IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v

MOJALEFA TEBATEBA

HELD AT BUTHA-BUTHE

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 18th day of June, 1990

The accused stands charged with the murder of Francis Monate who died on the 26th or thereabouts of November 1988, at Tsifalimali in the Leribe district. The accused pleaded not guilty.

The postmortem report made by the doctor who examined the deceased shows that death was due to a 10 cm. cut wound on the left side of the neck. The doctor was of the opinion that the deceased had died from excessive haemorrhage. The nature of the wound as described by the doctor is that it was a 10 cm. long wound appearing to have been effected with a ragged instrument.

The evidence that was led on behalf of the crown was that of P.W.1 Molelekeng Moshabesha, who testified that on the material day she was at work at a bar where she is employed. She saw the accused and the deceased on that day. To her the accused appeared drunk. Although the deceased also is a drinker, however that day he didn't appear drunk and he was not drinking.

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She saw the accused and the deceased quarreling orally, at the end of which quarrel the deceased complained to her that the accused was picking a quarrel with him. She advised the deceased to let that be and the deceased left. She testified that the accused then turned on to her and slapped her on the face asking her why she should ask for drinks from boys when the accused was still there (probably implying that she should have asked for drinks from the accused himself). P.W.1 didn't reply, she also let this aspect of the matter be.

The accused then left sometime after the close of the bar.

At the P.E. P.W.1 said he left five minutes later than the deceased. In this court she said the accused left an hour after the deceased had left. Asked to explain this discrepancy, she said she believed she made a mistake in the court below. Her evidence in part is corroborated by that of the accused who said he left a long time after the deceased had left. He said the deceased had long left when he himself left the bar. According to P.W.1 the quarrel as presented to her by the deceased was that, the accused was taxing the deceased with having nearly caused the vehicle in which they had been travelling to injure them while on a trip sometime in the mountains. And to the deceased's surprise as expressed to P.W.1, the deceased said he was wondering why the accused should say this whereas in fact the person who nearly caused the accident was the accused who was the driver of the vehicle and the vehicle was the accused's in any case.

Well, at the closing time of the bar P.W.1 also left. On going out she met the deceased who offered to take her home. When they were about, - or before reaching a spot - seventy paces away from her home, she heard the voices of people from behind and she identified the accused's and 'Maahia's voices. Along the way the deceased returned :

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that is at a point lying about that 70 paces away from P.W.1's home. The direction he took was bound to make him meet the people who were following.

In short, the following morning she learnt that the deceased had died. She was cross-examined at length, but all in all her evidence was not shattered. She impressed me as a reliable witness and whose evidence I accept and admit as true.

P.W.7 Detective Trooper Rabolinyane gave evidence and in it said upon receiving a report of the death of the deceased, he conducted some investigations along with other team members. The officers who investigated this case are said to have worked as a team.

P.W.7 testified that the first contact he had with the accused was on the 28th November 1988. He interrogated the accused who took him to his home, where he took out a wheel-spanner he used to cause the injury, or in the text given in this Court - wheelspanner which was used in the encounter between the accused and the deceased.

The spanner is said to have been taken out from behind the seat of a Toyota Van. P.W.7 said he didn't find any blood on it. Asked why he said this and whether he expected to find any, he said yes because the accused had told him that the wheelspanner had been used in the offence and that it had blood.

They returned to the police office, and P.W.7 handed over the spanner to the clerk of court, per the latter's instructions. In the circumstances I need not elaborate on fine details. The upshot of the matter is that P.W.7 cautioned and charged the accusd with the murder of the deceased.

Then came the evidence of P.W.8, then detective sergeant Molefi,now a Warrant Officer who, during the course of his

investigations, went to the scene and found a torch and jacket besides the deceased's body. He examined the body, and found on the neck an open wound. He collected the body and took it to the mortuary, where it underwent a post-mortem examination prior to its burial.

The jacket and the torch were marked Exhibit 2 and 3 respectively but their purpose in this case is hardly discernible.

Then Mrs. Sehahabane, the Magistrate who was P.W.6 was called to give evidence. She is the witness before whom the accused is alleged to have made a statement. In that statement the accused is shown to have gone to the bar with one Makenzi a friend of his who was working in the Republic of South Africa. According to that statement the quarrel erupted between the deceased and the accused. The accused complained that the deceased had called him a rag. The deceased left after this quarrel and intervention of some people. The accused also went and got to sleep. Then he woke-up and felt angry. He took a spanner and went to look for the deceased. He threw the spanner at him and the deceased fell to the ground. The accused picked up the spanner and stabbed him with it on the left side of the neck, and the accused left him there.

In the questions put to the crown witnesses it was said the accused had nothing to do with deceased's death. It was also put to P.W.1 that she never heard the accused and 'Maabia's voices coming from behind them, i.e. behind her and the deceased. It was put to P.W.1 that the accused left at 2100 hours at the bar not as was suggested by P.W.1 or not as testified to by P.W.1 that he left at closing time, which was 2400 hours. It was also put to her that it was the deceased who picked up a quarrel with the accused and not the accused with him.

As rightly submitted by counsel for the defence, although the case was conducted by Mr. Mokhobo, but this was submitted

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by Mr. Qhomane, and is not really material, the crucial matter consists in the evidence of P.W.7 who told the court that the accused took him to the accused's home where a spanner was extracted from behind the seat of a Toyota Van. As submitted by both counsel the court made a ruling on the admissibility of this statement namely that it was freely and voluntarily made.

In a format that was filled by P.W.6 when taking the statement from the accused, it is significant that the accused when asked if he had been threatened to make that statement he replied no. It is also significant that P.W.6 and P.W.7 were not told that the accused had been assaulted to go and make the statement. The same applies to P.W.8. It is significant that it was never put to them that in fact P.W.7 and P.W.8 are the ones who took the accused to the magistrate to make a statement. It is also significant that P.W.7 was not told that he had had a hand in the covering of the accused with a blanket around his face subsequent to which he was assaulted. It was not put to P.W.6 that the accused had told her and shown her that he had been assaulted on the 26th. Not only on 26th and 28th which are days which precede the 29th when he made a statement before her. All these are matters which were heard for the first time when the accused was giving his evidence on oath. The onus even in a trial within a trial rests on the crown. The authority of Small vs Smith 1954(3) SA at 434 is in point in this matter, and the case also of Phaloane vs Rex 1981(2) at 246 is of relevance in the regard that it is important to put the accused's case to the witnesses for the crown in order to avoid an inference that the accused is fabricating or that his statement is an afterthought, even allowing of course for the latitude that failure to put one's case to the opposite side in a criminal trial is accorded.

There is also authority for the view that once the accused's story is shown to be false, such falsity can be used as a factor in strengthening the case for the crown. It is significant that the doctor's statement of postmortem

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was made on the 30th November 1988. And his findings are consistent with or correspond with the description of the locality where the injury was effected as stated by the accused before P.W.6 on 29th November 1988, because before the learned magistrate the accused had the previous day said he had stabbed the deceased on the left neck with a spanner.

The court has had a look at the spanner. It looks rusty and rough edged at the sharp end, and it is obvious that the type of wound it can inflict would be ragged in its outline. And when asked the doctor at the P.E. stated that - and presumably after having been allowed to examine it - he was of the opinion that such an instrument could have caused the injury that he found on the deceased.

Needless to say the medical evidence was admitted in terms of provisions of the Criminal Procedure and Evidence Act.

The Crown submitted that the accused had the necessary intention to cause the death of the deceased, and that this is shown by the fact that the accused woke up in the middle of the night, went looking for the deceased; and on this score the Crown submitted that the accused could not avail himself of the plea in mitigation that a plea of provocation affords, because according to the Criminal Law Homicide Proclamation 1959, in order to avail oneself of the benefit held out by the plea of provocation one should have acted in the heat of passion, or in response to sudden provocation, occasioned by an insult offered to him or to one who is next of kin to him; and before the passion would have had time to cool off. The accused himself in giving evidence, testified that he wasn't angry when he left the bar.

A factor of some importance is what counsel for the accused submitted, namely that if the evidence of P.W.1 is accepted as true, that the accused left the bar at 12.00 midnight, then it seems to be in conflict with the admitted

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evidence, i.e. the admitted statement made before the Magistrate that he woke up around 3.00 a.m.

The statement made before the Magistrate, was just a statement, and the court is at large to see what the material aspects of the statement are. What was admitted of value in that statement is the fact that the accused made his statement freely and voluntarily. He was at large, of course, to lie about certain things in it, and that it was possible that it could be riddled with inaccuracies. Of crucial importance is the material aspect of the statement so made, and I therefore resolve this time conflict on basis of the satisfactory evidence that I heard from P.W.1 as to the time when the accused left the bar. The accused gave his evidence, which up to the point that at least he and the deceased were sometime at the bar and shows that the deceased left before him is consistent with the evidence that was given by P.W.1. Apart from that, as earlier pointed out, the accused's story was riddled with lies, and this is not an unusual thing in a criminal trial where a man is fighting for his life.

Another significant factor in the matter is that as P.W.1 stated, the deceased said to the accused during the quarrel that erupted in the bar; "but what have I done elder brother?" And in the evidence which for all it is worth of the accused's witness D.W.1 it is stated that the man or to be specific the voice of the man that she heard when some trouble happened to have been taking place outside her house some fifteen paces away, was saying "what have I done brother?" It is also significant that at the close of his evidence the accused stated that he was not at the scene at all. In other words this struck me as implying that he was raising a defence of Alibi; for it was put to him by his counsel as to what his defence was. But Hoffman at 473 states that where a witness pleads Alibi at the last moment, his failure to call the people he was with during the time of the alleged incident, would detract considerably from his credibility. I

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was referred to the authority of R. v. Bezuidenhout 1954(3) SA 188 and 197 in support of this principle.

As to the submission made on behalf of the accused that the pointing out was a result of the assault, Hoffman again at page 177 quotes Milner Judge President in S. v. Ismael 1965(1) SA 446 and 449 as saying that, even if pointing out results from, or was as a result of cross cruelty upon the person who subsequently points out, the evidence if so produced is admissible.

Considering the question of the intention: the nature of the weapon used and the part of the body on which the injury was inflicted, all point out that whoever inflicted the injury with that type of instrument, in acting as he did was reckless as to whether death resulted or not, because the nature of the weapon and the spot where the injury was inflicted clearly show that possibility of death might ensue.

Having said all these, I find that the accused is guilty of intentional killing of the deceased.

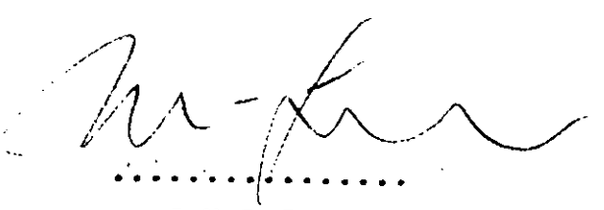
My assessors agree.

J U D G E

15th June, 1990

J U D G M E N T
ON EXTENUATING CIRCUMSTANCES

Your counsel asked that the Court should find that there are extenuating circumstances in your case. Extenuating circumstances are factors which the Court should take into account as having a bearing on the accused's moral blameworthiness. The test to apply in determining the existence or otherwise of the extenuating circumstances is a subjective one. Meaning that this has nothing really to do with the intention of the accused as laid down in the law relating to the finding and returning of verdict of guilty of murder. In fact the question of extenuating circumstances when said to be existing is a matter of the accused's responsibility to establish it. The onus is on him to establish on a balance of probabilities the existence of the extenuating circumstances. The record and credible evidence show that the accused was very drunk that day. And as rightly submitted by the accused's counsel, his mind must have been clouded with the intake of liquor. To that extent his moral blameworthiness must have been reduced. I therefore find that there is justification for the finding that extenuating circumstances exist in your case. I have heard what your counsel submitted on your behalf in mitigation that you are the sole bread-winner for your family, and you are the first offender. Although you are a first offender, the crime which you have been convicted of is a very serious one. The least possible sentence to impose on you is that of twelve years' imprisonment.



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J U D G E

15th June, 1990

For Crown : Mr. Mokhoba

For Defence : Mr. Mphutlane