

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

KEPA PIKAPA KEQE

Held at Butha-Buthe

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla  
on the 11th day of May, 1989.

The accused is charged with the crime of murder of Edward Morapalla who the crown alleges the accused killed unlawfully and intentionally on 4th December 1987 at Ha Ramolakalali in the Mokhotlong district.

Accused pleaded not guilty to the charge.

The defence admitted the preparatory depositions of P.W.1 Phororo Thuto, P.W.3 Paballo Polihali and P.W.5 Dr Schumacher.

P.W.1's evidence is that on the day in question there was a (Letsema) communal hoeing work party at the field of Litseho. Among those present were accused and deceased.

After the hoeing the hoeing party consisting of many people sat down to drink beer. Accused and deceased also took some beer. To P.W.1's observation they did not seem drunk.

It would seem that not much beer was brewed for

/this

this occasion because cross-examination of P.W.4 Makoae Morapalla deceased's brother revealed that deceased had told him that at the sitting in the field only one four-gallon tin of beer was drunk. A further four-gallon tin was drunk later at the field owner's home. The alleged story of the deceased told to P.W.4 is corroborated by the admitted evidence of P.W.1 as to the fact that from the field the hoeing party went to Litseho's home and that further feasting was indulged in.

While accused and deceased were in Litseho's house an oral quarrel erupted between them. It appears deceased had remarked that some cattle which had strayed into the grave yard might disturb the soil of freshly dug graves. Accused took exception to this remark and charged that deceased was prompted by sheer jealousy to make it because the cattle in question were accused's. It turned out that the cattle were not accused's at all but one Stephen's. The quarrel was put down by those present in the house. Though the disputants heeded the reprimand they nonetheless appeared upset.

It is common cause that in order to reach deceased's parental home from Litseho's one has to go past accused's home.

The evidence of P.W.1 shows that immediately after deceased left for his parents' home accused also left.

Some time afterwards P.W.1 saw deceased leave his parents' home for his own home. The two even had some hearty exchange of words when P.W.1 was enkraaling his sheep and deceased was on his way home.

To go back home from his parents' home deceased had to pass a little below accused's home.

After enkraaling his sheep P.W.1 heard 'Malimakatso

/P.W.2

P.W.2 calling out. Consequently P.W.1 headed for a spring lying along the way to deceased's home. P.W.1 said many people gathered around the spring, including P.W.2, one 'Masethole and school children. Deceased had laid down on his side. Deceased reported to the gathering that accused had hit him on the head with a stone, further that deceased said he did not know with what accused had hit him at the back of the head. A lot of blood was oozing from the wound on deceased's head.

When lying there deceased did not have anything in his hands. Accused was not there where deceased was found lying on the ground by P.W.1.

Many other men arrived at the spring at sunset and helped one another to take deceased to the chief's place for deceased could no longer walk on his own. The chief ordered the men to go and arrest the accused and bring him to him.

Accused was found at his home and brought to the chief's place.

The following day messengers were sent to take accused to the Mapholaneng Charge Office. Deceased was conveyed to Mapholaneng too in one Abdul's car.

Days afterwards P.W.1 saw accused at his house in the company of two policemen. P.W.1 saw accused take out a knobkerrie from a wall between his houses and an iron rod from inside one of his houses and gave them to the police.

The police informed P.W.1 that deceased had died. P.W.3's admitted evidence shows that on 6th December 1987 he was at chief's place when he saw two policemen and accused arrive there. Having been informed of deceased's death P.W.3 was detailed as a messenger by the chief to accompany the police to accused's home where the accused took out a knobkerrie between his

/houses

houses hidden among some grass and an iron rod from inside his house and handed them to the police. Accused and the police left.

P.W.5's admitted evidence shows that on admission at the Mokhotlong hospital the deceased was almost unconscious. He had problems with breathing as well as a brain problem resulting in unconsciousness. Deceased died the same day in hospital.

Two days afterwards i.e. on 7th December 1987 P.W.5 performed the post mortem examination on the body of the deceased and observed that there were two open wounds on both sides of the scalp above the ears and a fracture of the left temporal skull with bleeding and epidural haematoma causing brain damage;

There was also a small superficial laceration on the neck.

P.W.6 Detective Trooper Foloko's admitted evidence is that the two exhibits marked "1" and "2" remained in police custody since their retrieval from accused's home by accused from an old wall and his house respectively. These had been handed over to P.W.6 by accused himself.

P.W.2 'Malimakatso Morapalla gave her evidence on oath that she resides at Tloha-re-bue in the district of Mokhotlong. Accused is her cousin and known to her. Deceased was her husband's younger brother.

On 4th December 1987 she had gone to hoe at her field. She came back from there in the company of 'Malikhapha. As she climbed up the hill next to her house she saw accused emerge from his house already running.

When she first saw accused she was some hundred paces away from him. Accused was speaking in a raised voice saying "I am going to kill him there in the trees."

/It

It is worth mentioning at this stage that accused in a sworn statement before this Court said the fight between him and deceased took place not at the ridge as stated by P.W.2 but at the place of the trees.

P.W.2 said accused was wearing a blanket and that he was not holding anything.

She further said accused stood at the ridge where he stopped. The ridge was estimated at about one hundred and fifty paces away from where P.W.2 was when she saw accused stop and remain standing. She testified that from the time accused was seen running from his house till he got to the ridge accused was always within her view.

P.W.2 said she was surprised when she heard the words uttered by accused so much so that she even spoke to 'Malikhapha and said "Malikhapha what could have confused your brother." The latter replied that she did not know. It was while accused was standing at the ridge that P.W.2 saw deceased coming along the road passing through P.W.1's village. This village is said to be not far from P.W.2's village because the two villages share a spring. The villages were estimated to be about fifty paces apart.

Deceased went along and caught up with a girl Libuseng along the way. He overtook her and proceeded along till he came next to where accused was. To reach his village deceased would have to pass the ridge referred to earlier.

P.W.2 said she did not know what was happening but immediately when she took a look she saw accused hit the deceased with a hand. Deceased fell immediately to the ground but accused hit him once more whilst thus fallen.

After meting out these blows accused returned. Libuseng had not yet gone past the ridge when the

/incident

incident took place there.

P.W.2 raised an alarm when she saw the assault. Consequently P.W.4 Makoae Morapalla responded to the clarion call that had been transmitted to him through 'Malikhapha who had received it from P.W.2.

P.W.2 proceeded to the scene. Along the way she saw the accused on his way back but moving along a parallel path some ten paces away from P.W.2's path.

She heard accused muttering to himself "I have killed that thing of yours there it has vomited meats."

Accused was holding a knobkerrie under his left arm-pit but over his blanket.

P.W.2 was joined by P.W.4 along the way and they found deceased at the spring beyond the ridge.

Deceased had stretched his arms out and was gaping and gasping repeatedly. P.W.2 could see blood on his jacket and at the back. He had water drops on his face showing he had just washed.

P.W.4 asked deceased what had happened and deceased said "brother I am tired" and kept saying that; or "Kepa has finished me."

P.W.2 observed that deceased was swollen.

P.W.2's testimony was criticised under cross-examination on the grounds that she was exaggerating and inclined to make her version richer in that her alleged remarks to 'Malikhapha in this Court differed from those she is recorded as having said at preparatory examination; further that in this court she said accused said he would kill deceased at the place of the trees whereas at P.E. no mention of trees is made with regard to this point, further still that at P.E. she said accused was hitting deceased with a fist whereas in this Court she said it was with a hand.

/My

My assessment of these criticisms is that when taken along with the substance of her story and the totality of the evidence in this case they pale into insignificance.

For instance the fact that when she saw accused come back from the ridge he was carrying a knob-kerrie is corroborated by the credible evidence of P.W.4 Makoae Morapalla that he saw not only the knobkerrie but an iron rod both of which weapons accused even made an attempt to hide under his blanket.

Indeed as was properly submitted by counsel for the crown if P.W.2 was bent on fabricating or falsely implicating the accused she would have had no reason for saying when proceeding to where deceased later found the accused she saw the latter already carrying the knobkerrie which she later saw when she and he crossed their respective paths.

Indeed P.W.2's honesty is borne out in this respect by not straining to make her story more truthful when she said she didn't see if accused was holding anything when he set out for the scene.

She did not want to commit herself by saying that accused was assaulting deceased with a stick or any other objects besides the hand or fist though she, having seen the nature of the injuries and known that after they had been inflicted she saw accused's knobkerrie she appreciated that it might have been the one used to inflict those injuries. However she did not, despite this, budge from her version which on all accounts would seem to reduce the role played by accused in meting out the assaults on the deceased.

More than anything else it seemed to me that the defence's cross-examination of P.W.2 was geared at eliciting rather fine details with the result that she became at times understandably puzzled.

/P.W.4

P.W.4 testified that deceased is his brother. On the day in question P.W.4 had not attended the "letsema" to which deceased had gone.

He instead was hoeing his parents' field. When the letsema came to a close P.W.4 also knocked off from the field he was hoeing and went to his parents' home where he was later and shortly joined by deceased. The two conversed for a long time before deceased left. When he left deceased was not holding anything. P.W.4 heard his wife 'Masethole shouting for him. Thereupon he went into the house to pick up his stick and proceeded to the place where deceased was. Along the way and as he was running he met with accused who was also running but in the opposite direction. Accused was holding a knobkerrie and an iron rod. P.W.4 pointed these out easily before Court.

I am most impressed with P.W.4's evidence. It sounds not only credible but was given with the confidence that showed he knew what he was talking about.

The cross-examination of this witness appeared to have been the denial of all that he said.

For instance

"Accused was not wearing a red blanket - ?

I said he was.

He has never had one - ?

He has it. It is there at home.

He has a grey one which he was wearing - ?

He was wearing a red one that day when I met him.

You mistake him for another person -?

I know him. We live in the same village.

He was not holding a knobkerrie - ?

He was.

Nor an iron rod -?

He was.

He never spoke to you-?

/He



He did and he gave me a clear answer to my question."

I therefore accept this witness' evidence as true because of its high and unparalleled quality. I believe him when he says deceased told him accused hit him with a knobkerrie on the chest when he was down.

Accused gave his sworn testimony.

He denied ever being seen by P.W.2 on the day in question. He denied utterances attributed to him by that witness. He denied that he came running out of his house and was standing at the ridge. The most important aspect of his version is that he says he hit deceased only once with a stone.

Accused came up with a new story that deceased had struck him with a stone behind the shoulders such that he even fell to the ground. He conceded that this indeed was something new as it had never been put to the crown witnesses. But he said he had told this to his counsel.

Indeed his counsel confirmed this and stated that he forgot to put this important aspect of his client's defence to the crown witnesses.

I have been told and, indeed it is not unheard of that Homer sometimes nods, I have never on the other hand been told that this expression may also mean that Homer sometimes goes into an insensible slumber.

However I do accept Mr. Kolisang's sincerity of his confession to this omission albeit with utmost bewilderment. To this extent accused's credibility is vindicated.

However even assuming that his belated version is true that he acted in self defence against the deceased, it becomes utterly impossible to see how deceased on credible evidence is shown to have suffered

/injuries

injuries in more than three places when accused had hit him only once with a stone on the head. His counsel suggested that deceased might have hit his head against the stony ground where he fell after being struck by the accused once. But Lord Denning in Miller vs Minister of Pensions 1947 2 ALL E.R. at 373 says

"The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice."

While R vs Ndlhovu 1945 A.D. 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."

I do not only believe that deceased was dealt the severe blows above the two ears and at the nape by the accused I also believe and accept the deceased's dying declaration that accused hit him with a knobkerrie on the chest when he was already on the ground. From deceased's dying declaration it seems not only one weapon was used to assault him. That P.W.2 saw accused deliver a blow with whatever means he did followed by delivery of another when deceased was already down amply shows criminal intent.

The knobkerrie itself is a crude piece of wood which cannot be wielded by any reasonable person against another without realising that serious injury might ensue or possibly death.

The part of the body injured namely the head is an additional ground from which criminal intent can be gathered.

I find that the crown has discharged the onus which throughout this case has been resting upon it. I accordingly find accused guilty of murder.

My assessors agree.

J U D G E.

11th May, 1989.

EXTENUATING CIRCUMSTANCES

Factors affecting moral blameworthiness of the accused.

After letsema there was drinking at home of Litseho. Consumption of liquor has different effect on different people.

Closeness of drink to events that took place. Serious altercation concerning cattle at grave yard. It was late afternoon; events took place at sunset.

Accused may have suffered some provocation however slight this would affect his moral blameworthiness.

Even if he was lying when he said deceased attacked him the belief that he did may reduce his moral blameworthiness.

Accused has no previous convictions.

Accused is 45 years old. He is entitled to mercy. He has 4 minor children. He was prepared to tender plea to lesser charge. This shows that he was remorseful. He has been in custody since December 1987.

Sentence: Sentenced to thirteen years' imprisonment.

---

J U D G E.

11th May, 1989.

For Crown : Mr. Qhomane

For Defence : Mr. Kolisang.