that they should go. When she said she was still eating the accused went out of the house. 'Mateboho Mosehle says that the accused appeared to be unhappy. A short while after he had gone out she went out to find out what he was doing outside. She found him behind the house where he was

/passing water.....

passing water. When he came back the deceased was already waiting for him at the forecourt. When he came to her he said "let's go". They left and that was the last time she saw them.

'Mateboho told the Court that the accused and deceased were lovers and that she had known of their relationship about two months before the deceased was killed. She stated that although the accused was not her friend they were on good terms and never had any quarrel. As far as she knew the deceased was accused's only lover. On the night in question she and deceased had not taken any liquor. When it was put to her that the accused never went to her home that evening, she said he did.

The second Crown witness was the accused's own mother, 'Maseshophe Toloane. Her evidence was that on the night of the 2nd November, 1987 the accused arrived at her house and knocked at the door. She opened the door for him and immediately he entered he said he had killed the deceased. When she asked why he had killed her, he said she was his lover. 'Maseshophe Toloane told the Court that she did not ask him many questions because she was frightened, she, however, managed to ask him where he had left her and he said "down there". He was crying as he told her all these things.

She called her neighbour, Mrs Namanyane and made a report to her. Later the chief came and a report was made to him as well.

/In cross-.....

In cross-examination 'Maseshophe testified that she has very cordial relations with the accused and that his wife left him a long time ago. She said that her husband died a very long time ago and as a result of that she went to Kimberly in the Republic of South Africa and worked there from 1968 and returned home in 1972. On arrival at home she learned for the first time that during her absence the accused had gone to an initiation school without her consent. She denied that as a christian she felt so bad about it that she never had anything to do with the accused. When it was put to her that the accused never came to her house and told her that he killed the deceased. She said he did.

Detective Sergeant Monyane testified that on the 2nd November, 1987 he received a telephone call from Scott Hospital; as a result of that call he went to Scott Hospital where he was shown the dead body of the deceased. He examined it and found that there was blood coming out of the nostrils and through the mouth; the face, head and stomach were swollen. After examining the dead body he went back to his office and found the accused who reported that he had fought with the deceased and that she had sustained injuries. When asked what he had used to cause the injuries, he said he used the gumboots he was then wearing. Sergeant Monyane says that he seized the gumboots as exhibits but they were subsequently released to the accused by mistake when he had gone out on patrol. He denied that the accused was arrested in his village but that he surrendered himself to the police at the charge office.

The fourth Crown witness is Daniel Lekarapa Toloane. He is the uncle of accused. His evidence is to the effect that the accused

/came to his.....

came to his home on the night of the 2nd November, 1987 and reported to him that he had killed the deceased. He said he was chastising her and he borrowed a wheelbarrow so that he could carry her home. Instead of lending him a wheelbarrow he said they should go to accused's parent's home where they found his mother. Eventually the accused led them to a spot outside the village and showed them the deceased. She was still alive but was breathing with great difficulty and her whole body was swollen.

Daniel said that one Azael Namanyane (P.W.5) returned to the village and brought his vehicle. The deceased was taken to hospital. Daniel confirmed that he was amongst the people who were led to where the deceased was found and that he conveyed her to the hospital in his vehicle.

The defence of the accused is a complete denial of the evidence of all the Crown witnesses. He testified that on the night in question he attended a party in the village of Ha Sekoala. He arrived there at about 6.00 p.m. and drank four longtom cans of beer before leaving for his home at about 8.00 p.m. He stays alone in rented house. He went to bed at about 8.00 p.m. and never went anywhere during the night. He denies that he went to the home of P.W.1 and suggests that she falsely implicates him because she is jealous. The reason why she is jealous is that both P.W.1 and the deceased were his lovers.

He denied that he ever went to his mother's place and confessed that he had killed the deceased. He says that his mother falsely implicates him because their relations are not cordial.

/She hates.....

She hates him because he went to an initiation school without her permission and that jeopardised her position in her church. As far as his uncle's evidence is concerned he does not know why he implicates him falsely because he has very cordial relations with him. The same applies to Azael Namanyane because he has never quarreled with him.

The summary of the evidence against the accused is that on the day in question he fetched the deceased from 'Mateboho's place and appeared to be unhappy when he ordered her to go with him. During the same night he awoke his mother and his uncle and informed them that he had killed the deceased. He later led his uncle and Azael Namanyane to the spot where the deceased was found. She had very serious injuries and was breathing with difficulty. The accused left them at the scene of the crime and said he was going to fetch money to pay for deceased's hospital fees. He never came back till the deceased was taken to hospital.

At about 9.00 a.m. he surrendered himself to the police and said that he had fought with the deceased.

I observed the Crown witnesses as they gave their evidence and they impressed me as being truthful witnesses who had no apparent reason to implicate the accused falsely. He is being implicated by his own mother and he alleges that they are not on good terms. This allegation was denied by his mother and I have no reason to disbelieve her. It is common cause that when the accused went to the initiation school his mother was working in Kimberly. She

/heard for.....

She heard for the first time when she returned to her home that the accused had been to an initiation school. There is no evidence that she was excommunicated because of that; even if she was excommunicated the punishment would not be a permanent one.

The accused is again implicated by his own paternal uncle with whom he has very cordial relations. He impressed me as being a truthful witness who would not enter into a conspiracy to falsely incriminate his nephew with whom he had such cordial relations.

The accused was a very poor and unimpressive witness who was only prepared to deny everything said by the Crown witnesses. His alibi was not even put to the Crown witnesses during cross-examination. We heard for the first time when he went into the witness box and testified that he was at Sekoala's from about 6.00 p.m. to about 8.00 p.m. He apparently left Sekoala's village, in which 'Mateboho lives, at about the same time referred to by 'Mateboho in her evidence. She said it was at about 8.00 p.m. when the accused and the deceased left her place. The so-called alibi is not an alibi at all because at the relevant time the accused was in the same village where the deceased was.

He stated that from Sekoala's he went to his home and remained there for the whole night. This is not true because during the same night he went to the homes of his mother and uncle and reported to them that he had killed the deceased. This statement was made freely and voluntarily by the accused who was in his sound and sober senses. The mere fact that he was crying when he made the admission cannot affect its admissibility.

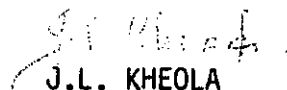
/The evidence.....

The evidence against the accused is overwhelming and his alibi cannot reasonably be true. I have formed the opinion that he killed the deceased.

The next question is whether he had the requisite intention for murder. He kicked or hit the deceased with a blunt object so savagely that when she was found at the scene of the crime her face, arms and head were swollen. The force he applied when he inflicted the injuries was so much that it caused a subdural haemorrhage. I am of the opinion that the accused subjectively foresaw the possibility of his act causing death but was reckless of such result.

In the result the accused is found guilty of murder as charged.

My assessors agree.


J.L. KHEOLA
JUDGE

3rd March, 1989.

EXTENUATING CIRCUMSTANCES

The fact that the conviction in this case is arrived at on the basis of dolus eventualis may be taken into account as extenuation when considered with other factors (Lefu Malata and another v. The King, C. of A (CRI) 3 of 1986 dated 13th October, 1987 (unreported)).

The second factor to be taken into account is that of intoxication. There is no evidence that the accused was drunk on the day in question, but he gave evidence (which was not controverted) that he drank four longtom cans of beer while he was at Sekoala's during the period from 6.00 p.m. to 8.00 p.m. I am of the opinion that the quantity of liquor he took was substantial and must have affected his mind to some extent and that his moral blameworthiness is less than that of a completely sober person.

I come to the conclusion that there are extenuating circumstances and the verdict is that the accused is guilty of murder with extenuating circumstances.

SENTENCE: In passing sentence I took into account that the accused is a first offender but the offence with which he charged and of which he has been convicted is a very serious one. In order to reform him and to deter others from committing similar offence, a sentence of imprisonment for a substantial period is necessary. The accused has shown no repentance or remorse.

/In the result.....

In the result the accused is sentenced to eight (8) years' imprisonment.


J.L. KHEOLA
JUDGE

3rd March, 1989.

For the accused - Mr. Pitso
For the Crown - Miss Moruthoane.