

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

SUTHA SHALE

Held at Butha-Buthe

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 24th day of August, 1989.

The post mortem examination report by Dr. Bruckish shows that the death of the deceased Rampinane Mokone was due to a big subdural bleeding into the left side - that this bleeding was as a result of application of a blunt instrument on the deceased's head.

As to the external appearances the report reveals that there was blood coming out of the left ear. There were also observed multifractures of the left skull which had a depression. There were two centimeter wound on the upper lip towards the right and a three centimeter wound on the occiput to the left.

His report was handed in marked Ex. "B". His depositions were also admitted by the defence.

The crown led the evidence of two witnesses while the rest of other depositions were admitted and made part of the record in this proceedings save that of

/P.W.5

P.W.5 Tlala who didn't respond to the summons.

The oral evidence of P.W.1 Masheane Shale revealed that he is aged 70 and is an uncle to the accused. Their relations are of the very harmonious nature. The two live in the same village of Maphiring. P.W.1 is accused's father's younger brother.

The deceased was unknown to this witness; in fact to any of the witnesses who gave evidence including the accused, save that P.W.4 the Chief of Maphiring chief Lebina knew the deceased's father who was a subject of a neighbouring chief.

The accused stands charged with the murder of the deceased who died on 31st August 1987.

P.W.1 can neither read nor write. It however appears that on the late afternoon preceding deceased's death later in the night P.W.1 in the company of a fellow villager Tlala were proceeding from the home of one Setefane where they had gone looking for beer but finding that it had been finished retraced their steps home to Maphiring in disappointment.

On their way home they were overtaken by the accused who went ahead of them and came to a stand still at a neck or pass six hundred paces away. P.W.1 and his companion came following at a gentle pace. The accused confirms that he went past them and that he was ten paces away from them when he did so.

Thus P.W.1 was able to see that accused was carrying a stick which this witness described at great detail and identified in court during these proceedings.

Shortly after the accused had gone past P.W.1 and Tlala were overtaken by the deceased who was walking hurriedly. He was wearing a blanket but was carrying nothing in his hands as indeed the events did eventually

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bear out at the place where he was found lying on the ground a hundred paces ahead of P.W.1 who observed the encounter between the accused and the deceased at that distance.

P.W.1 says it was at this distance that he saw the accused rush at the deceased and beat him with a stick so much that he fell to the ground. P.W.1 says the accused beat the deceased several times with that stick. The accused says he only beat him twice.

On seeing this P.W.1 shouted to the accused who there and then stopped beating the deceased, looked back and rubbed his stick against the ground. The witness made a demonstration of this before court.

After doing this the accused left. P.W.1 detailed Tlala to go and report this incident to the chief who sent out messengers to arrest the accused who was eventually arrested and brought back to the scene and questioned about this incident. In reply he is said to have said he only saw himself assault the deceased and did not know what he was doing.

The accused in his evidence said he also had set out on the day in question for a different place where I would say that he was lucky to find much beer had been brewed for the removal of the mourning cloth ritual.

He does not remember how much beer he took. However two four gallon tins of beer was shared between him and some others equal in number to people who were in this Court room. My estimate of people who were in there was about between twenty and thirty.

Later on the accused made his way home. It is common cause that he went past P.W.1 and Tlala on the way. It is also common cause that he waited some 600 paces ahead of them at the neck.

His version differs from P.W.1's in the following respect. While P.W.1 says the deceased came following

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the same direction as that which was followed by the accused; the accused counters by saying the deceased came to the neck apparently coming from the direction of the village where the accused was heading for.

At this stage it is to be observed that P.W.1's story was neither tested nor, let alone, gainsaid under cross-examination. The court only heard for the first time when the accused was giving evidence that P.W.1 was lying.

Mr. Klass for the defence wanted in his submission to persuade the court to resolve this conflict of versions in favour of the accused.

But in Small vs Smith 1954(3) S.A. 434 it is said

"It is, in my opinion elementary and standard practice for a party to put to each opposing witness so much of his own case of defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence to go unchallenged in cross-examination and afterwards argue that he must be disbelieved."

I agree with this quotation and in deference to this dictum propose to reject the accused's version in favour of the crown's. Along with my decision I incorporate the submission that the accused merely brought this new thing into the picture so as to remove the deceased from the view of P.W.1 whose view is important in that although he was too far to hear the exchange of words, if any, between the deceased and the accused he however saw the accused rush at the deceased and beat him up. The deceased's path to the place where the accused was standing was not obstructed by anything. Thus if the deceased did anything such as blocking the accused's path P.W.1 would have seen it.

/However

However the path from the village on the other side of where the accused was standing to where the encounter took place is obscured from P.W.1's view. It is this state of affairs that the accused wants to take unfair advantage of. Hence my total rejection of it.

I have tried in vain to find what the accused's defence is. He did not plead intoxication though he claims to have taken beer thus suggests his senses were dulled by this factor.

He however says the deceased insulted him by saying to him "Jou Muur". This he says means go back to your mother's womb.

He says the deceased was blocking his way and ordering him to retrace his steps. He tried to avoid him by going to the other side of the neck but the deceased blocked his path there too. If this was true P.W.1 would have seen it. I reject it therefore as false beyond doubt.

However the question of the deceased's having insulted the accused cannot as the evidence stands be rejected for there is nothing to gainsay it as, the reliable witness, P.W.1 was too far to hear any exchange of words between the two.

I should add that though this is resolved in accused's favour it however does not accommodate his case within the provisions of the Criminal Law (Homicide Amendment) Proclamation 42 of 1959 which spells out the effect of provocation as applied in our law.

The part of the body assaulted and the weapon used are sufficient to show that the accused had the requisite intent to murder.

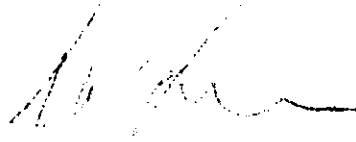
The evidence of P.W.1 was so satisfactory that on it alone the court found that a verdict of guilty as charged would be well founded.

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The accused is found guilty of the unlawful killing of the deceased with the legal intent.

My assessors agree.

Sentence : Sentenced to 14 years' imprisonment.



J U D G E.

23rd August, 1989.

For Crown : Mr. Thetsane

For Defence : Mr. Klass.