CRI/T/37/88

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MOLAHLEHI RAMATLA

Held at Quthing

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 9th day of March, 1989.

The accused Molahlehi Ramatla pleaded not guilty to a charge of murder wherein it is alleged by the crown that on 1st February, 1987 he unlawfully and intentionally killed Salemina Monyake at or near Ha Setenane in the district of Mafeteng.

With the exception of P.W.7 Detective Trooper Ntsapi's deposition the depositions of P.W.1 'Matiisetso Lepoqo through P.W.11 'Mamatleoa Moeti at the preparatory examination were admitted on accused's behalf by his counsel and these admissions were accepted by the Crown. The admitted depositions were recorded and made part of proceedings in this trial.

The only evidence led by the Crown was that of P.W.12 Nthabeleng Lepoqo and that of P.W.7 No. 3676 Trooper Ntsapi.

P.W.1 'Matiisetso Lepoqo is the daughter of the deceased. Her home is at Ha Kuili where she lives with her own daughter Nthabeleng Lepoqo a girl of 16 years of age who must have been 14 years in February 1987 when

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the incident that forms the subject matter of this trial took place.

On 1st February 1987 the day of the incident P.W.1 and her daughter P.W.12 accompanied the deceased from Ha Kuili where she had paid them some visit and took her part of the way on her return to her own home at Bochabela.

P.W.1 parted company with deceased when they had reached the field of 'Matipi Ramatla. P.W.12 proceeded further along with her grandmother the deceased and parted company with her and returned to Ha Kuili leaving deceased along the path leading to Bochabela. Deceased had a cane stick which she used as a walking stick to steady and support herself. The two broken pieces of this stick were later tendered in evidence by P.W.7 and marked exhibit "1" collectively. There were also handed in two stones marked exhibit "2" collectively.

At the time of her death deceased is reputed to have been aged seventyfour years, but in the opinion of P.W.9 Dr. J.B. Prempeh who performed the post mortem on her body she could have been seventy years old. See Annexure "A" the post mortem report. P.W.9 also made an observation that deceased was very fat.

On the day in question P.W.2 Samuel Moeti while looking after his horses noticed two people engaged in a fight some one and half miles away from where he was. While still his attention was anchored on this spectacle he saw one of these two people running away while the other one was on the ground.

This witness took a horse and followed the person who was running away. P.W.2 failed to find him because that man had run into a field. P.W.2 then raised an alarm but Lekhooa and some boys who responded to this alarm could not find this man who had fled. Thereupon P.W.2 headed back for the place where the other person was lying, and was joined by P.W.8 Tlakofa Shabe to that place.

On arrival they found deceased badly injured and

/bleeding

bleeding from the head. Deceased had laid face down. Next to her was a broken stick i.e. Ex. "1". Deceased was already dead when found by these people at the scene. P.W.2 left P.W.8 watching over the body and made for the chief's place to report his discovery.

The chief in turn raised an alarm which was responded to by many people who went to the scene and were ordered to keep watch over the dead body overnight till the following day when police came and collected it conveying it to the mortuary. P.W.12 testified that Bochabela is far away from Ha Kuili. Thus when she reached Noka-Ntso a river separating these two places she returned home while her stout and aged grandmother waddled along in the opposite direction plodding her weary way to Bochabela with the support of her walking stick.

When P.W.12 reached a place called Litsilo some three hundred paces away from the spot where she broke company with deceased, she saw accused sitting outside her path some hundred paces away. For all it is worth when this portion of her testimony was adduced accused shouted his objection to it saying "she is lying." I have no doubt that having been seated in court during cross examination in another case wherein the court repeatedly asked the accused in question why he could have let adverse testimony adduced by the crown pass in silence and only hope to refute it when his turn to give evidence came, accused thought to seize his opportunity in this way, whereas the proper manner I had in mind was to put his challenge through his counsel who is his mouth piece.

P.W.12 testified that she observed that accused was wearing blue jeans. It did not register in her mind what, apart from these jeans, accused was wearing. It did not cross her mind that she should observe if he was wearing a shirt. Apparently there was nothing fascinating about the accused for the young girl to feast her eyes on him with any amount of concentration.

/Prior

Prior to this occasion P.W.12 who is a regular church-goer had seen accused wearing a blue shirt and blue pair of jeans at church earlier that day. Apart from this accused is seen by P.W.12 on the rare occasions when he happens to come to church as he and P.W.12 attend the same church. Furthermore she some times sees him when he and she happen to be at the cafe together where she does her shopping for goods sold there. Otherwise because accused's home, though being in the same village as hers, is further away from it, P.W.12 does not meet accused often. However she has known him for a long time. In fact this is her eighth year of her knowing him.

After parting with her grandmother P.W.12 went home and thereafter went to the village spring to draw some water. This was at about 2.00 p.m. At the spring she was in the company of many people including Matipi, Ntlalane and others.

While P.W.12 was at this spring she saw accused running past her company some thirty to fourty paces away chased by P.W.2 Samuel who was on horseback. But as the horse on which P.W.2 was riding could not negotiate the steep bank of a donga that separated him from the accused a good deal of precious time was wasted by the rider navigating his horse along the length of this donga trying to look for an access to it that would lead to its other side. Consequently accused beat him to a field under dense and tall mealie plants whose stalks-measuring about two metres high had already shot their tasselled flowers. In a brace of shakes he disappeared into that field.

As at accused's entrance into the field of the lush mealie plants Samuel and he were about one hundred and fifty to two hundred paces apart.

When thus fleeing accused was wearing his blue jeans but no longer his shirt for then he had folded and carried it in his hand. The field was about two hundred and fifty paces away from the spring where P.W.12 and her company were.

/P.W.2

P.W.2 asked Lekhooa who that person was who got into the field. Lekhooa replied that he did not know. Lekhooa who was tending his sheep was some thirty to forty paces away from P.W.12 when thus being questioned by P.W.2. Lekhooa was with Mosiuoa Ramatla. Thereupon Lekhooa headed for the maize field, came back to give a report to Mosiuoa. By then P.W.2 had already left.

P.W.12 drew water and went home. The following day she learnt when about to go to school that deceased had died. This was before 7.30 a.m. because P.W.12 usually starts for her school at 7.30 a.m. in order to be there at 8.00 a.m. when school starts.

During the course of the day P.W.12 was approached by P.W.7 Trooper Ntsapi to whom she related factors surrounding the events she had witnessed the previous day. As a result of her information to P.W.7 the two left for accused's parental home where they found accused's mother only at about 9.00 a.m. Accused was not present.

P.W.12 testified that she did not know why P.W.2 was chasing accused. Accused and Lekhooa are cousins for their fathers are brothers. P.W.12 testified that when she parted with her grandmother the latter was holding a stick and carrying a bag whose whereabouts are to this witness unknown. The stick which deceased was holding was not broken when P.W.12 last saw it when deceased was hobbling along with its aid.

Under cross examination P.W.12 stated that when she saw accused at the P.E. he was not in the box but was sitting on a bench. The court takes judicial notice of the fact that some court rooms do not have the conventional docks or boxes to which accused persons are confined.

This witness stated that accused was not truthful if it was his case that P.W.12 did not see him hundred paces away from her path after parting with deceased three hundred paces back.

P.W.12 did not personally get to the scene where

/deceased

where deceased was, but was subsequently shown the spot on the day of deceased's funeral. This spot is an additional 30 paces beyond the place where P.W.12 and deceased parted; and it is above a donga. It would appear from this that P.W.12 and deceased parted inside this donga.

P.W.12 told the court she learnt of the fact that accused was under arrest when she gave her evidence at P.E. She denied the suggestion that she formed an opinion later, when she learnt that accused was under arrest that accused must have been the person she had seen being chased by a man on horseback.

She denied that she was tempted to adopt this attitude because if she didn't she would live with the uncomfortable feeling that she is the only one who does not know what everybody knows i.e. that she feared she would be looked upon as the odd man out.

She emphatically stated that she saw accused when the latter was fleeing and denied the suggestion that whoever it was she saw fleeing from Samuel she did not know.

The trend of this contention was buttressed by putting to P.W.12 the fact that even though she was aware that Lekhooa perhaps because of ignorance regarding P.W.2's quest failed to be of service to him, she nonetheless did not volunteer her own knowledge which was relevant. To this she replied that Samuel was too far already. But she was in a cleft stick when the court drew her attention to the fact that she should say why Samuel could suddenly appear to be too far from her to hear her yet she was not too far to hear the words exchanged between Samuel and Lekhooa. She thus was honest enough to say nothing could have prevented her from volunteering her information.

However the question remains: Was it her business to intrude upon a conversation engaged in by two people? Further more it would appear she had some personal

/qualms

qualms about furnishing this information as the question put to her and the answer thereto will illustrate as follows:

"Why didn't you volunteer the knowledge that you had - ?
Because I didn't know why he was being chased."

In any event under re-examination she was neatly steered clear of the path of the storm by the re-examiner eliciting from her the relevant answer that Samuel did not ask her who the man she saw fleeing was.

To the observation that she never imparted her knowledge to anybody in her village till giving evidence at P.E. she said she told her mother when she (P.W.12) came home.

I think the relevance of the next question put to this witness is neither here nor there:

"Your mother gave evidence at P.E. She could have told that court your story - ?

She went alone to Mafeteng".

It is a known fact that each witness has to furnish the Court with its own personal knowledge of facts based on first hand information. Otherwise the information becomes hearsay which is inadmissible. Moreover no party is entitled to direct the other how to conduct its own case.

P.W.7's evidence corroborates P.W.12's testimony that the mealie plants in the particular field where accused is said to have been seen running into bore very tall mealie stalks such that even P.W.7 a policeman of 1½ metres height could not be visible once he got into that field.

It was P.W.7's further evidence that he had seen shoe prints in that field leading from entry point to the exit point because it was damp in the soil as it was in autumn. But the shoe prints were lost beyond the field

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as that was a grassy waste land on the other side of which was a road close by. P.W.7 testified that he is a police-man of 9½ years' standing and that his entire period of service was spent in the investigation of crimes. He is the investigating officer in this case. He knows the accused. He arrested him in connection with this case. He first met him during the investigation of this matter.

Having received a report from Chief Peete Setenane at 7 a.m. of the previous evening P.W.7 set out for this chief's area on 2nd February 1987. He was shown a dead body of a woman. This laid between the villages Boehabela and Ha Kuili. P.W.7 examined the dead body and observed seven wounds on the head. Next to the body he found two stones and a broken cane stick in two pieces. On both stones the special thing that he observed was fresh blood. He also observed blood that was on the ground next to the body. After completing his examination of the area at the scene P.W.7 conveyed the body to the mortuary and kept the exhibits which he handed in as earlier indicated.

Then having left the body there P.W.7 came to Ha Kuili where as earlier stated he met P.W.12. The result of their meeting set P.W.7 on accused's tracks till he went as far as Matelile where he sounded a clarion call for accused's capture. His efforts were not long in being rewarded because on the following day i.e. 3rd February 1987 accused was brought to P.W.7's office by Police-Woman Bereng. Accused was cautioned and charged. In fact he had been given in charge by P.W.3 Pitikoe Sekheke who testified at preparatory examination that accused was wearing a white shirt that had blood spots on it when taken by P.W.3 from Tsoeu Nkoaneng's home to Matelile police station.

P.W.7 testified that when accused was brought before him he was wearing blue jeans and black shoes. Accused gave an explanation in regard to exhibits "1" and "2" to this witness.

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Under cross-examination this witness said the blood he found on the stones was fresh and not dry for it could stick on to a person's finger if touched with it. When found by this witness at the scene deceased was lying two paces along side the path that lies between the fields. This was not a beaten path for it was even grassy.

From the scene one is able to see Bochabela village which is 15 minutes' walk from the scene at a brisk pace. Ha Kuili however is not visible from the scene.

Mr. Sakoane for the crown submitted that from her evidence under cross examination it was clear that P.W.12 knew accused well, and that she couldn't have been mistaken that accused was the person she saw being chased. He referred to the admitted medical evidence which showed that the deceased's body had sustained multiple lacerations of the scalp and minor bruises on the face. That there was contution of the lips and fracture of the skull. Further that there was also subdural haemorrhage. That these last two factors above were the cause of death.

Crown counsel submitted that the medical evidence supports that of witnesses who came early to the scene.

He submitted that in the cross examination of the Crown witnesses it has not been possible to discern what accused's defence was. The crown was led to speculate on whether defence was going to rely on the defence of alibi as this view emanated from the fact that on being cross examined it was put to P.W.12 that accused was putting on a yellow shirt, without saying where he was. Defence merely contended itself with saying accused was wearing this shirt the whole day.

Reference was made to R vs Hlongwane 1959(3) SA. 367 at 370-1 where it is said

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"The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted ..... But it is important to point out that in applying this test, the alibi does not have to be considered in isolation. ..... The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses."

The tenor of the circumstantial evidence led here is that some distance away a man was seen from far fighting with or against deceased and later seen chased by P.W.2 but disappeared. He was however recognised by P.W.12 who didn't know why he was being chased by P.W.2. The reasons for chasing accused were known by P.W.2 who gave them in the admitted P.E. depositions.

By some inexplicable but amazing surroke of coincidence accused is never found at home. The entry point where the shoe prints are observed is consistent with the spot where he was seen disappearing.

With regard to circumstantial evidence based on the authority of R vs Blom 1939 AD. 188 at 202-3 the position is stated as follows:-

"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

Mr. Sakoane submitted that by closing its case without testifying the defence undertook a risk which, if the crown established a prima facie case against the accused, it must bear against him. It was submitted that on the evidence led prima facie case exists against the accused for his identity as the man who committed the crime has been established and thus in absence of anything to the contrary, the evidence adduced by the crown becomes

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conclusive.

With regard to failure to rebut or explain prima facie evidence Hoffmann and Zeffertt in their invaluable book South African Law of Evidence 3rd Ed. at 470-1 say:

> "An accused's failure to testify can be used as a factor against him .... only when at the end of the case for the State, the State has prima facie discharged the onus that rests on it, ... it cannot, therefore be used to supply a deficiency in the case for the State, that is to say, where there is no evidence on which a reasonable man could convict.
>
> The situation is rather different when the evidence against the accused is not direct but circumstantial. If the prosecution has proved suspicious circumstances which the accused, if innocent, could reasonably be expected to answer or explain, his failure to testify will strengthen any unfavourable inferences which can properly be drawn from the prosecution evidence. But this form of reasoning is permissible only when the prosecution case is strong enough to call for an answer. It must be sufficient in itself to justify, in the absence of explanation or answer, the inference of guilt."

It is further stated at 470 that

> "Although evidence does not have to be accepted merely because it is uncontradicted, the court is unlikely to reject evidence which the accused himself has chosen not to deny."

See S. vs. Madlala 1969(2) SA. 637 where against letter "D" is illustrated the position in terms of the proposition laid down by Holmes J.A. that

> "An accused person who elects not to give evidence runs a risk and the fact that his failure to give evidence might be due, not to his complicity in the offence charged, but to his complicity in a subsequent or lesser offence, will not enure to his benefit."

It is accepted that accused bears no onus to state his whereabouts at the time of the crime he is charged with but the crown is entitled to know at an early stage in the trial of the defence's reliance on alibi in order to enable it to move an application for evidence in rebuttal of the alibi.

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It was submitted that in the case such as the present where in common with all murder cases mens rea should be proved beyond reasonable doubt it may be gathered from the vicious injuries found on the body of the deceased. The nature of these injuries, the part of the body where inflicted and the weapon used in inflicting them could also sufficiently supply information necessary to reach the conclusion that the perpetrator was reckless whether death resulted or not. See S vs Mini 1963(3) 188 at 192; letter "g".

With regard to the importance of putting accused's version to the Crown witnesses Maisels P. in Phaloane vs Rex 1981(2) LL.R. 246 said

> "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. ....."

Mr. Moorosi for the defence argued that the crown should prove that noone other than the accused committed the crime charged. He argued that should there be any doubt that accused committed it then he should be given benefit thereof and acquitted.

But in R. vs. Mlambo 1957(4) SA. 728 at 738 Malan J.A. said

> "An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

I have considered the case that has been advanced on behalf of the defence including the various hypotheses postulated with regard to the short distance of only thirty paces travelled by deceased from her parting of ways with P.W.12 to the spot where she was found dead, as

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as compared with the three hundred paces already travelled by this little at the time she saw accused hundred paces away. I have considered the argument that it is questionable that accused should have within half the time made that distance twice, that is 330 paces twice. The conclusion I came to was that this is wanting in substance. The fact that deceased had only progressed 30 paces away from her parting with P.W.12 is neither here nor there because it is not known whether she rested, or relieved nature, in any case it is not reasonable to expect her to move nearly as fast as her grand daughter. In any case the arguments raised around these issues are not based on evidence for there was none to support that deceased continued walking all the time she parted with P.W.12. I have considered the attack levelled at P.W.12's testimony but have come to the view that her evidence was very convincing on the point that knowing accused for upwards of eight years and having met him the number of times she did regard being had to the fact that they live in the same village she could not have been mistaken when she saw accused being chased with a horse by P.W.2.

Furthermore reference to R vs Ndhlovu 1945 AD. 369 at 386 shows that legal authorities disapprove of speculation

> "on possible existence of matters upon which there is no evidence, or the existence of which cannot reasonably be inferred from the evidence.

P.W.12's evidence of accused's identity forms an important link between the man who was seen fighting deceased, leaving her at the scene, being chased by P.W.2 on horse-back, passing near the spring at full flight and being observed by P.W.12 in the process and finally disappearing into a field full of tall mealie crops, and is unshakeable.

Motive for the killing has not been established in this trial. The fact that the bag deceased was last seen carrying disappeared without trace may provide the motive for the killing as robbery but there was no evidence of this.

/However

However in line with Mlambo above at 737 I should express that :

> "Proof of motive for committing a crime is always highly desirable, more especially so where the question of intention is in issue. Failure to furnish absolutely convincing proof thereof, however, does not present an insurmountable obstacle because even if motive is held not to be established there remains the fact that an assault if so grievous a nature was inflicted upon the deceased that death resulted either immediately or in the course of the same (day). If an assault .... is committed upon a person causes death either instanteneously or within a very short time thereafter and no explanation is given of the nature of the assault by the person within whose knowledge it solely lies, a court will be fully justified in drawing the inference that it was of such aggravated nature that the assailant knew or ought to have known that death might result."

I am indisposed to incline to the persuasion that conviction for culpable homicide may result as a verdict among possible other verdicts in this case.

The available evidence before me suffices to lead to the conclusion which is free from "conjecture" that there is no reasonable doubt that accused has committed the crime charged. See Mlambo above at 738 E - F. The killing was both unlawful and intentional.

I accordingly find accused guilty as charged.

My assessors agree.

J U D G E.
9th March, 1989.

EXTENUATION

Accused's father adduced evidence on accused's behalf for purposes of establishing extenuating circumstances if any. The thrust of his evidence was that accused was born in 1971. He further said accused has signs of abnormality manifested by lack of articulation in speech. Mr. Moorosi also in a statement from the bar told the court that he had difficulty in communicating with accused except with accused's father's assistance.

It is regrettable that the Court was never afforded the opportunity to establish for itself this alleged peculiarity of the accused. It will be noted that in a passage devoted to accused's reaction in Court when reference was made to the fact that he was seen by P.W.12 sitting hundred yards away from her path struck me as one of a man who was alert and who knew how to react to a statement that adversely affects him. Furthermore this was a clear indication that he was capable of heeding the Court's advice and abiding by it-hardly the type of behaviour to be expected of a man who has been projected as retarded in anyway. Supidity is a condition that cannot help a man avoid dire consequences of his criminal acts. Furthermore accused when tendering his plea audibly in open court gave no rise to the suspicion that he did not understand the charge.

Your father's evidence as to your age is hearsay and therefore inadmissible. Efforts were made to secure services of a local doctor to help establish your age. His report shows you were over eighteen years of age when you committed this gruesome murder. You were at least twenty one years old.

You therefore cannot be treated in terms of section 297(2) (b) of our C.P. & E. which helps juvenile murderers avoid punishment by hanging.

However on the basis of a Court of Appeal matter of 'Musetsi Thebe v Rex C. of A. (CRI) No. 3 of 84 where a young man not so far beyond 18

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when he committed the offence was sentenced to death by the High Court had the sentence altered on appeal on account of his youth.

Adopting the same attitude I come to the view that your youth is a factor which serves as an extenuating factor albeit a very very tenuous one regard being had to the fact that you killed an innocent old lady who posed no threat to you. She was going about her lawful business of using the path where you waylaid her for no reason at all.

You may note that the Court of Appeal did not in finding extenuating circumstances in Thebe change the law which qualifies you for hanging. You are just lucky.

Sentence : You are sentenced to fifteen years' imprisonment.

My assessors agree.

J U D G E.

9th March, 1989.

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