

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

v

1. GERARD NKAKI
2. 'MOKO NKAKI

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai on
the 21st day of June, 1989.

The two accused are before me on a charge of murder, it being alleged that on or about 21st July, 1987 and at or near Upper Thamae in the district of Maseru they both or either of them unlawfully and intentionally killed one Mathe Seahle. They have pleaded not guilty to the charge.

It may be mentioned from the word go that Mr. Thatsane, counsel for the crown, accepted the admissions made by Mr. Pitso, who represents the accused in this case, that the defence would not dispute the depositions of Kelebone Nkaki, Dr. Nacario Oliver, D/Tpr Selebalo and D/Tper Pelea who were, respectively, P.W.4, 6, 7 and 8 at the proceedings of the Preparatory Examinations. In terms of the provisions of S.273 of the Criminal Procedure and Evidence Act, 1981 their depositions were accepted as evidence and it became unnecessary, therefore, to call the deponents as witnesses in this trial.

2/ It is

It is common cause from his evidence that on 27th July, 1987 Dr. Oliver Performed a post mortem examination on a dead body of a 33 years old male African. The body was identified before him by Kelebone Seahle as that of the deceased, Mathe Seahle.

The external examination revealed that the deceased had sustained a 7 cm laceration under the right armpit, a 3 cm laceration on the head, bruises on the left arm, a 2 cm laceration on the left lumbar area and a laceration under the left armpit. On opening the body, the medical doctor found that the laceration under the left armpit had penetrated the left lung causing a massive haemothorax and collapse thereof with the resultant death of the deceased. He formed the opinion that a sharp instrument was used and massive force applied to inflict the injury on the left armpit of the deceased.

I am prepared to accept as the truth the unchallenged evidence of the medical doctor that the deceased died as a result of the injury that had been inflicted on his left armpit. The next question that remains for the determination of the court is whether or not the accused are the persons who inflicted the injuries and, therefore, brought about the death of the deceased.

In this regard it is common cause that on the night in question, 21st July, 1987, the deceased, the two accused and P.W.2, Pte Cheko, visited Upper Thamae lodge for beer drinking. According to P.W.2, the deceased and the two accused were already drinking beer in the public bar of the lodge when he first noticed them. He was not, therefore in a position to tell the court whether or not they had come into the public bar before

3/ his arrival

his arrival there. In any event P.W.2 told the court that after exchanging greetings with accused 2 who is an ex-member of the army, and acquaintance of his he went into the private bar of the lodge for his drinks. I shall return to his evidence in a moment.

The evidence of P.W.1, Matia Lethapa, is to the effect that as of 21st July, 1987 he was employed as a night watchman at Upper Thamae lodge. He reported for duty at 6 p.m. on that day. At about 9.p.m. he was standing at his post at the gate of the lodge when he noticed the two accused arriving in a combi. They parked their combi outside the gate and entered into the bar. On several occasions he noticed the two accused coming out of the bar carrying bottles and tins of beer which they consumed in their combi. At one time he (P.W.1) even talked to accused 1 and warned him that it was not permissible to take bottle of beer out of the gate of the lodge premises. However, Accused 1 assured him that they would not go away with the bottles and he (P.W.1) ignored the matter. As there was electric light illuminating the area where he was standing guard at the gate P.W.1 had no difficulty in seeing the accused going to and from the bar for their beers.

At about between 11 p.m. and 12 midnight, P.W.1 noticed the deceased, in the company of a person he did not know, leaving the lodge. At the time the deceased and his companion passed through the gate at which he was standing guard, P.W.1 noticed that the two accused were standing about 4 paces (indicated) away from the gate. Accused 1 then told the deceased that he was "cabating" them at the main bus rank in Maseru. By that

P.W.1

By that P.W.1 understood accused 1 to mean that the deceased was interfering with the operation of their taxi at the bus rank.

As accused 1 thus talked to him, P.W.1 noticed accused 2 suddenly delivering blows with fists on the deceased whose blanket dropped to the ground in the process. The deceased tried to pick up his blanket but accused 2 stepped on it with his foot. The deceased struggled to pull away his blanket but accused 2 produced a knife with which he stabbed him under the armpit. P.W.1 could see the knife because it was shining in accused 2's hand as the latter was stabbing the deceased.

Whilst accused 2 was assaulting the deceased in the manner described, accused 1 joined him by kicking and hitting the deceased with fists. As he was being assaulted by the two accused the deceased who was not armed with anything moved backwards until he fell into a furrow. Apart from telling the accused and the deceased to stop what they were doing, the deceased's companion, who was, however, not called as a witness in this trial, did nothing to intervene, in the fight.

According to him, P.W.1 was also scared to intervene in the scuffle particularly so because he realised that accused 2 was using a dangerous weapon. He, however, went into the bar of the lodge to enlist assistance. On his return from the bar P.W.1 was in the company of many other people amongst whom was P.W.2. On arrival at the place where the fight was taking place, P.W.1 noticed that the deceased was no longer in the furrow into which he had fallen. He was then lying prostrate in the middle of the road. Accused 2 was standing on the side

5/ of the taxi

of the taxi combi which accused 1 was driving towards where the deceased was lying in the road, clearly in an attempt to run him over. According to P.W.1, the deceased was saved by P.W.2 who rushed at and stood in front of the taxi combi requesting accused 1 to stop the vehicle so as not to run over the deceased in the road. Accused 1 complied with the request of P.W.2 who then ran to a nearby police station in the village of Upper Thamae.

Returning to his evidence, P.W.2 testified that at about a little before 12 midnight on 21st July, 1987 he was already leaving the lodge for his house. As he went through the gate he noticed a person lying prostrate on the road. A taxi combi was moving towards that person. The vehicle had its lights on and was illuminating the road. P.W.2 had, therefore, no difficulty in identifying the deceased as the person who was lying prostrate in the road. He was, however, no longer wearing the blanket he had been wearing in the public bar. The deceased had clearly been injured as there was a pool of blood at the spot where he was lying in the road.

P.W.2 confirmed the evidence of P.W.1 that he then rushed at and stood in front of the taxi combi which was being driven by accused 1 whom he knew very well as they had at one time, been renting rooms on the same stand. He could not see where accused 2 was at that time. P.W.2 then knocked at the windscreen of the taxi combi and told accused 1 to stop the vehicle so as not to run over the deceased. According to P.W.2 the vehicle

6/ was then

was then about 2 paces from the deceased and on the verge of running him over.

When accused 1 complied and stopped his vehicle, P.W.2 rushed to make a report to the police at Upper Thamae police post. He immediately returned to the scene of crime in the company of P.W.3, Tpr Baholo. This is confirmed by P.W.3 who testified that on arrival at the scene of crime he found many people gathered there. The deceased whom he knew very well as a traffic police was lying in a pool of blood in the road. Accused 1, who was standing with another person next to a taxi combi which had fallen into a furrow some 20 paces away from the deceased, was pointed out to him. P.W.3 went to accused 1 and his companion but as he approached them and before he could identify him, accused 1's companion ran away and disappeared under cover of darkness. However, P.W.3 was able to arrest and take accused 1 to Upper Thamae police station. On the following day he handed him over to Tpr Selebalo of the Maseru Police. P.W.3 further told the court that before he left with accused 1 for the police station at Upper Thamae, Tpr Tsiu had arrived at the scene of crime in a vehicle in which the deceased was rushed to Queen Elizabeth II hospital for medical attention.

This is confirmed by P.W.2 who testified that he accompanied the deceased to the hospital. However, on arrival at the casualty department of the hospital the deceased was certified dead and had to be taken to the mortuary.

7/ The evidence

The evidence of Kelebone Nkaki was to the effect that he was the elder brother of the two accused. On the early morning 22nd July, 1987 accused 2, who appeared drunk and had some blood stains on his trousers, arrived at his house at Upper Thamae. To his inquiry about the blood stains on his pair of trousers and where he came from at that early hours of the morning accused 2 informed Kelebone Nkaki that he had been involved in a fight at Mafeteng where he ordinarily stayed. He was, however, on his way to Leribe where their original home was.

Before leaving for work in the morning of 22nd July, 1987 Kelebone Nkaki gave accused 2 a change of clothes so that he could wash the blood stains on his pair of trousers. On his return from work later on that day Kelebone found that accused 2 had already left. He assumed that he had gone to his home in Leribe.

According to Tpr Pelea in September, 1987 accused 2 was arrested and kept in Police custody at Mafeteng in connection with a different offence. The police officer then received a certain report following which the accused was transferred to Maseru police. This is confirmed by D/Tpr Selebalo who also told the court that on 18th October, 1987 accused 2 took him to Upper Thamae where he was to point out the place where he had thrown away the knife he had used in his fight with the deceased. A search was made for the knife which could, however, not be found.

In their evidence on oath the two accused conceded that on the evening in question they visited Upper Thamae lodge for beer drinking. They were travelling in a taxi combi which was driven by accused 1. After parking their vehicle

8/outside the

outside the gate of the lodge premises, the two accused entered into the public bar where they met P.W.2. They drank altogether between 10 and 12 bottled beers. They denied, however, the evidence of P.W.1 that there were occasions when they went outside the bar with beers that they consumed in their vehicle.

I must say I observed all the witnesses as they testified from the witness box. P.W.1 impressed me as a witness of the truth. I am unable to think of a good reason why in a lodge milling with many people he could pick on the two accused persons and fabricate against them that on several occasions he saw them going out of the bar with beers which they consumed in their vehicles. He was honest enough to tell the court that when he pointed to him that it was not permissible to take bottles of beer away from the lodge premises accused 1 assured him that they would return the bottles after use and he ignored the matter. I am prepared to accept as the truth P.W.1's evidence that he did, on several occasions, see the two accused taking beers to their vehicle and reject as false the accused's story that they did not.

Be that as it may, the accused conceded that at about 12 midnight, the public bar was about to close down and they left for their vehicle. As they went through the gate of the lodge premises they noticed two people walking about 5 paces ahead of them. One of the two people made a remark about the vehicle in which the accused were travelling to the effect that they (accused) were transporting passengers in vehicles that were not in good conditions.

9/ It will

It will be remembered that according to the evidence of P.W.1 the accused were waiting outside the gate of the lodge premises when the deceased and his companion passed next to them. The accused were the first to talk to and attack the deceased who had not uttered a word to them or made any remark about their vehicle. In their own testimony, the accused told the court that they were not conveying passengers at the time nor was there anything apparently wrong with their vehicle. I find it unconvincing that, in the circumstances, the deceased could have remarked that the accused were conveying passengers in vehicles that were not in good conditions.

In any event accused 1 told the court that he had identified one of the two people as the deceased, a traffic police officer in Maseru. When accused 2 asked him who those two people were, accused 1 told him that one of them was the deceased, a traffic police officer. Accused 2 then asked whether those two people were police officers even at night. In reply accused 1 said they just wanted to "cabata" people meaning that the police officers were molesting people.

There was then an altercation between the deceased and his companion on one hand and the two accused on the other hand. In the course of that altercation the deceased hit accused 2 a blow on the face with a fist and a fight ensued.

According to the accused when the fight started, accused 1 moved away. The fight was, therefore only between the deceased and accused 2 who told the court that the deceased was no match for him. After he had hit him the first blow he told the deceased that he (accused 2) was going to beat him up until he swarted

10/ From then

From then onwards he was punching the deceased like a boxing bag. Eventually the deceased lowered his hands and threatened that he was going to shoot him. As the deceased's hands were underneath his blanket he feared that the deceased had in his possession a gun with which he was going to shoot him. Accused 2 then took out his knife with which he stabbed the deceased in self-defence.

It is clear from the evidence that accused 1 was the person who had a complaint that the deceased was interfering with the operation of his taxi at the Maseru bus rank. I do not believe that he could have stood aside when the deceased was fighting with accused 2, his own brother. On the contrary I am inclined to accept as the truth the evidence of P.W.1 that when accused 2 started assaulting the deceased, accused 1 joined and assisted his brother in the assault on the deceased. Indeed, the evidence of P.W.1 that accused 1 was also fighting the deceased is corroborated by that of P.W.2 who told the court that when he first came to the scene of crime accused 1 was driving his vehicle towards the deceased clearly in an attempt to run him over. I reject as false the defence's story that accused 1 did not join accused 2 in the assault on the deceased and accept as the truth the crown's version that he did. Bearing in mind that there was electric light illuminating the area where the fight was taking place accused 1 must have realised that accused 2 was stabbing the deceased with a knife. He nonetheless joined in the attack on the deceased thus associating himself with what his brother, accused 2 was doing. On the principle of common purpose, accused 1 is equally responsible for the injuries that accused 2 inflicted on the deceased.

11/ As regards

As regards the defence of self-defence, it is significant that in his own mouth accused 2 told the court that the deceased was no match for him. He was just punching the deceased like a boxing bag. Although accused 2 testified that deceased threatened to shoot him and he could not see if the deceased had a gun in his possession as his hands were underneath his blanket, P.W.1 told the court that the deceased's blanket had dropped down at the time accused 2 started attacking him. He was unable to pick it up from the ground because accused 2 had stepped on it by his foot and stabbed him with a knife. The evidence of P.W.1 was on this point corroborated by that of P.W.2 who told the court that at the time he first came to the scene of crime the deceased was lying prostrate in the road and no longer wearing the blanket he had been wearing in the public bar. In my view the accused are being dishonest with this court in their story that they believed the deceased had in his possession a gun with which he threatened to shoot. By and large I am satisfied that at the time he stabbed the deceased the fatal wound under the left armpit accused 2's life was not in danger at all. That being so, self-defence cannot avail him. Considering the evidence as a whole there is no hesitation in my mind that the question I have earlier posted viz. whether or not the accused are the person who inflicted upon the deceased the injuries that brought about his death must be answered in the affirmative.

Regard being had to the fact that a knife was used with massive force to stab the deceased on the upper portion of his body I am satisfied that the accused were aware that death was

12/ likely to

likely to result. They acted reckless of whether or not death did occur. Consequently the accused had the requisite subjective intention to kill, at least in the legal sense.

In my judgment both accused are guilty of murder and I accordingly convict them.

Both my assessors agree.

B.K. MOLAI

JUDGE

21st June, 1989

For Crown : Mr. Thetsane,

For Defence : Mr. Pitso.

EXTENUATING CIRCUMSTANCES

This 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 their act.

The court has found no evidence indicating that the accused had premeditated the death of the deceased. There is also evidence that shortly before they assaulted and killed the deceased the accused had been drinking beers at the lodge. This must have affected their minds so that they were prone to do things they would not do when sober.

I find, therefore, that the accused's state of intoxication and absence of premeditation for the death of the deceased do constitute extenuating circumstances in this case. The proper verdict is that the accused are guilty of murder with extenuating circumstances.

My assessors agree.

Sentences : A.1 - 9 years imprisonment
A.2 - 12 years imprisonment

B. K. MOLAI
JUDGE

21st June, 1989.