CRI/T/64/88

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

MORENENG MATHABA

Held at Butha-Buthe

J U D G M E N T

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

Accused pleaded not guilty to the intentional killing of Joshuoa Setipa Mathaba who died at Ha Khalanyane in the Mokhotlong district on 23rd December 1986.

Medical evidence handed in in the form of a post mortem report marked "A" shows that the cause of death was an open head injury.

The body was badly decomposed and infected with magots when it was examined seven days after the death. There was a deep laceration of the scalp and the skull was fractured with the result that the brain substance was exposed.

The Preparatory depositions of P.W.4 and P.W.5 Moupo Setipa and Trooper Thebe respectively were admitted on behalf of the defence and accepted by the Crown. P.W.4's evidence is to the effect that he repaired to the scene on the day in question and on examining the body he saw two wounds on the head and

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another above the eye.

He later accompanied the body to the mortuary and was the one who identified the body to the doctor before the post mortem was conducted.

P.W.5's testimony is to the effect that Lisema Mathaba came to his office one day in December 1986 in the company of accused who was holding a stick. A report was made by Lisema concerning accused and the stick. Lisema later handed over to this witness the stick and the accused. The stick was handed in at P.E. and marked Ex."1". The same number was retained in this Court by virtue of the admission relating to it by the defence.

The evidence of P.W.7 at P.E. Lisema Mathaba was not led because of the absence of this witness. No. 2828 Detective Trooper Tsita gave sworn evidence showing that Lisema had been served with the subpoena requiring his attendance to this Court. The court having been satisfied that no good reason had been forwarded for Lisema's absence issued a bench warrant for his apprehension.

In order to settle once and for all a dispute that arose concerning certain things alleged to have been said by P.W.1 Masetipa Setipa the deceased's wife, in submissions by the crown concerning suspected stray cattle and the time of her husband's arrival at home, I propose to render one and half pages of her evidence in chief verbatim as appears in my manuscript as follows:-

I live at Taung in Mokhotlong district. I know the accused. He is my uncle. He lives at Mokhotlong.

I was at home on 22-12-86. I was with my father and mother-in-law. I am married. My husband has since died.

My husband was in the village not in our house.

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During the day I don't know where he had gone.

He returned in the evening before sun set. He did not say where he came from.

He slept in the same room with me.

It was at about early in the morning when I heard a knock at the door. It was before sun rise.

That person knocked first time and I remained quiet. The person knocked for the second time and called my name. It was when she called my name that I recognised her by her voice when she called.

I heard that to be 'Malebitso's voice. I prepared to open for her, but did not do so because she opened it herself. She entered and sat down near the bed. I was still in bed when she came in.

I expected her to say what she had come for but she did not say anything.

Then I heard a sound as if something was being hit. I was sleeping with my husband not facing each other.

It will be clear from the above therefore that Crown counsel relied in making his submissions on portions of the P.E. depositions of P.W.1's evidence which was not led in this Court.

However the cross-examination of this witness revealed that at P.E. she had said her husband arrived very late at night and she conceded that the true position is that in fact he came very late at night and not before sunset as she had perhaps wished the Court to believe that her husband since arriving before sunset never ventured out throughout that night till when rudely aroused from his sleep by accused's wife's and accused's intrusion.

It is in this regard that there is some substance in defence's criticism of this witness as tending to

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hide certain things. What appears to have been sought to hide would most likely be P.W.1's husband's alleged deviation from the path of matrimonial virtue.

P.W.1 testified that immediately after accused's wife came in and sat down and remained silent she heard the sound referred to above. On hearing it she turned her head to see what was happening. Then she saw a man standing next to the bed with a raised stick in his hand. She recognised him as the accused Moreneng. She inquired "Moreneng what are you doing" but accused vouchsafed her no reply.

Even as she rose to see what was happening her husband happened to be rising at the same time as she did with the result that he knocked against her and she instantly got pushed over the edge of the bed and fell to the floor between the bed-stead and the rondavel wall.

The fall was from a considerable height of some one and half metres because tins had been used to give added height to the bed.

When she recovered from the fall she found that there was no longer anybody in the rondavel.

However the credible evidence of P.W.2 'Majoshuoa the deceased's mother shows that accused's wife had remained in there for she found her later when deceased was led into the rondavel to be seated on a chair and later to be laid down on the mattress placed on the floor where he died shortly afterwards.

I attach much importance to the testimony of P.W.1 that while she might understandably be tempted to lie in order to protect her husband's moral rectitude she did not implicate the accused falsely when she said she saw him in her house with a raised stick. Had she been inclined to implicate the accused falsely there seems scarcely any reason why she would not say that she saw him deliver the blow that accounted for the sound that was consistent with that of something

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that was hit when she suddenly noticed that accused was in her house though she did not see him enter.

When P.W.1 came to the door she saw deceased staggering with his hands stretched out and P.W.2 rushing to support him from below the arm-pits. P.W.1 rushed to the deceased to help support him too.

Meantime accused was pacing up and down and around this trio swearing at the deceased by his mother's private parts and threatening in his utterances to kill him.

P.W.2 fully corroborates this portion of the evidence. Her own version which, if I may say even at this stage, is very credible shows that she was busy grinding corn early in the morning when her attention was drawn to the outside by the bark of a dog.

When she came out she saw accused behind whom was the deceased at the door. Her house and deceased's house face each other and are only ten paces apart. The two were some three paces apart when P.W.2 heard deceased ask accused what he was doing. At that time accused and deceased were facing each other.

Accused did not reply to the question put to him by deceased but delivered a blow with a stick. P.W.2 saw the blow land on deceased's head whereupon deceased grabbed the side of his upper face. Deceased was not carrying anything but was wearing short sleeved shirt and a pair of trousers. Otherwise he was bare-footed.

Given the opportunity or forewarning that P.W.2 received from the barking dog and the short distance that she had to travel to the scene there can be no doubt that she was able to witness all that occurred outside from the beginning to the end. Given the fact that deceased was bare-footed when he came outside the door I have no doubt that P.W.1's evidence is well corroborated that deceased when he arrived put his shoes off and went

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into bed. This alone would belie accused's story that he observed deceased all along from where he aroused him with accused's wife in the grave yard till deceased on coming to his house propelled accused's wife into it and turned round at the door and delivered a blow with a stick at the accused.

Accused's deliberate attempt at misleading the court in this aspect of the matter further strengthen's the crown's version that deceased had been a long long time in the house before accused's wife came there at dawn followed shortly by actions attributable to accused.

This is further strengthened by accused's failure to put to P.W.1 the version that she was incorrect in saying deceased came into the house first and accused's wife came next after this long long time she attested to for that matter. Accused conceded that he did not instruct his counsel on this. Hence it is not wrong to make an observation that he is fabricating.

Furthermore accused conceded that it was only when he was giving evidence that the court heard for the first time that he had actually found deceased and accused's wife in the grave yard lying down under cover of a green and brown shawl. Needless to state if this were true it could not have been left out when his version was being put to the Crown witnesses especially when it was the version of those witnesses that accused did not say why he was assaulting the deceased.

I accept the crown's version that deceased was not carrying anything when being assaulted by the accused. There was some suggestion that he had been carrying a stick when allegedly he was aroused from the grave yard where he was chased along with accused's wife by the accused. If so, it is difficult to understand why deceased would run away all that distance without putting up a fight and only start fighting when he was at the door of his house.

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Deceased's possession of a stick and shawl which had been used as a spread on the ground on which he and accused's wife were lying when aroused there is belied by the fact that credible evidence led showed that no such things were seen or found at the forecourt of deceased's house where accused said he had dropped them after dispossessing deceased of them.

Indeed a prudent man having managed to dispossess his rival of a weapon used in an attempt to harm him would have not parted with it until he handed it to the chief. Accused said he reported the incident to the chief; and this appears to be true. If he had presence of mind to report as he says he did why if the stick had been dispossessed from deceased would he not have presence of mind to take it along with him to the chief?

I have had a look at the stick with which accused struck the deceased. It is a heavy timber stick measuring about one and half metres long wound with fused wire at far and near ends and middle. The thick end is some ten centimetres in diameter while the thin end is about 6½. It tapers gently from end to end. If I may add, severe use of such a weapon can hardly be without serious consequences.

P.W.3 'Manyakane Mathaba's story in its material respect is a report of what accused told him after the latter had already injured the deceased and left him at death's door. Indeed he said it was not worth sending deceased for any medical treatment because his life was not worth an hour's purchase. Thus since it is not independent evidence but a report of what accused told him it does not improve on accused's story nor does it land any credence to it.

There doesn't seem to be anything to gainsay the conclusion that the number of injuries deceased sustained were inflicted by the accused. It would seem therefore an idle waste of time to determine how they were inflicted because at no time when they were inflicted was the deceased seen as the aggressor. There is a

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reasonably high degree of probability that the sound of something P.W.1 heard being hit followed by her observation of accused with a raised stick and the instant departure from the house followed by deceased asking what accused was doing, was due to an assault accused had dealt him in the house. Subsequent blood seen on the sheet on the basis of which another mattress was used instead of the one that was on the bed would tend to give credence to P.W.1's version albeit given rather late in the day during cross-examination. This attitude derives support from the fact that as to the standard of proof there is authority for the view that it need not reach certainty. If as in this case a high degree of probability shows that an act has been committed, then that is enough.

Accused's version is that when he came to his village from the mountain he learnt of the death which had occurred at Hlaoli's home some hundred paces from the grave yard. He learnt that his wife had gone to Hlaoli's place where there was a wake. He went there but did not see his wife. He made inquiries as to her whereabouts but did not get or find any leads to where she could have possibly gone. He embarked on a hunt for her in several homes of his relatives. It was when he went towards Lisema Mathaba's house the road to which passes near the grave yard that he found people sleeping in the grave yard. He said these people were his wife and deceased. The time was then dawn. He asked them "what are you doing there." The wife said that's my husband.

Then they ran away. They headed for the deceased's place. Deceased was in front on reaching forecourt he sent the accused's wife to the front, and made her enter first. Deceased got in but turned round at door. When he delivered the blow accused warded it off with his left arm covered with his blacket.

Credible evidence shows that deceased was not armed so there is no basis for a man armed with as lethal a stick as "Ex.1" to claim that he was defending himself. No

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basis avails for the claim that accused's case qualifies for treatment under the statutory plea in mitigation provided by the Proclamation No. 42 of 1959 (Homicide Amendment) because no basis has been revealed in evidence that there was provocation except the one imagined by the accused. In any case even if accused's version were to be entertained he would fall between the stools because having failed to accommodate himself within the provisions of the above Proclamation by attacking deceased at the grave yard he then claims that he was acting in self-defence when he got to the deceased's home. Thus he lost his claim to the plea of provocation when he acted in self-defence. But the essence of the matter is that there was nothing to justify his so-called self-defence because evidence shows that deceased did not attack him nor was he armed in order to inspire accused with apprehension of immediate danger to himself.

I have indicated that accused's story cannot possibly reasonably be true. It is therefore rejected on the score of absurdity.

Because of the value I attach to the crown version it seems to me that the only rational and common sense explanation of why accused's wife came to deceased's home was that she had been compelled by her husband in a bid to trump up some excuse for going to deceased's house in order to give vent to accused's extreme jealousy inflamed by the delay incurred either before he found her or before she came to her own house and got taxed about where she came from.

This view is expressed on account of the fact that in argument counsel for defence made much of the fact that accused's wife's presence in deceased's house has not been accounted for by the Crown. This submission overlooks the fact that accused's wife is not compellable as a witness against him in a charge such as the present. But that is not to say accused was at any stage precluded from calling her as his witness to

support his version. He was under no compulsion to call her, however he failed to do so hence the inference that he did not call her because he knew that she would not support his story if it was false.

I accordingly find accused guilty of murder as charged.

Accused is sentenced to five years' imprisonment.

J U D G E.
10th May, 1989.

For Crown : Mr. Qhomane
For Defence : Mr. Lesutu.