

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

VS

MAKHABANE TLALI

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 26th day of May, 1989.

The accused is charged with the crime of murder, it being alleged that upon or about the 26th August, 1987 and at or near Majakaneng in the district of Thaba-Tseka, the accused unlawfully and intentionally killed Thabo Khemane (hereinafter called the deceased). The accused has pleaded not guilty to this charge.

The first witness called by the Prosecution is one Masilonyane Sengoatsi. He testified that on the 26th August, 1987 he went to Ntlatlapa's bar. When he approached the bar he noticed that the

/accused.....

accused and the deceased were fighting; the former was on top of the latter. The accused had a brownish knife in his hand. He tried to stop the fight but as soon as the deceased rose the accused stabbed him with the knife on his left kidney region. At that stage the deceased already had a wound on his right hand but the witness does not know how the deceased had sustained it. The deceased ran away to the home of one Lakabane Sengoatsi (P.W.5). He (witness) followed him and saw that the intestines were protruding from the wound at the kidney region. He tied him with a doek around the waist.

Masilonyane told the court that after stabbing the deceased the accused said " have you felt it, I have stabbed you." He then left. The deceased was later taken to the hospital. The witness did not know how the fight started and the cause for it.

Under cross-examination Masilonyane deposed that the accused is a troublesome person who often fought with other people. He did not know that the deceased looked down upon other people. He knew a lady by the name of Makaizer, but that lady was not present when the fight took place. Accused appeared to be sober on the day in question.

The second witness called by the Prosecution was one Ntlebo Jakobo who testified that on the morning of the day in question he and accused went to gather fire wood. While they were gathering wood they saw the deceased at a distance of about fifty yards from them. He had a black stick and was raising it up but not saying anything. The accused shouted at him and said, "You son of Ntilane, I want to cut you." The deceased asked what he

/had done.....

had done but received no response from the accused. While they were gathering wood the accused went on saying he would cut "that child". Ntebo says that he warned him to desist from doing such a thing. After gathering wood they carried it to the village using three donkeys. It was unloaded at accused's bar. After that the accused invited him for a drink at Ntlatlapa's bar. When they arrived there the accused bought a tin of beer for him.

He sat down in the bar and drank the beer bought for him by the accused. While he was drinking he heard an alarm that people were fighting outside. He rushed out of the house and found that the accused was on top of the deceased and holding a brown knife in his hand. He removed the accused and saw that the deceased had a wound on the right hand and on the left side of his body. He explained that the wound on the left side of the body was inflicted by the accused with a knife after he (witness) and P.W.1 had removed the accused from the top of the deceased. The deceased was taken to P.W.5's house and later to the hospital. He says that as far as he observed the deceased did not respect the accused who was much older than him.

Under cross-examination he denied that the accused had a fresh wound above the left eye when he removed him from the deceased. He did not see one 'Makaizer at Ntlatlapa's place on that day and that he would have seen her if she was present.

Trooper Koetle testified that on the 26th August, 1987 he found the deceased in Lakabane's house. He had a wound on the left kidney region from which the intestines protruded. The doek was

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tied around the waist over the wound and it appeared to be clean. He carried the deceased to the Paray Hospital in a vehicle. On the same day the accused gave him the brown knife before Court (Exhibit 1). On the 29th August, 1987 he arrested the accused and charged him with assault with intent to cause grievous bodily harm. On the 3rd September, 1987 he was informed of the death of the deceased and formally charged the accused with murder. He denied that on the 26th August, 1987 the accused had any wound above his left eye. He says that he already had an old scar above the left eye.

The evidence of Lakabane Sengoatsi was to the effect that on the 26th August, 1987 he was at his house when he saw the accused and the deceased near Ntlatlapa's place. The accused was saying, "Let me stab you again and finish you off. You have felt it." As he ^{was} about fifty yards from them he did not see whether the accused had a wound on his face, but he appeared to be angry.

Dr. Waldis testified that on the 26th August, 1987 the deceased was admitted at Paray Hospital. He had stabwounds on the left dorsal side of the flank, on the right forearm and on the right thigh. The wound on the left flank went deep into the body and broke one rib and punctured the large intestines at two places. On the same evening he performed an operation and found that there were stools in the abdominal cavity and the two wounds on large intestines. He rinsed out the stools and sutured the two wounds and the stabwound. The wound was about two to three centimetres long and appeared to have been caused with a sharp object such as Exhibit 1. During the operation the deceased was

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vomiting but after the operation he was fine for about two or three days, then he developed pneumonia which was treated with drugs according to approved medical standards. Later the patient developed delirium tremens.

On the 2nd September, 1987 the wound on the left flank opened and the intestines could be seen protruding. He decided that the patient must undergo a second operation in order to clear the abdominal cavity. In about ten to fifteen minutes the patient died. On examination the doctor found that the small intestines were attached to each other and then to the first operational wound. There was yellowish fluid and pus coming out of the abdomen. The wounds on the large intestines were still closed and had started healing. It was his opinion that the cause of death was the original stabwound and the others were the consequences. It was caused by the operation which he was bound to do under the circumstances.

Under cross-examination Dr. Waldis said he qualified in 1980 and obtained his general practitioner's certificate in 1986. Before this operation he had performed many others which were even more complicated than the present. He admitted that the second operation was risky because of the poor condition in which the deceased was but with an open stomach he had no alternative but to operate. He formed the opinion that it was infection that opened the wound because faeces are very infectious. He developed the infection despite the fact that he was put on antibiotics treatment. It was also impossible to be thorough to clean stools in the abdominal cavity.

/The accused.....

The accused gave evidence in his defence and stated that on the day in question he was drinking Sesotho beer in the house of one Ntlatlapa. He had already drunk three babaton tins of beer before the events which led to his fight with the deceased unfolded. He and deceased were sitting on the same bench. He never talked to the deceased on that day but they were on talking terms. While they were sitting there he gave a M10-00 note to one 'Makaizer Pereko and asked her to go to the cafe and to buy snuff for him. She took the money and went out, the deceased followed her. She later came and told him that the deceased had taken the money. After that report the deceased again went out of the house. He (the witness) followed him intending to ask him why he had taken his money. As soon as he got out the deceased struck him with a stick above the left eye; he fell down; the wound was bleeding.

When he rose he caught hold of the deceased and they wrestled with each other till he (accused) managed to throw him on the ground. He sat on top of him and took out his knife from his pocket. He unclasped it and then stabbed the deceased. He does not remember how many times and which parts of his body he stabbed with the knife. The deceased had struck him even before he spoke to him. He denied that he stabbed the deceased after P.W.1 and P.W.2 had removed him from the deceased. He denied that he ever uttered the words referred to by the Crown witnesses. He says that he stabbed the deceased because he had struck him with a stick.

The first issue to be decided by the Court is whether the accused had a fresh wound above his left eye at the relevant time i.e. immediately after the stabbing of the deceased. All the Crown

/witnesses.....

witnesses deny that he had such a wound. Trooper Koetle went further to see that when he arrested the accused he saw that old scar above the left eye. He apparently did not do anything about it because it was an old scar which had nothing to do with the present case. The rest of the Crown witnesses ^{are} fellow villagers of the accused and it was common cause that he got along well with them. There was no reason why they could all of a sudden turn against him and fabricate evidence against him. They impressed me as being honest and truthful witnesses whose evidence has a ring of truth. They never attempted to say they saw when the fight started and to say they know its cause.

I reject the story of the accused that the deceased struck him with a stick as soon as he came out. He did not have any wound at all and must have surprised the deceased. It is very clear from the evidence of one Crown witness, P.W.2, that the accused intended to cause grievous injury to the deceased. Earlier that morning the accused had threatened to cut the deceased with a knife. When asked by P.W.2 why he intended to cut the deceased, the accused did not answer and kept on opening and closing his knife. In other words, the accused premeditated the stabbing or cutting of the deceased with a knife.

The Prosecution witnesses have denied that the lady by the name of 'Makaizer was present at the home of Ntlatlapa on the day in question. I have believed them on this point and I reject the accused's version that she was there and that he gave her M10-00. The accused planned the assault on the morning of the 26th August, 1987, and had planned the attack in such a way that no people would

/see how.....

see how the fight started. If it were true that the deceased had taken his money why did he not tell the people who intervened in the fight that the deceased had just taken his money? The people would have there and then searched the deceased and interviewed 'Makaizer. It is also significant that after the stabbing the accused uttered words which indicated that he was boasting of having stabbed him. He never uttered a single word to indicate that the deceased had taken his money. If it were true that deceased had taken his money, he would have mentioned that fact while he was in frenzy. He did not do so because such a thing never happened.

After the deceased had been assaulted he survived for at least seven days but during that time the accused never revealed or complained to anybody, not even his own chief, that the deceased was stabbed because he had taken his money and attacked him (accused) when he tried to asked him about the money.

Mr. Peete, counsel for the defence, submitted that the accused acted in self-defence. I have already rejected his story that as soon as he came out of the house the deceased struck him with a stick above the left eye. Even if his story was accepted as the truth the defence of self-defence would still not be available to him. It seems to me that he exceeded the bounds of self-defence. He says that after he was struck with a stick he wrestled with the deceased and managed to throw him to the ground and sat on top of him. In other words he had overpowered the deceased and there was no longer any imminent danger to his life. The deceased was no longer in a position to harm him. Instead of calling for help or just

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pressing the deceased to the ground until other people came, he took out a knife from his pocket and stabbed the deceased three stabwounds on various parts of the body including the wound on the left flank which caused the death of the deceased. I come to the conclusion that even if his story was believed he would still be guilty of murder because he grossly exceeded the limits of self-defence.

Mr. Peete further submitted that the second operation carried out by Dr. Waldis was a novus actus interveniens and was the cause of death of the deceased. He submitted that the operation may have been prudent but was not necessary. He also hinted that Dr. Waldis did not have enough experience to perform such an operation. In R. v. Motomane, 1961 (4) S.A. 569 (W.L.D.) the headnote reads as follows:

"Where, on a charge of murder, the Crown proves a stab wound, inflicted by the accused with haemorrhage as a result, and death as a result of haemorrhage, the burden of proof is upon the accused to show on the probabilities that there was an interruption of the causal chain.

The accused on a charge of murder had stabbed a woman with a knife. He had injured a vein but the bleeding has stopped, a clot had formed, and the woman would probably have recovered in the ordinary course. But the course which would probably have led to a natural recovery had been interrupted. A medical practitioner had decided to operate, a prudent decision but not a necessary one. The clot had been disturbed and the woman had bled to death.

Held, that the causal chain had been broken and that the Crown had failed to prove that the accused was responsible for the death of the deceased.

Held, further that the accused should be convicted of "assault with intent to do grievous bodily harm".

/In an earlier.....

In an earlier case of R. v. Du Plessis, 1960 (2) S.A. 642 (T.P.D.) it was held that where a wound is inflicted and the person is placed in the care of a medical practitioner and the person dies, then the person who inflicted the wound is responsible for such person's death unless the medical practitioner by his negligent or intentional act introduced a nova causa which is actually the cause of the death. The causal connection between the infliction of the wound and death which resulted is broken thereby. Where there is no nova causa introduced from outside by a third person, and the death results as a natural consequence of the infliction of the wound, having regard to the bodily condition of the injured person, then the person who inflicted the wound was the cause of the death. The fact that the deceased, on account of his age, constitution or habits, was more vulnerable or prone to the result which followed, does not affect the causal connection."

In the present case Dr. Waldis testified that the second operation was necessary and that he had no choice because the operational wound had opened and he could see the intestines through it. It was clear that the cause of the opening of the wound was infection caused by faeces which had remained in the abdominal cavity when the rinsing out was done. There is no evidence by the defence that the doctor and his staff were negligent in any way. The onus was on the defence to prove on a balance of probabilities that there was novus actus which interrupted the chain of events from the stabwound to the death of the deceased. The doctor testified that the faeces are very infectious and yet it is not always possible to clean the

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abdominal cavity so thoroughly that subsequent infection can be ruled out completely. He pointed out that after the operation he put the deceased on antibiotics. I am of the opinion that the doctor in the present case was not negligent and that there was no interruption in the causal chain. The wound inflicted by the accused was the cause of death.

It was submitted on behalf of the accused that at the time he committed the actus reus he was drunk. The Crown witnesses who were in the company of the accused just before the fight testified that he appeared not to be drunk. It is not the defence of the accused that he was so drunk that he did not know that such act was wrong or that he did not know what he was doing (see Criminal Liability of Intoxicated Person Proclamation No.60 of 1938, section 2).

I have formed the opinion that the accused had the necessary intention to kill in that when he stabbed the deceased on the left flank he foresaw that his act might cause deceased's death.

In the result I find the accused guilty of murder.

My assessor agrees.

J.L. KHEOLA
JUDGE

26th May, 1989.

EXTENUATING CIRCUMSTANCES

There is evidence that just before the fight the accused had been drinking Sesotho beer and that he had already finished three "babaton" tins of beer. I am convinced that although the accused was not actually drunk, the beer he had drunk had affected his mind.

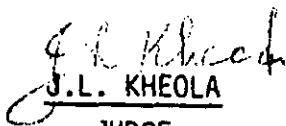
It is common cause that the deceased used to look down upon the accused despite the fact that he was much younger than the accused. This factor must have been working on the mind of the accused for a long time. Although that kind of behaviour of the deceased towards the accused did not amount to provocation it is a factor which cannot be ignored when considering extenuating circumstances.

Taking into account the cumulative effect of liquor on the mind of the accused and the fact that the deceased looked down upon the accused, I have come to the conclusion that there are extenuating circumstances and that the accused is guilty of murder with extenuating circumstances.

SENTENCE:

Eight (8) years' imprisonment.

My assessor agrees.


J.L. KHEOLA
JUDGE

26th May, 1989.

For Crown - Miss Moruthoane
For Defence - Mr. Peete.