CRI/T/40/87

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

SELELU RAMAJOE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 19th day of April, 1989.

On 10th July 1981 P.W.1 Koenehane Moorosi had organised a (letsema) communal threshing of maize at his field near his village Boinyatso in the Butha-Buthe district.

It is common cause that P.W.1 had invited accused, deceased and many other villagers.

P.W.1 testified that deceased came to this "letsema" before accused did.

Deceased was assigned the duty to distribute beer to the invitees.

P.W.1 said accused arrived very late when the threshing had been finished. Accused maintains that he arrived very early at that place - in fact at 7.00 am. before the work had been completed.

P.W.1 testified that when accused arrived a woman called 'Mapuleng approached the deceased and asked him to give her beer. But deceased said to her that he couldn't give her beer when she had not worked. Accused took exception to this and asked deceased why he should make an issue about food instead of giving it to 'Mapuleng.

/Accused

Accused even before any response was given to his remarks said he could beat up the deceased. Thereupon deceased rose but accused got hold of him and fell him to the ground.

The two were separated. Then accused took out a knife. P.W.1 tried to hold the knife and got cut by it in the process. Accused was apparently relentless and trying to attack deceased once more even after they had been separated.

Thereupon P.W.1 ordered deceased to run home and deceased complied.

Accused followed deceased at a run and the two fell out of P.W.1's view.

A good distance away from P.W.2 Joseph Ramotali observed accused stab deceased with a knife.

It is my impression that P.W.2 did not see the knife and its colour from the two hundred paces he said he observed this second encounter between accused and deceased.

What he is unable to appreciate is that he had seen this knife and observed its colour at the first encounter near the threshing ground, for it being common cause that P.W.2 was also present at the "letsema", it follows nothing at that stage could have prevented him observing the knife with which deceased was being attacked.

In his mind's view P.W.2 is not able to separate the two incidents with regard to the objects he testified he saw being used in one or both of them. He said he saw accused pick up a fist-sized stone and hit deceased with it. It is incredible again that he could have seen the stone being thrown at that distance.

The only reasonable assessment of his "observations" is that he saw the movements of accused followed by

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their effects on deceased and concluded that what accused did when bending must have been to pick up a stone (for according to his testimony there were many stones there) and threw it at deceased and hit him (for he saw deceased being felled).

Likewise because P.W.2 had earlier seen the knife at close range he concluded that the plunging movements executed by accused at deceased must have been with the "brown" knife.

P.W.1 and P.W.2 testified that on arrival at the letsema accused was very drunk.

P.W.3 said on the day in question he saw deceased running towards the village followed in hot pursuit by the accused.

Having heard a noise P.W.3 rushed towards the two who were running towards his house where he had been relaxing.

Before P.W.3 could reach the spot where accused caught up with him accused stabbed deceased with a knife three times. One wound was inflicted in the region behind deceased's shoulder, the other around the kidney region and the third was on the left hand side below the chest.

Because throughout the chase nothing was outside P.W.3's view he testified that he had seen accused throw a stone and hit deceased with it consequent upon which the latter fell on his tracks never to rise again before being stabbed and abandoned by accused there where P.W.3 helped him to his (deceased's) home. Deceased was in a weakened state when thus being led to his own home where he died not too long after arriving.

Ex"A" post mortem report handed in by consent shows that 3 stab wounds were found on the body. It refers to a 2 cm long laceration above right shoulder,

/a 2 cm

a 2 cm long laceration on left back side of the chest and 11 cm long laceration on the upper abdomen. It also refers to a collection of 50 ml. of blood below the diaphragm.

However medical evidence in a sketchy fashion, in relation to the cause of death says "cause of death not found." Mr Klaas basing himself on the admitted evidence of the policeman who said deceased's body was found on a hill raised a possibility that deceased might have been killed by exposure, regard being had to the view that medical evidence showing that cause of death is unknown may lend support to the view that injuries were so minor that they could not cause death.

However credible evidence that I heard and that was tested showed that deceased died in his own home after being led there by P.W.3.

From the evidence I have heard it is clear to me that deceased did not die from natural causes. In fact he had been fit and healthy before the attack on him by accused with a knife. The length of time after the stabbing was a matter of no more than two hours from what I can make out from the evidence of P.W.3 who I concede was not very helpful from the point of view of reckoning the time. But he went to deceased's assistance when the sun was on the east and deceased died when it had tilted on the west.

I don't claim to be knowledgeable in the medical science but 50 ml collection of blood below the diaphragm was not shown to have been there before deceased was stabbed with a knife. It is doubtful that deceased would remain alive when such a collection prevailed.

Accused's defence is that of intoxication. But for this to avail it has to be shown that the drunkenness was involuntary, excluding possibility of Dutch courage. Further that it was to the extent that it

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deprived him of all his mental faculties.

The central point of his defence raised in evidence by him is that he was drunk and did not know what he was doing. Thus he seems to suggest that on that day he couldn't be held accountable for his actions.

Yet in evidence he related a fairly coherent account of events as set out on pages 17 and 18 of my notes showing that he remembers the events that occurred.

He said

> "Deceased refused to give 'Mapuleng beer. I never asked for beer at the time. I asked deceased why he didn't give 'Mapuleng the beer when she asked for it."
>
> "Deceased said he would give her after she had worked. Then deceased rose and said he would not be ordered about by me there where he had been assigned to give out beer to the attendants."
>
> "I responded by asking why he refused to give us beer yet we were working together."

From the foregoing it is clear to me that accused remembers the events of the day if not the cause of the trouble which has been outlined satisfactorily by crown witnesses. I am satisfied by the crown witnesses' testimony as to the cause, course and results of the encounters that accused had with deceased.

I am of the view that accused appreciated that, though he tends to down play the lethal qualities of his knife on the footing that he was drunk, use of it was dangerous and could result in danger to the victim upon whom it is wielded, especially as evidence shows, on the victim's upper body.

Even if I were to concede that deceased's possession of a stone at the first encounter entitled accused to resort to use of his knife for self-defence, any such resort at the second encounter was not called for, because deceased was not only unarmed but

/was

was also running away.

Crown witnesses stated that deceased at the first encounter was seen holding a stone. This is common cause. But in the course of his evidence accused went further to say deceased threw the stone at him and he dodged it. If at all deceased threw this stone at accused there could have been no reason why this aspect of the matter was not put to the crown witnesses. Accused conceded that he did not apprise his counsel of this very vital point in the morass of his defence. It can safely then be discarded as a mere afterthought or an invention resorted to by accused as he is getting along in giving his evidence. I cannot lay the blame at the door of accused's counsel for accused's own conceded failure to put his case to crown witnesses. The words of Maisels P. in Phaloane vs. Rex 1981(2) L.L.R. at 246 are relevance here. Namely

> "It is generally accepted that the function of counsel is to put the defence case to the crown witnesses ..... to avoid the suspicion that the defence is fabricating ..... (and) to provide the witnesses with the opportunity of denying or confirming the case for the accused ....."

It follows therefore that the suspicion that accused's story that deceased threw a stone at him is a fabrication becomes conclusive through his failure to put it to the crown witnesses so that its truthfulness could be tested.

Accused's assertion that he just "found" himself doing the things without knowing what he was doing is negated by the coherent manner in which his actions were performed including the motive for their occurrence. I have set out his actions above. The motive can be gathered from deceased's response to accused's interference. Deceased's response is pertinent to the occasion; and is as follows:

> "I am not to be ordered about by you here where I have been assigned duty to ration

/out

out the beer."

It thus becomes clear that accused's motive for the attack derived from deceased's refusal to be ordered about by the accused.

Once the motive has been established it becomes easy to realise that accused bent his mind on showing the deceased one thing or two. Hence the persistent attack that paid no heed to the intervention by the attendants and the final and fatal injuries which were inflicted at the place where deceased was found by P.W.3.

The intent to kill can be gathered from the persistent attack by accused at deceased. The long distance that had to be endured in the hot pursuit. The area where the injuries were inflicted, and the nature of the weapon used. That accused was not all that drunk is shown by the fact that he avoided all interference with the task he had set himself. For instance in his own words he ran away when he saw P.W.3 approaching him and seemingly scolding him and threatening him with an iron peg for what he was in the process of doing.

In Mohlalisi & Others vs R. 1981(2) LLR. at 394 Schutz J.A. as he then was when addressing the issue whether the verdict of murder was correctly arrived at, said:

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

It stands to reason that the state of accused's drunkeness was not such as to qualify him to conviction of culpable homicide.

Accordingly accused is found guilty of the killing of deceased with legal intent.

J U D G E.

19th April, 1989.

Extenuating Circumstances

Court found extenuating circumstances to exist and took into account that accused spent 3 years in jail before going out on bail.

Accused is sentenced to eight years' imprisonment.

My assessors agree.

J U D G E.

19th April, 1989.

For Crown : Mr. Mokhobo
For Defence : Mr. Klaas.