CRI/T/17/88

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

RETHABILE PHEPHENG

Held at Quthing

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 8th day of March, 1989.

Accused 1 Mathai Lethoko who was jointly tried with accused who was accused 2 in the preparatory examination was discharged at the completion of that examination because no case was disclosed in the evidence of witnesses who testified before the court below.

The accused Rethabile Phepheng faces the charge of murder in which it is alleged that on 28th February 1987 at a place called Ha Matsepe in the Mafeteng district he unlawfully and intentionally killed Lekhotla Maoela. Accused pleaded not guilty.

The depositions of P.W.3 Mosenyehi Lethoko, P.W.5 Molelekoa Makhele and P.W.7 Staff Sergeant Posholi at the preparatory examination were admitted on behalf of the accused. These have become part of the instant proceedings.

P.W.3 had testified in the court below that he knew accused and that on 28th February 1987 he met accused and Mathai Lethoko at this witness's home at dusk.

/Accused

Accused informed P.W.3 that he had assaulted a person and already killed him. Accused did not tell P.W.3 why and where he had assaulted that person.

P.W.5 Mololekoa' Makhele's evidence was to the effect that deceased was his cousin. He identified deceased's body before the doctor who performed the autopsy on deceased. It was on 6th March when this witness observed five open wounds on deceased. P.W.5 observed one wound below the left breast, another at the left kidney and three were behind the left shoulder. I fail to see how these wounds as enumerated could number only the figure five.

Accused in his evidence referred to the wound on the neck one on the breast and another in the kidney region. He made reference to the wound in the kidney region despite that it had been said earlier from the bar by his counsel that he would deny any knowledge of the wound in the kidney region. Accused's explanation of what instruction he had given his counsel regarding this wound escapes me for lack of coherence or clarity.

P.W.7 Staff Sergeant Posholi told the court below that he went to Motse Mocha where he saw the deceased's body which had four open wounds. One was at the neck, another on the abdomen and the last one on the waist. Again it puzzles me how the toting up of these wounds should equal four. I may just make an observation that the original manuscript refers to another wound between the shoulders. But the evidence admitted is not as appears in the manuscript but in the typed script, and that makes a big difference which could only be put right along with other glaringly incomprehensible and inconsistent statements by the magistrate putting questions to witnesses for clarification if she paid serious attention to the state of the record.

The medical evidence is also very sketchy as to the number of open wounds for it only refers to what are referred to as several stab wounds on the body. However in regard to the doctor's observations relating to

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external appearances his notes refer to stab wounds sited in four regions. The first was on right pectoral ridge, the second was situated low in the neck, the third was between shoulder blades and the fourth was in the kidney area. Death is said to have resulted from bleeding. It is thus the unfortunate result of delays in bringing cases to trial that even as early as when this matter was dealt with in the Court below the doctor had already left this country for good. Consequently his findings which were reduced to writing in a sketchy fashion were handed in and admitted in terms of section 223(7) of our C. P. & E. both in that court and the present.

This Court heard the oral evidence of P.W.4 'Mathabang Matsepe who said she knew accused since the latter's boyhood for he grew up where this witness had occasion to see him constantly though the two did not stay in the same village. She further testified that accused's grandmother is her own aunt.

On the day in question P.W.4 had gone to draw water from a tap when her attention was drawn to an event taking place some fifty or so paces away. Thereupon she saw accused stab deceased with a knife. She saw accused raise his hand and stab deceased with it on the chest. Deceased staggered. The sequence of events is rather muddled for this witness made reference to an occasion when after being stabbed deceased tried to run away but accused chased after him and stabbed him above the breast whereupon deceased staggered but was stabbed again around the breast region following which deceased fell to the ground. This witness raised an alarm and neighbours came and she accompanied them to the scene where deceased was found bleeding profusely. He was no longer winking. His eyes had turned in the careless abandon of death. Therefore P.W.4 concluded deceased had died.

As for accused, P.W.4 testified he was no longer at the scene. His mother arrived though. It is P.W.4's testimony that accused also arrived whereupon his mother

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questioned him about the incident in response to which accused was heard to say deceased had died for his sins. P.W.4 said she did not see deceased armed with anything. She was adamant that at the distance she was when first her attention was drawn to the scene she saw that accused was holding a knife. I heard P.W.1's evidence on this aspect of the matter. It is to be observed that P.W.1 Tsohle Masupha a boy of 14 years of age said he was next to P.W.4 near the tap when he also saw accused stab deceased with a knife. Though initially he too had said he had seen this knife it was a mark of his reliability that he admitted that because he saw this shiny object wielded by accused and repeatedly plunged in the direction of deceased's body he thought it was a knife. He satisfactorily testified that at the tap where he was not far from P.W.4 who also testified she was at that tap the scene was between hundred and hundred and fifty paces away. On this issue of the distance I find that P.W.1's evidence is preferrable and therefore would accept it and reject P.W.4's unsatisfactory evidence which was elicited with a good deal of difficulty and great taxation on the Court's patience. I can only agree with Mr. Moorosi's contention that it was only after P.W.4 saw this knife at close quarters when she moved to the scene that she concluded that the shiny thing she had seen earlier from the tap where she was, being wielded a great distance away was in fact a knife. No way could she have seen at that distance that this was a knife before later getting an opportunity of seeing it at close quarters near where deceased was lying and at the time she and others were scared away with it by accused. On all other material aspects where this witness is even corroborated by P.W.1 there is no reason why she should not be believed especially because she testified that she and accused are related and no suggestion has been put forward why she should implicate accused falsely. The only criticism against her is that as with other witnesses of her standard of education she had great difficulty in estimating distances which separated participants from objects and witnesses in the scene.

/Because

Because accused does not deny having inflicted no less than three wounds the question of the type of blanket he was wearing or its colour drifts to the background.

The evidence of P.W.1 makes a very clear reading indeed. He said he was in the vicinity of the top area playing football with other boys when he saw three people running downward from a rise and he thought they were playing as they were chasing each other. At that distance of between 100 to 130 paces away from him P.W.1 could observe by their manner of dress that accused and his companion Mathai were chasing deceased who was wearing a black jacket and a black pair of trousers also having a black bag slung over his shoulder.

As accused was chasing deceased the latter jumped clear of a fence ahead of him while accused's blanket got caught by the barbs of the wire constituting the fence. The chase continued until the participants in it fell out of this witness's view. After 20 minutes they were seen retracing their steps but this time walking following the deceased who arrived first at a clearing where he was later joined by the two pursuers. The witness said walking ahead of his pursuers deceased was about seventy paces away from them.

It was while thus walking that P.W.1 saw accused staggering (This witness demonstrated and it became clear to me that this witness understood well the meaning of staggering for in his demonstration he moved from side to side and tottered as if going to fall.)

Deceased is said to have been standing by and doing nothing when this witness's attention was alerted to the scene where he saw accused stab deceased repeatedly with a knife. Unfortunately this knife has not beeen produced before this Court though it had been at P.E. I need hardly emphasise the importance of making exhibits available to the Court during trial as indeed disputes naturally arise as to the size and length of the blade of the knife

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and related questions such as whether depending on its size a knife could be discernible as such at certain distances away from the observer.

Later P.W.1 observed deceased already fallen on the ground though he did not see him fall save that he was staggering when thus being stabbed. This witness stood the cross examination well and therefore his evidence is worthy of much credit. As for accused's evidence save that he does not deny having stabbed the deceased it sought to bring new things which were never canvassed during cross examination of witnesses who gave oral evidence. With regard to a new issue of veiled defence of self-defence raised by accused his counsel thought better of pursuing it hence I need not deal with it except to conclude that accused was obviously bent on deceiving the Court when he raised it.

Accused though contending that he did not hand the knife to P.W.6 Police Woman Thamae nonetheless led her to a place where credible evidence shows he picked the knife i.e. the okapi one with a number of stars from a sand heap at Motse Mocha and handed it to her. Despite that accused would like us to believe that he had at the time a fresh injury sustained when deceased delivered a blow with a knife which accused parried, he did not draw this attention to the incident when he alleges he drew this witness's attention to that injury in the presence of this witness.

P.W.6 denied that she is the one who picked up the knife. Indeed it would be a matter to be wondered at how she would have known that the knife answering accused's own description of his was there. As this witness was shown not to have had any interest in fabricating against accused I admit her evidence and reject accused's on this aspect of the matter.

What is clear and what was not seriously challenged by the Crown was that accused had taken beer. P.W.1 said he was staggering. Accused said he had taken pineaple beer but was not so drunk as not to know his acts. In fact he

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blames the deceased for them as, for the first time we learnt when he was in the witness box that he had caught deceased having sex with his wife in the forest some two years previously. He sought to make us believe that the fight was precipitated on the day in question by deceased jeering at accused that

> "that prostitute of yours over whom you always fought me is married by someone at Matsaneng."

It is incredible though that a man who was guilty of adultery with another's wife and who was caught red handed and consequently ran away and who naturally would have sought never to come face to face with accused should when occasion presents itself for their meeting make so bold as to utter the words accused referred to. Furthermore accused seems to have done nothing concerning the adultery complained of. He never reported this to his chief. He says he reported it to his in-laws. But one would have expected him to have said it to his mother when she made inquiries about the fatal attack on deceased at the scene. But this would not be because accused denied that his mother was ever at the scene nor that on being asked by her about this episode he said deceased had died for his sins.

In as much as accused's attempt at suggesting that he fought in self-defence amounted to a mere red herring across the trail and because he could not on a balance of probabilities persuade the Court to the view that in fact he was defending himself I find that the evidence of P.W.1 does pass muster in that when being stabbed deceased was just standing and swaying from side to side in response to each plunge with a knife that was being wielded by accused. The defence of self defence is further flawed by the existence of the two wounds found at the back of deceased.

In App. No. 21/85 Zunku vs. The Queen (unreported) at page 6 Maisels P. sitting in the Swaziland Court of Appeal quoted with approval the words of Lord Devlin

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in Broadhurst vs. Rex 1964 AC. 441 at 457 that save in one respect an accused who gives false evidence is in the same position as one who gives none at all and that in reaching a conclusion in a case where the jury can make two inferences the fact that accused has given false evidence serves as a factor in strengthening an inference of guilt. Of course the onus rests on the Crown throughout to prove its case beyond reasonable doubt.

Even as of now accused failed to illustrate how this fight started. I am of the firm view that his version fails to qualify for acceptance even if one is to have regard to the authority that accused does not have to convince the Court of the truthfulness of his story as long as it is reasonably possibly true, for this particular story fails to meet that minimum standard of acceptability.

In Phaloane vs Rex 1981(2) LL.R at 246 Maisels P. as he then was observed that

> "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 due allowances for certain latitute 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."

In Mohlalisi and Others vs Rex 1981(2) LL.R at 394 Schutz J.A. as he then was while treating of examination of the issue whether the verdict of murder was correctly arrived at, observed that

> "It is necessary in addition to establish that the accused ought as a reasonable man to have foreseen the possibility of death."

See S. vs. Mini 1963(3) SA. 188 at 192.

The issues involved in this case may be highlighted by reference to South African Law of Evidence by Hoffmann

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and Zeffertt 3rd Ed. at 409 where it is said

> "..... no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

But Lord Denning in reference to the Criminal standard is reported as having said

> "It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so great against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence (of course it's possible but not in the least probable), the case is proved beyond reasonable doubt, but nothing short of that will suffice."

See Miller vs Minister of Pensions (1947) 2 ALL E.R. at 373. I am not impressed with the argument that because accused has not damaged any vital organ and that because deceased died from mere bleeding which if it had been stopped would result in deceased remaining alive makes accused's case less reprehensible. There is nothing to suggest that in inflicting injuries he was careful not to damage vital organs. It in fact can be inferred that it was by accident that he did not inflict injuries on any of them. The fact that his knife blows were inflicted in the general portion of deceased's upper body is enough to show that he appreciated that inflicting injuries at that portion of the body might result in serious injury or death. In any event I cannot see any difference between harming a vital organ and severing a vessel which carries blood to the vital organs in order to keep them going. To that extent such a vessel appears to me to be equally vital.

I accordingly rule that the Crown has proved the case beyond reasonable doubt against the accused and I therefore

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find him guilty as charged.

My assessors agree.

J U D G E.

8th March, 1989.

ON EXTENUATION

That the intent proved is legal intent as opposed to direct intent was advanced as extenuating the accused's moral blameworthiness.

Further that there was proof of liquor having been consumed by accused no matter the degree of intoxication, requires court to find that intoxication was involved.

Having considered the above submission the Court is satisfied that extenuating circumstances do exist.

Court having been addressed in mitigation of sentence where accused's counsel incorporated factors advanced in the earlier argument that resulted in the finding that there are extenuating circumstances in this case accepts that accused is a first offender. This in itself serves to mitigate sentence. I have also learnt that accused has been in custody since February 1987 which is two years ago.

However the court does not take kindly to the use of a knife. It is appalling that each time a man picks a quarrel with another he resorts to the use of a knife and wields it with fatal consequences all at the drop of a hat. Your relentless attack with a knife against a defenceless man cannot entitle you to benign treatment by this Court.

The society is entitled to protection against this indiscrimate taking of human life for the flimsiest of reasons. Sentence to be imposed should be such as would make person of accused's ilk to realise that the game is not worth the candle. Positive demonstration has to be made that human life is inviolable and cannot be taken away for frivolous reasons.

Consequently the minimum sentence to be imposed account having been taken of the arguments raised in mitigation

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is of ten years' imprisonment.

My assessors agree.

J U D G E.

8th March, 1989.

For Crown : Mr. Thetsane
For Defence : Mr. Moorosi.