

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

PHOMANE LEBAJOA

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai on  
the 3rd day of May, 1989.

The accused is before me on a charge of murder, it being alleged that on or about 6th April, 1987 and at or near Ha Semione in the district of Maseru he unlawfully and intentionally killed the deceased, Motsoari Boraka. He has pleaded not guilty to the charge.

It is perhaps convenient to mention at this stage that Mr. Maqutu, counsel for the defence, admitted the depositions of Lefa Mohlakoana, Polao Lebajoa, Nkoai Nkhahle, Liphakana Peiso, D/P/W Shata, Dr. Tlale and D/Sgt Tsehlo who were P.W.1, P.W.3, P.W.4, P.W.6, P.W.7, P.W.8 and P.W.9 at the proceedings of the Preparatory Examination. Miss Moruthoane counsel for the crown, accepted the admissions. In terms of the provisions of S.273 of the Criminal Procedure and Evidence Act, 1981 the depositions of P.W.1, 3, 4, 6, 7, 8 and 9 at the Preparatory Examination proceedings

2/ are accepted .....

are accepted in evidence and it has, therefore, become unnecessary to call the deponents as witnesses in this trial.

In as far as it is relevant the evidence of D/Sgt Ts'ehlo is that on 8th April, 1987 he received information following which he proceeded to Ha Semione in the district of Maseru. He was taken to a spot next to the river where he found the dead body of the deceased. He examined the body for injuries and noticed three open wounds on the head. He conveyed the body to the mortuary at Queen Elizabeth II hospital. It sustained no further injuries whilst it was being transported from Ha Semione to the mortuary.

On 9th April, 1987, Dr. Tlale performed an autopsy on a dead body of a male African adult. The body was identified as that of the deceased by George Mosiki and Lefa Mohlakoana. This was confirmed by Lefa Mohlakoana who was P.W. 1 at the Preparatory Examination proceedings. The medical examination revealed that the deceased has sustained three open wounds on the head i.e. a wound on the left side of the forehead, a wound on the right side of the forehead and a wound on the left temporal region of the head. The temporal and frontal bones on the left side of the head were shattered with the result that brain tissues were damaged. In the opinion of the medical doctor death was due to the head injuries and an instrument such as an iron rod could have been used to inflict the injuries.

I can think of no good reasons why in the circumstances, the opinion of the medical doctor that the deceased died as a result of the head injuries should be doubted. That being so, the next

3/ question for .....

question for the determination of the court is whether or not the accused is the person who has inflicted injuries upon the deceased and therefore brought about his death.

In this regard the court heard the evidence of P.W.2, Tebalo lebajoa, who testified that in the morning of 6th April, 1987 he accompanied his wife to a bus stop next to accused's house. The wife was going for medical treatment at Roma hospital. After his wife had embarked a bus on her way to the hospital P.W.2 went to the house of accused. He wanted to inform the accused, who is his relative, about the health of his (P.W.2's) wife.

On arrival at his house P.W.2 found the accused still in bed. When he inquired why he was still in bed at that time of the day the accused told P.W.2 that he had had a sleepless night because of lightning. Shortly after P.W.2 had left the accused's home, the latter called him back and showed him one of his horses. The horse was dead and appeared to have been struck by lightning as it had some burns. On his request P.W.2 helped the accused to skin the dead horse. They were assisted by Polao Lebajoa and Nkoai Nkhahle. This is confirmed by Polao Lebajoa according to whom one Molumo also took part in the skinning of the horse.

According to the evidence of Polao Lebajoa and P.W.2 after the horse had been skinned the accused invited all the people who had assisted him to a beer house belonging to one 'Matieho Lebajoa who is in fact the mother of P.W.2 and P.W.1, 'Masaene Setai. When they came to the house of 'Matieho Lebajoa P.W.2 and his party found many people including P.W.1 who was the person selling the beer. They took their seats inside the house and P.W.1 served them with beer.

4/ In her .....

In her evidence P.W.1 told the court that the accused, who is her relative, appeared somewhat disturbed and had not yet partaken of the beer she had served to him and his party when the deceased knocked at the door and said "koko". The deceased then entered into the house and was carrying a small "kolitsana" stick. Just as the deceased appeared at the door of the house, P.W.1 noticed the accused standing up from his seat. Without uttering a word the accused hit the deceased two blows on the head with an iron rod. The deceased fell on the floor. As the deceased fell to the floor P.W.2 and Nkoai Nkhahle intervened by holding the accused and asking him what he was doing. The accused was taken out of the house by P.W.2, who ordered him to leave the place and go to his home.

Whilst Nkoai Nkhahle and Polao Lebajoa were assisting the deceased to a sitting position P.W.1 went out of the house. On her return into the house she noticed the deceased picking up his hat and going away. As the deceased walked away his hat dropped down outside the house.

The evidence of P.W.1 is, in all material respect, corroborated by that of P.W.2, Polao Lebajoa, Nkoai Nkhahle and Liphakana Peiso. In his evidence Nkoai Nkhahle testified that after the deceased had been assisted in the house, he tried to persuade him to rest a little before going to see a doctor but all to no avail. The deceased insisted that he was going home and left the beer house. Nkoai Nkhahle who is the headman in the village accompanied the deceased for some distance. Having satisfied himself that the deceased was able to walk properly the headman returned to the beer house.

5/ Shortly .....

Shortly, thereafter an alarm was raised and as a result thereof P.W.1 went out of the beer house. She noticed the deceased lying down on the mountain slope across a nearby river. The accused was walking away from him. However, P.W.6 testified that at the time he went out of the beer house as a result of the alarm he actually saw the accused delivering at least two blows on the deceased who was already lying on the ground across the river.

According to the evidence of P.W.1, P.W.2 and Liphakana Peiso the accused returned to the beer house and told Nkoai Nkhahle, the headman, that he had killed the deceased. This is confirmed by the headman who testified that he then detailed Liphakana Peiso to go and report the incident to the chief of the area, one Michael Ramashamole whilst he (headman) himself went with the accused to the latter's house. At his house he ordered the accused to get dressed and take the weapon with which he had assaulted the deceased so that he could escort him to the police station. The accused complied. Nkoai Nkhahle accordingly escorted the accused to Roma police station where he handed him over to the police, together with the iron rod. This is confirmed by D/P/W Shata who testified that she consequently arrested, cautioned and charged the accused as aforesaid.

The accused who is a traditional doctor gave evidence on oath and admitted, as correct, all the evidence adduced by the prosecution witnesses. That being so, it must be accepted that there is overwhelming evidence that the accused is the person who assaulted the deceased and inflicted upon him the injuries that brought about his death.

6/ The salient .....

The salient question is whether or not in assaulting the deceased in the manner described by the evidence the accused had the requisite subjective intention to kill. In this regard it is common cause that prior to the events of 6th April, 1987 two of accused's herdboys, Rabati and Macheli, were struck and killed by lightning at separate times. Then a house belonging to accused's sister was burned down by lightning. Thereafter one of accused's horses was struck and killed by lightning.

The deceased, who was also a traditional doctor, then boasted to P.W.1, a relative of the accused, that since he had tried unsuccessfully to kill the accused he was going to finish his (accused's) children and animals by lightning. This is confirmed by P.W.1 who told the court that she even reprimanded the deceased and alerted the accused about the threats which the deceased was making against him. Indeed, in his evidence the accused told the court that following the death of the second of his herdboys he once met the deceased who claimed responsibility for the death of the first herdboy, Rabati. He (accused) then assaulted the deceased and was subsequently charged criminally before a court of law. The accused told the court that he was convinced that the deceased was practising witchcraft to his detriment and the killing of his horse by lightning on the night preceeding 6th April, 1987 was still the evil work of the deceased.

When on the day in question, 6th April, 1987, he noticed the deceased entering into the house of P.W.1, his relative, the accused felt extremely provoked and assaulted him as it has already been described by the evidence. He (accused) conceded that after he had been ordered away from the beer house he was

7/ walking .....

walking towards his house when he noticed the deceased also walking at some distance away. According to the accused, the direction followed by the deceased was not leading to his house. He had a suspicion that the deceased was going to practise his witchcraft so that he could harm him. He decided to follow and kill the deceased before he could get a chance to do so.

When he caught up with him the deceased had crossed the river and was lowering his pants. His blanket was lying on the ground a few paces from him (deceased). Accused believed that the deceased was making preparation to go into the water and create lightning which would harm him (accused). He hit the deceased two blows on the head with his iron rod. The deceased fell to the ground and died.

It must be pointed out that according to the evidence of P.W.1 and Liphakana Peiso when they saw him lying prostrate on the ground, the deceased had already crossed the river and was on the mountain slope. I find the accused's story, that when he caught up with him at the mountain slope the deceased was preparing to go into the water to create lightning unconvincing. A sensible thing for the deceased to do would have been to go into the water and create the lightning at the time he came to the river and not after he had crossed it and was already climbing on the mountain slope.

Be that as it may, the accused told the court that after he had assaulted the deceased to death he returned to the beer house and informed the headman, Nkoai Nkhahle, that he had killed the deceased. He confirmed that the headman then escorted him to Roma police station. He handed his iron rod to the police who accordingly cautioned and charged him of murder.

8/ I am satisfied .....

I am satisfied on the evidence, that at the time he assaulted him, the accused genuinely believed that the deceased was a wizard who practised witchcraft to his detriment. Indeed, in their evidence P.W.1 and P.W.2 told the court that the deceased was considered, by the community in which they lived as a person capable of practising witchcraft.

I was referred, among others, to the decision in Rex v. Nathane 1974-75 L.L.R. 64 at p. 67 where Mapetla C.J. reduced a charge of murder to culpable homicide after making the following remarks:

"It is fair to infer that she was reputed in her community to be person who was possessed not only of supernatural powers, but one who often used such powers to do physical harm to other people, a belief, I might add which deceased herself by her conduct and utterances to which I have already referred, fostered and encouraged."

It is to be observed, however that at the time the accused assaulted and killed the deceased in Rex vs Nathane, supra, the latter was uttering provocative words to the accused. In the present case no provocative words were being uttered by the deceased at the time he entered into P.W.1's beer house and was assaulted by the accused. To that extent the present case is distinguishable from Rex vs Nathane, supra.

In any event even if I were wrong and it can be held that the deceased's sudden appearance at the house of P.W.1, a relative of the accused, amounted to a provocation it must be remembered that after he had been assaulted at P.W.1's beer house the deceased was still alive and able to walk away from that place.

9/ The assault .....

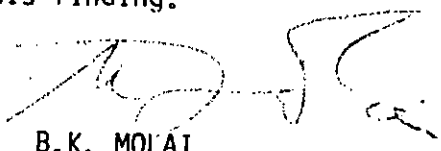


The assault that brought about the deceased's death is the one which the accused perpetrated upon him on the mountain slope across the river. It is significant to note that the question whether or not provocation can reduce murder to culpable Homicide is governed by Criminal Law (Homicide Amendment) Proclamation 1959 of which section 3(1)(b) clearly provides:

- " " 3(1) A person who -
- (a) .....
- (b) does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool, is guilty of culpable homicide only."

In his words the accused told the court that as he was going to his house from P.W.1's beer house he noticed the deceased walking at some distance away. He then decided to follow the deceased and kill him. Well, if he followed and killed the deceased who was walking at some distance away from him, the accused cannot be heard to say he assaulted and killed the deceased in the heat of passion caused by sudden provocation. In the result, it must be accepted that when he assaulted and killed the deceased on the mountain slope across the river, the accused had the requisite subjective intention to kill. I accordingly find him guilty of murder as charged.

Both my assessors agree with this finding.



B.K. MOLAI  
JUDGE.

3rd May, 1989.

For Crown : Miss Moruthoane,  
For Defendant : Mr. Maqutu.

EXTENUATING CIRCUMSTANCES

Having convicted the accused of murder the court is now enjoined by S.296 of the Criminal Procedure and Evidence Act, 1981 to state whether or not there are any factors tending to reduce the moral blameworthiness of his act.

There is evidence that the accused and the community in which he lives genuinely believed that the deceased was a wizard who practised witchcraft to the detriment of the accused. It is trite law that accused's belief in witchcraft can properly be considered a factor tending to reduce the moral blameworthiness of his act - see Rex v. Fundadubi and Others 1948(3) S.A. 810, Rex v. Rai Manyangaza 1971 - 73 LLR 171, Rex v. Nathane 1974-75 LLR. 64.

There is also evidence that whilst lightning was doing havoc to accused's herdboys, animals and the property of his relatives the deceased boasted that he was the person responsible for all his misfortunes. That, in my view, was provocation on the part of the deceased. Although it was not such that it could reduce murder to culpable Homicide the provocation must be taken into account for purposes of extenuating circumstances.

In the result, I come to the conclusion that extenuating circumstances do exist in this case and a proper verdict is that the accused is guilty of murder with extenuating circumstances.

It must be mentioned that only one of my assessors agrees with this finding. The other assessor takes the view that no extenuating circumstances exist in this case.

SENTENCE : NINE (9) years imprisonment.

  
B.K. MOLAI

JUDGE.

3rd May, 1989.

For Crown : Miss Moruthoane,  
For Defence : Mr. Maqutu.