

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

HESETSELEMANG NTLHOLA

Held at Guthing

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 10th day of March, 1989.

Accused pleaded not guilty to a charge of murder wherein it was alleged that on 1st March, 1988 he intentionally and unlawfully killed his father 'Meselara Ntlhola at Ha Makhabane in the district of Mofale's Hoek.

The preparatory examination depositions of P.W.2 Ntebele Ntlhola, P.W.3 Malehlohonolo Molai, P.W.7 detective trooper Mongali and exhibit "A" the post mortem report of the doctor who did not depose in the Court below but had left the country for good even before the P.E. was conducted, were admitted by the defence and accepted by the Crown.

P.W.2's admitted evidence was that one day in March he went to P.W.5 'Malebohang Lehloenya's cafe. He was asked by D.W.2 Sankana Ntlhola to accompany him with P.W.5 to a spot where the dead body of deceased was found. Deceased was full of blood. Only the following day was P.W.2 able to see that deceased had sustained about seven wounds whose locations he did not remember. The occurrences took place at late dusk. It had been raining

/intermittently

intermittently throughout that day.

P.W.3 'Malehlohonolo 'Molai's testimony is to the effect that on 1st March 1988 accused came to her house and told her that he had had a quarrel with his father and urged P.W.3 to go and see.

P.W.3 proceeded to the scene and found deceased dead. As it was dark he was able to see the blood on deceased's body by making use of a torch which lit up deceased whereupon the blood became visible on his body. P.W.3 did not ask accused why he killed his father because she was frightened and upset. She did not see any wounds though.

P.W.7 a member of the Royal Lesotho Mounted Police Force No. 4918 Detective Trooper Mongali's testimony at P.E. was to the effect that in March 1988 he was stationed at Phamong Police Post in the Mohale's Hoek district. On 1st March he received a report at about 8.20 p.m. whereupon he proceeded to Ha Makhabane the following morning. There he found deceased's body. He found seven punched wounds on the body. These injuries which seemed to have been inflicted with a pointed instrument consisted of

- (i) a wound on the head;
- (ii) one on the nose;
- (iii) one on the chest;
- (iv) one on the left abdomen;
- (v) another on the left shoulder and
- (vi) & (vii) two at the back.

P.W.7 found the exhibit 1 a spear which was displayed before Court. Though witnesses referred to it as a spear this seemed to me to be a dart commonly used by herd boys for killing mice with by piercing them with this type of instrument during the mice hunts. It consists of a reed of roughly five feet length forming its shaft headed by a sharp pointed piece of metal about six inches long. It is on all accounts a very lethal weapon the mere sight of which curdles one's blood.

/Accused

Accused was not present at the scene where the dart was found but it was P.W.7's testimony that accused had given the description of where it would be found.

The post mortem report showed that the body was examined eight days after death had occurred. Death was due to cardiac arrest caused by internal exsanguination and cardiac tamponade and hoemotothorax after an injury caused by a sharp long instrument.

The external appearance revealed several small stab wounds on anterior chest around the 2nd intercostal space on the right and behind the left shoulder around the dorsal chest. There was also a wound below the left eye next to the nasal root.

P.W.5 'Malebohang Lehloenya testified that her home is separated from deceased by a road running between the two. The estimated distance between the two homes is that of about ten paces. She testified that she and deceased are related because of the marriage between deceased's daughter and someone related to P.W.5.

She said she knew accused well. On 1st March 1988 at about dusk she was seated outside her home doing some cooking there and also roasting maize. She was in the company of her daughter P.W.4 'Mammatli 'Mamaqabe.

P.W.5 said she saw accused appear from his father's home. It was not dark because there was moonlight although because it was cloudy the moon was shining through the thin layer of clouds. Accused headed for one of the houses whereupon P.W.5 heard the sound as if something was being severely pounded with the result that each time it was pounded it produced a sound suggesting it was breaking. The sound came from the direction of deceased's home where accused was last seen heading towards before being obscured from view by portions of the fixed structures and buildings erected there.

Then P.W.5 sent for D.W.2. Meantime deceased emerged into view and inquired who was there. Accused replied "it is me." At that time accused was standing near a fire

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place in the forecourt of his father's homestead consisting of a hut and an L-shaped flat-roofed house. Accused seized hold of deceased tackled him expertly, threw him to the ground below the rise of the forecourt. At this time P.W.5 says she was only five paces away from deceased and his assailant.

Accused then hurriedly made for the hut where P.W.6 his brother Pheello aged 18 years had already gone to bed. Accused shouted "Pheello open". Accused went in and came back at deceased who inquired "what's the matter," but was vouchsafed no reply. Thereafter P.W.5 heard deceased ask accused "why do you stab me." At the time deceased and accused were close to each other. P.W.5 was not able to see what actions had aroused deceased's inquiries to accused. Then deceased shouted for P.W.5 asking her to come and indeed "behold a wonder of what my son is doing to me."

P.W.5 fell to the ground; tried to rise but fell again. She pleaded with accused and asked him what his father could possibly have done wrong. At the time accused merely uttered rhetorical questions "what do you say grandmother, what do you say grandmother? Where is that Sankana, he too should come so that I may finish him off like I am finishing off with you."

Accused was wearing a light shirt and a white pair of trousers. In the circumstances he was clearly visible to P.W.5 who saw him pushing his father around. Accused did not have any blanket on.

Accused then said I am shooting you. Whereupon deceased said "finish up my child for you have finished me already." Then accused said as they were standing close to each other "let me have a go at you once more to finish you." They then parted. Deceased came running towards P.W.5's house but in trying to climb up the road embankment he fell never to rise again. P.W.5 got a torch and lit up deceased's face with it and saw that his eyes had turned and worn the glazed gaze of death. Deceased

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was bleeding profusely from his nose, mouth and neck. The bizarre appears around deceased's neck made P.W.5 think that the neck had been cut; whereas the blood from the chest had collected around the neck and on congealing had formed a crusted embossment around the neck.

Villagers came and kept watch over the dead body till the following morning when police after inspecting the scene collected the body and conveyed it to Mohale's Hoek mortuary.

P.W.5 on being asked about Exhibit "2" the dart said she knew that it was kept in the hut together with another one. She said the hut is the same one where he saw accused go hurriedly into only to come in fury at deceased thereafter.

To the question put to P.W.5 that it was raining and dark that night she said it had rained before deceased died. She admitted that it had been bright before the death. She pointed out that though there were clouds they were scattered.

She was adamant that she had witnessed the scuffle that went on between deceased and accused.

She was referred to portions extracted from her statement in the P.E. record showing that she couldn't have seen deceased run or even fall because she had testified in that court that she had heard her daughter P.W.4 relate to her these incidents presumably as and when they took place. She denied this.

She was adamant that she had been roasting maize outside. She repudiated the suggestion that the condition of the weather would not allow her to be cooking and roasting maize outside her house. However the credible evidence of P.W.4 corroborated by P.W.6 who said he had run to report to P.W.5 about the fight shows that indeed P.W.4 and 5 were found by P.W.6 around a fire outside their house engaged in just the type of occupation they had told the court about.

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It would appear that the sound that alarmed P.W.5 was that made by big stones which were used to pound at deceased's door resulting in its breakage and that of the window that P.W.6 told the court about. The policeman also referred to these breakages and also to the stones found near the door in question.

P.W.4 gave a somewhat clearer picture of events than her mother but like a dull and unsophisticated member of her class she seemed to labour to come out with clear answers under cross examination. While she had earlier stated that it wasn't because of her bravery that she and P.W.5 stayed on doing nothing when deceased is alleged to have been asking accused repeatedly whether he was stabbing and killing him, but because the struggle didn't "seem strong at the time" she became confused and started saying deceased was not strong and was in an obvious cleft stick to explain what she meant by this latter version. However she was deftly steered in re-examination by Crown counsel to a more plausible path that it was because accused had asked that all those who usually came to deceased's aid should come in this occasion so that he could kill them too. It is this utterance that made her stop her mother trying to rise from her seat to go and intervene. Otherwise I find that P.W.5's evidence corroborates that of her mother in material respects.

Indeed the most plausible evidence is that of P.W.6 Pheello. He testified that accused is his elder brother and deceased his father. That in the evening in question accused came from his own house a good distance away from his father's homestead. That he was sleeping in the hut. He heard accused go to deceased's house where the latter was sleeping alone. Accused hit the door with force. P.W.6 said accused was very angry and demanding of deceased that should open the door. Deceased replied that he was already in bed. Then accused came to knock at the door of the hut inside where P.W.6 was. After being asked to come in, accused stepped in, lit some light and withdrew the dart from the roof of the hut where it had been stuck aloft

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in the thatching. Accused immediately retraced his steps and proceeded outside growling the words "I had better kill you, now."

P.W.6 didn't know to whom these words were being referred. He rose and dressed up and prepared to go and tell P.W.5 all these events. It was when P.W.6 got outside that he saw deceased run towards P.W.5's house. He saw that deceased seemed to be fleeing from where accused was. P.W.6 followed deceased, saw him try to climb to the top of the road from the steep bottom of its side but fail and fall to the ground. P.W.6 found that deceased had died. P.W.6 said P.W.5 was at her home but that she was one of those who came to see deceased where he had fallen.

There is no contradiction among these witnesses because the fact that P.W.6 says P.W.5 was at her home then does not detract from P.W.5's version that on seeing deceased fall she went to fetch a torch from her house in order to come and light up deceased and see the injuries with the aid of torch light. Regard must also be had to the fact that the distances between the respective homesteads are very short. Taken along with the fact that deceased actually approached P.W.5's home in a run, it is not far fetched to realise that when P.W.5 saw deceased pass her and fall the little delay that P.W.6 incurred before coming out of the hut was enough to enable P.W.5 to have proceeded to her own house without being seen by P.W.6 who found her there where she had gone to collect the torch.

P.W.6 corroborates P.W.5 and 4 that accused was wearing a white pair of trousers and a light shirt.

He further told the court that accused had broken a window and two doors. He said accused had been working in the wool-shearing business before this incident. Deceased too was occupied in this type of engagement. The two had had a quarrel before. That is long before P.W.6's mother's death which occurred in 1986. P.W.6 did not know what the source of that quarrel was but his mother had on that occasion intervened.

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Under cross examination P.W.6 said when proceeding to P.W.5's home he met nobody. That he found P.W.5 cooking outside her home in the company of P.W.4. The exchange of words between accused and deceased gave P.W.6 the impression that they were quarrelling.

During the day P.W.6 never saw deceased come from accused's home. In fact accused only stopped living in the homestead of his father a week or so before the incident. He was adamant that accused had never been expelled from deceased's house where he had been living till shortly before the incident. He denied that accused was wearing a yellow pair of trousers. He further testified that it is not the case that he dislikes accused more than ever before now that he killed his father but that he is hurt for he now hasn't anyone to help him. He said he took some time dressing up before going outside because he did not know who accused was threatening to go and kill. P.W.6 testified that he is illiterate and had never been to school.

Accused testified that he is 33 years old and is the eldest in his family. Further that he never went to school. Notwithstanding that it was never put to P.W.6 that he was not telling the truth in saying he never went to school accused said that of a family of six siblings he is the only one who never went to school.

He proceeded to say he is married but that his wife left for the Republic of South Africa after the quarrel she had with deceased.

Accused went to stay at his own home after he had had a quarrel with deceased. He said they quarrelled over money which deceased wanted from him.

Needless to say this is a completely new thing in these proceedings.

Accused told the court that on the day in question he had had some drinks with deceased and others at P.W.5's cafe. Thereafter they went for another bout of drinks

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at Matlotlo's house.

It was when he was in the company of very many people who were drinking and making a noise in the house of Matlotlo that he heard a distinct voice of someone saying "how come 'Meselara is taking goods from his son's house yet he has expelled him."

Then accused left in order to go and investigate at his house where he found that the door which he had left locked by means of a padlock was no longer locked and that his wallet was lying on the floor emptied of the M45.00 and that M800.00 which he had kept in the pillow case was missing including two of his blankets. He said he made these discoveries with D.W.2.

D.W.2 who is accused's uncle and headman testified that he went with accused to the latter's home after a complaint was made to him by accused. He found that nothing of what accused said gave any suspicion that the place had been robbed.

He said as a matter of habit accused doesn't lock his house. He further said when they got to accused's house accused never pointed out to him that the padlock had been picked and entry forced into that house. He said accused never complained that his M800 went missing from the pillow case nor did he say his blankets were missing from the bedding. In fact he said the bedding appeared to be still intact.

The only money that he heard accused say went missing was about M50.00 but D.W.2 dismissed this complaint from his own mind for he was surprised that anyone could keep that amount of money in an unlocked house. Though he did not believe accused he suggested that he should be confronted with deceased the following day. He indicated that as a chief he had heard deceased say that in a wool-shearing business only a very good worker would approximate M250 in three months. This indeed would tend to belie accused's claim that he earned M200 per week in wool shearing

/occupation.

occupation. In fact D.W.2 said it would be impossible to give credit to any such claim because he knew of an occasion when because accused had no money when arriving from that occupation he borrowed a sheep for slaughter from P.W.5.

D.W.2 said accused was not drunk on the day in question and that he knows him so well that he would tell if he is or is not drunk for in any case when he drinks he makes a good job of this habit leaving no doubt that he has had some drink.

Accused had testified that because he felt hurt when D.W.2 virtually did nothing about his complaint about deceased's behaviour he then went to deceased to get that money by force. He said deceased admitted having taken the money and kept it some place known by accused too.

This was enough to spark the trouble that ended deceased's life. Accused said he never thought that the dart used for killing mice could kill a man. Asked whether he had tried it on to himself to see if his assessment of its lethal potential would hold he said he never tried it. When it was pointed to him that no man of his age and experience could use this weapon on another and expect it not to have lethal consequences he readily conceded.

He had testified that even as he was piercing deceased with this weapon the latter was saying nothing. Further that because it was dark he could not see where the dart was finding its mark.

When it was put to him that because he could not see his mark then the conclusion should hold that he was piercing at random and that he should not make virtue of necessity by claiming that he did not pierce vital organs because it was by sheer accident that he missed them and that it makes no difference that he missed them as the consequences are equally fatal accused was in an obvious

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cleft stick. I am in agreement with the Crown's submission that accused had no lawful excuse for killing his father as the totality of the evidence by crown witnesses is well corroborated on material respects and as to events which occurred in the night in question.

It was never at all clear what the defence was, save that an attempt was made to lay down a historical background leading to the fatal assault on deceased.

There was no direct evidence that accused was suddenly and extremely provoked by deceased. None ever came to the surface that he was acting in self defence.

Much of the precious time was wasted in the cross examination of P.W.5 & 4 because I fail to see what accused's manner of dress would help achieve when he did not deny the act and; in any case his presence and identity would serve cure the defect that his trousers were yellow instead of white or vice versa.

The story that accused tried to put forth was categorically denied by not only the Crown witnesses but his own witnesses. D.W.3 was led to the completion of his evidence in chief before he suddenly remembered that he had heard someone say property was being taken from accused's place by deceased.

Even after remembering this point which was the main thing for which accused called him he was unsatisfactory in his answer to the question whether he was the one who informed accused about it or whether he had been informed by 'Manaha. Having said he himself told accused he turned round and said he had heard that 'Manaha had.

Accused's suspicion that deceased robbed his house was baseless because he usually left his house unlocked clearly indicating he could not have had anything of value in it. D.W.5 was not able to support the so-called discussion he was supposed to have had with accused.

P.W.6 was unshaken in his testimony. Medical evidence

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was valuable as to providing a basis from which intention can be gathered. The weapon is itself an obviously lethal kind of dart that on the mere look of it shows that it is capable of great penetration into the body or flesh for it is sharp-pointed and tapers from the sharp point to a smooth flushing with the handle that thus provides no resistance to further penetration.

Adopting a subjective test to find if accused's attack was initiated by provocation or self-defence or any of the known defences in order to help reduce the crime committed from murder to culpable homicide or even less, the court finds accused's defence wanting in all possible forms of acceptable excuses or legal defences.

It is clear therefore that in using the weapon in a manner that accused did he must have appreciated that it would cause death. If he did not, then in wielding it he must have done so without regard to the consequences that the use of this weapon might bring about. Thus accused must have foreseen that death might result. See S vs Mini 1963(3) SA. 188 at 192. The part of the body on which injuries were savagely inflicted is on the chest, face and back of the upper body.

Although accused had partaken of liquor it is clear from D.W.2's evidence and that of accused himself that he was not so drunk as not to distinguish right from wrong. His own witness says accused was sober. Accused says he was angry.

I have no doubt that the only fitting verdict is that accused is guilty of murder as charged.

J U D G E .

10th March, 1989.

re: EXTENUATION

The Court has been told that accused had pertaken of liquor that day. Although it is not easy to say how much was taken it cannot be denied that he in fact had taken it with the usual consequences that liquor has on the consumer's mind.

I have been asked to consider that judging from the time accused spent at Matlotlo's house drinking from 1 p.m. to sunset he must have taken considerable amount of liquor.

I am told that rightly or wrongly accused believed that deceased had broken into his house. The Court is asked to consider what accused actually felt especially as testified by D.W.2 that when they parted accused said his heart was sore. The fact that accused was hurt is bespoken by his setting out for D.W.2's to lodge a complaint. The Court should judge accused's moral conduct against the background of his illiteracy and the fact that there is an element of disharmony that existed between him and his father.

Having heard the above and having considered that killing one's father is one of the worst types of crime, especially in circumstances which reveal not even the remotest form of excuse I reluctantly find that extenuating circumstance exist. Having heard addresses in mitigation and considered that absence of previous convictions cannot mitigate the heinous nature of this offence I imposed seventeen years' imprisonment.

My assessors agree.

J U D G E.

10th March, 1989.

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