

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

VS

LIPHAPANG MOKHESI

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 1st day of June, 1989.

The accused is charged with the crime of murdering one Lilemo Mokhesi, it being alleged that on or about 10th September, 1985 and at or near Machekoaneng in the district of Maseru he unlawfully and intentionally killed the deceased. He has pleaded not guilty to the charge.

At the commencement of this trial Mr. Sakoane, counsel for the crown accepted the admissions made by Mr. Mpopo, counsel for the defence, that the defence would not dispute the post mortem examination report performed on the body of the deceased as well as the deposition of D/Tpr Raboqa, who was P.W.3 at the proceedings of the Preparatory Examination. The deposition of D/Tpr Raboqa and the post mortem examination report were, in terms of the provisions of S.273 of the Criminal Procedure and Evidence Act, 1981, accordingly accepted as evidence. It became unnecessary, therefore, to call D/Tpr Raboqa and the medical doctor

who had .....

who had compiled the post mortem examination report as witnesses in this trial.

It is common cause that Khadebe Mokhesi and 'Neko Jimisi identified the body of the deceased before a medical doctor who at about 2.20 p.m. on 11th September, 1985 performed a post mortem examination on the body. The external examination revealed that the deceased had sustained the following injuries: a laceration on the left frontal region of the head, bruises of both cheeks, abrasions of the right shoulder and the lower right eyelid. Upon opening the body, the medical doctor found that the deceased had a fracture of the skull on the frontal region, blood over the epicranium and a laceration of the brain tissue. On these facts the medical doctor formed the opinion that the deceased had died as a result of intra cranial haemorrhage.

I can think of no good reason why the unchallenged opinion of the medical doctor that the deceased died as a result of intra cranial haemorrhage should, in the circumstances of this case, be disturbed. That being so, the important question for the determination of the court is whether or not the accused is the person who inflicted the injuries upon the deceased and, therefore, brought about his death.

In this regard, the court heard the evidence of P.W.3, Sello Rankoe, who testified that on the day in question he and the accused were at a beer house in their village. There was a time when the accused complained that a woman by the name of 'Mantsoaki was using abusive language against him for a cattle which had apparently trespassed in her crops. This is confirmed by the

3/ accused according .....

accused according to whom the cattle belonged to one Joshua and not him.

It is common cause that P.W.3 persuaded the accused to ignore the quarrel he had with 'Mantsoaki. The accused then left for his cattle which were grazing at some distance away. On arrival at the cattle accused inquired from a herdboys who was looking after the cattle where the deceased was. The herdboys, who, however, did not testify in this trial, pointed out where the deceased was.

It may perhaps be mentioned at this stage that the deceased was a little boy of about 7 or 8 years old, an illegitimate child of accused's unmarried daughter. The accused himself was the person who brought up the deceased.

P.W.3 further told the court that when the deceased was pointed out to the accused, the latter angrily asked the deceased what he was doing as 'Mantsoaki was insulting him for cattle that were trespassing in her crops. There was no response from the deceased who was, in any event, out of P.W.3's view. P.W.3 only heard the accused instructing the deceased to bring a donkey to him. He then noticed the donkey which was kneehaltered coming to the accused. The accused caught hold of the donkey unkneehaltered and mounted it.

Shortly thereafter, P.W.3 noticed the deceased running passed the beer house outside which he was seated. The deceased who was riding on the donkey was chasing him. When he asked him why he was chasing the boy, accused told P.W.3 that the latter was disobedient. They chased each other until they went out of his (P.W.3's) view.

4/ Thereafter, .....

Thereafter P.W.3 left the beer place for his house. Whilst he was on his way home, P.W.3 heard one Mosiuoa Chaole, raising an alarm that a donkey was running away with a child. When he looked around P.W.3 noticed accused's donkey running out of a donga in the direction towards the accused's home. As it ran away the donkey was dragging along the deceased.

P.W.3 ran for the donkey and when he passed him next to the donga asked the accused why he had tied the child to the donkey. Accused replied that he had not tied the deceased to the donkey but the latter had entangled himself with the rope with which he was pulling it to the veld. P.W.3 left the accused and ran after the donkey which was eventually stopped, in front of accused's house, by one Pakiso. When he unfastened it from the deceased's left wrist, P.W.3 found that the rope had been tied twice around the wrist. As the terrain over which he was being dragged by the donkey was stoney, the deceased had injuries and his skull was removed. He was already dead.

The accused eventually came to where the donkey was stopped and asked whether the deceased was dead. According to him, P.W.3 replied in the affirmative. The deceased was carried to a place next to Mazenod mission from where he was transported in a vehicle to the mortuary at Queen Elizabeth II hospital.

In his evidence, P.W.1, Mosiuoa Chaole, told the court that on the day in question, 10th September, 1985, he was walking towards the village in which he and the accused lived. He then noticed the deceased running and the accused, who was riding on a donkey, chasing him. As the deceased was running towards him, P.W.1 was asked by the accused to get hold of the boy.

5/ He refused .....

He refused to do so because he realised that the accused wanted to beat up the child. He was against the beating up of children.

The accused then called at one boy by the name of Mosito and asked him to get hold of the deceased. Mosito ran after, and caught hold of, the deceased. The took the deceased to the accused who then threw him down. Thinking that the accused was just going to chastise the deceased moderately, P.W.1 continued on his way home. When he looked back P.W.1 noticed accused's donkey emerging from a donga. It was running and dragging along the deceased.

P.W.1 confirmed the evidence of P.W.3 that he raised an alarm as a result of which he and many other people ran for the donkey which was eventually stopped by Pakiso and one Sekofolo. When he came to where the donkey had been stopped, P.W.1 found the deceased already dead and unfastened from the donkey. He assisted in carrying the deceased into the house of accused. When he asked the accused whether he had requested him to get hold of the deceased so that he could kill him, the accused wanted to fight him. He was, however, stopped from doing so by other people. On the request of the accused's wife and one 'Mantala P.W.1 went to report to the chief what had happened to the deceased. On his return from the chief's place he found that the deceased had already been taken to the mortuary.

The evidence of P.W.2, Mosito Rankoane, was that on the afternoon of 10th September, 1985 he was herding his animals when he noticed the deceased running away and being chased by the accused

6/ who was .....

who was riding on a donkey. He also noticed P.W.1 walking on a footpath about 60 paces away from him. On the request of the accused, P.W.2 ran after the deceased, caught hold of, and handed him over to the accused who was then waiting in a donga. When the accused threw the deceased down and started whipping him with his plastic sjambok, P.W.2 returned to his cattle.

As he was going to the cattle P.W.2 had the occasion to look back and noticed the deceased walking in front of the donkey while the accused was whipping it from behind. They were emerging from the donga in which the accused had been whipping the deceased. He was some distance away and could not tell with any certainty whether the deceased was holding the rope by which he was leading the donkey in the direction towards the veld or the rope was actually fastened around his hand.

Shortly thereafter, P.W.2 noticed the donkey running back towards the donga. The deceased had fallen down and the donkey was dragging him along. As the donkey emerged from the other side of the donga still running and dragging along the deceased, the accused shouted from inside the donga and asked him to stop the donkey. P.W.2 did run for the donkey which, however, outran him until it was stopped by Pakiso outside the accused's house.

When Pakiso, who is the elder brother of the deceased, stopped the donkey, P.W.2 went to his house and reported to his mother what had happened. He then went to accused's house where he learned that the deceased had been taken to the hospital.

7/ The accused ....

The accused gave evidence on oath and confirmed the evidence of P.W.3 that following his quarrel with 'Mantsoaki at the beer house, he proceeded to his animals which were grazing some distance away. According to him, the accused wanted to get his donkey so that he could ride on it and go to the cafe to buy some tobacco. After getting hold of the donkey he instructed the deceased to go home so that on his (accused's) return from the cafe he could take the donkey back to the veld.. While he was on his way to the cafe the accused noticed that the deceased was not going home as he had instructed him. He returned to the deceased and again instructed him to go and wait for the donkey at home. However, the deceased started running away.

Realising that the deceased was refusing to obey his orders the accused wanted to discipline him and so he chased him. As the deceased was outrunning him the accused conceded that he then called at P.W.2 and asked him to get hold of the boy so that he could beat him up for refusing to obey his orders. According to the accused, P.W.1 was nowhere in the vicinity at that time. He denied, therefore, to have asked him to get hold of the deceased.

As it has already been pointed out, P.W.2 told the court that at the time he saw the accused chasing the deceased, P.W.1 was walking on the footpath about 60 paces away from him. I must say I observed all the witnesses as they testified from the witness box. I was satisfied that P.W.2 was a truthful witness. There is no doubt in my mind that he and P.W.1 were testifying to the truth when they said the latter was in the

8/ vicinity at ....

vicinity at the time the accused was seen chasing the deceased. The accused is, therefore, not being honest with this court in his denial that P.W.1 was in the vicinity at the time he was chasing the deceased.

As for the reasons why the accused chased the deceased it is significant that none of the witnesses who testified in this trial saw when he started chasing him. They were all out of view. The accused's herdboyc who was next to the deceased at the time the chase started was not called as a witness. The accused's evidence that he chased him because the deceased had refused to obey his instructions may well be the truth.

Returning to his testimony, the accused confirmed the evidence of P.W.2 that the latter caught hold of the deceased and handed him over to him. He was then waiting in the donga where he threw the deceased down and whipped him once on the legs and twice on the shoulders with a plastic whip or sjambok.

According to him, the accused was no longer interested in going to the cafe. He handed the donkey over to the deceased with the instructions to take it back to the veld. When the deceased left with the donkey he remained in the donga relieving nature. It was whilst he was relieving nature in the donga that he noticed the donkey running back home and dragging the deceased on the ground. He confirmed that he then called at P.W.2 and asked him to stop the donkey which, however, outran him (P.W.2). He himself ran after the donkey which was eventually stopped in front of his house. He found Pakiso, 20 years old elder brother of the deceased, and P.W.3 already holding the donkey. The

9/ deceased who .....



deceased who had sustained head injuries had already been unfastened from the donkey. He (accused) was, therefore, not in a position to tell the court who, between Pakiso and P.W.3 had actually unfastened the deceased from the donkey.

The accused then immediately went to look for a vehicle in which to rush the deceased, who was still alive, to Queen Elizabeth II hospital. On arrival at the hospital, the deceased was, however, certified dead. He carried the body of the deceased to the hospital mortuary and subsequently reported the incident to the police.

D/Tpr Raboqa confirmed that on 11th September, 1985 the accused reported this incident to him and handed over the rope and the plastic sjambok. According to the police officer, the accused explained that the deceased was pulling the donkey to the veld when the rope accidentally entangled around his wrist and the donkey ran away with him. The police officer attended the scene of accident and found that the place where the donkey was allegedly dragging the deceased was full of stones.

According to the accused, after he had lashed him in the donga, the deceased left with the donkey for the veld. He was leading it by the rope which was fastened to its neck. In his evidence before this court the accused again denied that he had fastened the rope around the deceased's wrist. He, however, told the court that he ordinarily worked with animals and whenever one of them was being stubborn he usually fastened it with a rope which he coiled around his hand in order to have a firm grip. The deceased who usually worked with him

10/ had seen .....

had seen him do it. It was possible, therefore, that whilst the deceased was leading it to the veld the donkey became stubborn and wanted to return home. The deceased could then have coiled the rope around his hand hoping to have a firm grip and stop the donkey. However, he could not successfully do so because of his tender age. When the donkey ran away with him the rope which he had coiled around his hand could have tightened up on the deceased's wrist with these tragic consequences.

It is important to remember that apart from P.W.3's mere assumption that the accused had fastened the rope twice around the deceased's wrist none of the witnesses told the court that he had seen the accused actually doing so before he instructed the boy to take the donkey back to the veld. There is, therefore, only the word of P.W.3 against that of the accused on this issue. I must, however, point out that P.W.3 is a witness who, in his deposition before the magistrate at the Preparatory Examination proceedings testified that when he was transported from home to the hospital the deceased was still alive. In his evidence before the High Court he now agrees with the other crown witnesses that when he left home for the hospital the deceased was already dead.

It is also worth mentioning that when he started giving evidence before this court P.W.3 clearly said he was never employed by the accused. However, it later turned out that there were occasions when the accused had, in fact, employed him to do certain jobs for which he was paid money.

In my view, P.W.3 was not an entirely reliable witness and it would be totally unsafe to accept his evidence, that the accused

11/ had tied .....

had tied the rope twice around the deceased's wrist, unless such evidence was corroborated by that of a more reliable witness. There was evidence suggesting that at the time P.W.3 was unfastening the rope from the deceased's hand Pakiso and Sekofolo were present. Indeed, Pakiso himself gave evidence at the Preparatory Examination proceedings. It was, therefore, the easiest thing for the crown to call him as a witness in support of P.W.3's story. Both Pakiso and Sekofolo were, however, not called as witnesses in this trial by the crown counsel who told the court that he was making Pakiso available for the defence, if it so wished. The inference to be drawn from this is that Pakiso was not going to support the crown evidence that the accused had tied the rope twice around the deceased's wrist. That being so, I am inclined to accept the accused's evidence that when he instructed the deceased to take the donkey back to the veld he had not fastened the rope around his wrist.

It was not really disputed that the terrain over which the donkey was dragging the deceased was stoney. For obvious reasons the deceased sustained the head injuries that admittedly brought about his death whilst he was being dragged over that stoney place by the donkey. However, in the absence of any conclusive evidence that the accused had deliberately fastened the deceased to the donkey I am unable to find that the accused can properly be held responsible for the injuries that brought about his death. The question I have earlier posted viz. whether or not the accused is the person who inflicted the injuries upon the deceased and, therefore, brought about his death must be answered in the negative.

on the boy for refusing to obey his orders. That, in my view, cannot be regarded as unlawful assault on the deceased. It was a moderate punishment which, in the circumstances of this case, was permissible in law.

Having found, on evidence, that he cannot be held responsible for the injuries that brought about the death of the deceased, it necessarily follow that I am unable to find that the accused has committed the offence against which he stands charged. I would accordingly find him not guilty and discharged.

My assessor agrees with this finding.

B.K. MOLAI

BJUDGE

1st June, 1989.

For Crown : Mr. Sakoane,

For Defendant : Mr. Mpopo.