C. OF A. (CRI) NO: 10 OF 1988

IN THE LESOTHO COURT OF APPEAL.

In the matter between:

LIKHETHO NKOLI — Appellant

v

REX — Respondent

HELD AT MASERU

CORAM:

Schutz P.
Trengove J.A.
Ackermann J.A.

J U D G M E N T.

TRENGOVE J.A.

The appellant was convicted of the murder, with extenuating circumstances, of one Mamoliehi Macheli (hereinafter referred to as "the deceased") and was sentenced to imprisonment for nine years. He now appeals to this Court against his conviction. It was common cause at the trial, and on appeal, that the deceased died on 5 September 1986 at or near Ha Letele, in the district of Maseru, as a result of an injury inflicted by the appellant. The injury was described as a penetrating wound on the deceased's left thigh which ruptured the femoral artery. The dispute between the parties, as regards the facts, related mainly to the

circumstances of the assault upon the deceased. On this issue, the Crown relied principally upon the testimony of the witness Maliphapang Lekala (PW2). Her account of the assault upon the deceased was denied by the appellant. However, the trial court accepted PW2's version of the incident, and rejected that of the appellant as being untrue. The first question for consideration in this appeal is whether the trial court erred in rejecting the appellant's account of the circumstances in which the deceased was fatally injured.

PW2's evidence can be summed up as follows. PW2 and the deceased were cousins and close friends. The deceased had been working in Johannesburg for some time and had returned to Ha Letele about a week prior to 5 September 1986. At about 3p.m. on that day, PW2 and the deceased went to a neighbouring village, called Moeeling, to drink beer. On arriving at the beer house, they found the appellant and the deceased's brother there. They were sitting on their own, drinking beer. PW2 and the deceased did not join them nor did they engage in conversation with them. PW2 and the deceased shared about six scales of beer. By the time they had finished drinking, the appellant and the deceased's brother had already left the beer house.

PW2 and the deceased then set off for Ha Letele. They had not gone very far, when PW2 noticed the appellant coming towards them. He was carrying a stick which had a metal cap at the tip. When he caught up with them, he hit at the deceased with the stick and struck her on the temple, saying:"Hey, what are you

saying when I say you should stop". The deceased protested and replied: "What is it you want from me because I have nothing to say to you, because the only person I have something to say to is your brother". The appellant then took a brown knife (identified as an Okapi knife) from his pocket and started stabbing at the deceased - he stabbed her on her thigh, her hip and her ankle, and when he stabbed at her for the fourth time, the deceased collapsed and fell to the ground.

At that stage PW2 ran back to the village to raise the alarm and call for help. She reported the incident to a number of people, including the deceased's brother, and she also sent a young boy to report the incident to the Headman and to the deceased's relatives. PW2 then returned to the scene of the assault. The appellant was no longer there. At the spot where the deceased was lying on her back, with her dress lifted up to her thighs, there was a pool of blood and the ground was disturbed. She was already dead. At that stage PW2 noticed that there were a large number of wounds, about twelve, on the body of the deceased.

After a while the Headman, Makonyane Letele (PW3), and other villagers arrived on the scene. PW2, the Headman and a number of the villagers remained with the body of the deceased throughout the night until the following day when the police arrived. PW2 was present when the Headman and Detective Trooper Khanyapa (PW4) examined the body of the deceased before it was transported to Marakabei on horseback. She saw PW4 making a note of the injuries that the deceased had sustained. This concludes

the summary of PW2's account of the attack upon the deceased. I shall return to certain aspects of her evidence presently.

The appellant's evidence relating to the events on the fateful day is briefly as follows. Although he was a married man, he said that he and the deceased had been involved in a secret love affair since 1985. He worked on the mines in Johannesburg but at the time in question he had been home for about a week. On the afternoon of 5 September 1986, he and the deceased's brother, Majoro Macheli, had gone to the beer house at Moeeling. When they arrived at the beer house, the deceased and PW2 were already there. They all sat drinking together. The appellant had two bottles of grape beer but he was not at all intoxicated. After a while he beckoned to the deceased that he was about to leave. She nodded, indicating that she had got the message. The appellant then left. When he was some 150 paces from the beer house, he noticed that the deceased was following him. She was on her own and was not accompanied by PW2. At the deceased's request, he stopped and waited for her.

On catching up with the appellant, the deceased told him that she was no longer interested in him and that she was in love with his brother. On hearing this, the appellant became very upset and warned the deceased "she must not speak things like this because I will lash her". The appellant, who had been sitting down, then stood up. He did not notice that his Okapi knife had fallen on the ground from his back pocket. At that moment the deceased bent down, picked up the knife, and rushed at the appellant

trying to stab him. He defended himself by hitting the deceased on the forehead with his stick. Having thereby warded off the attack, the appellant decided to run away. The appellant's version of what then occurred appears from the following passage in his evidence:

"Q: And what then happened?

A: When I decided to run away, then the stick sort of went out of my hands and it dropped down.

Q: Yes?

A: This is the time when I was trying to run away and she was next to me. I found that the knife is now on the ground and I picked it up and stabbed her.

Q: Stabbed her where?

A: I stabbed her on the thigh.

Q: Yes and what happened thereafter?

A: And after having stabbed her with this knife she then stood up, and then I found I had a chance of running away which I did".

The appellant also stated that: "The reason I assaulted her is because I had said to her I will lash you and then before I could do it she started fighting with me and she stabbed me first with the knife". (My underlining).

After he had stabbed the deceased the appellant ran away and went home. He did not report the incident to his headman, nor initially, to the police. After a few days he told his sister about the incident and that he had run away from Marakabei. However, he admitted that he did not tell his sister that he had

stabbed the deceased in self-defence. He explained: "I thought she will be frightened especially when I was also frightened". His sister then persuaded him to surrender himself to the police, which he did at Maseru on 8 September 1986. To conclude on this aspect, the appellant was adamant that PW2 was not present during his confrontation with the deceased.

As far as the case for the Crown is concerned, PW2 was the only eyewitness of the assault upon the deceased. There was no other direct evidence of the circumstances in which she was killed except, of course, for the appellant's version. In his evaluation of PW2's testimony the learned trial Judge, Molai J, stated that she was not a very impressive witness and that her evidence had to be approached with caution. The learned Judge, in fact, found her evidence to be unreliable in certain respects. It was contended on behalf of the appellant that in the light of the fact that PW2 was in effect a single witness, and a number of shortcomings in her evidence, the trial court erred in accepting her account of the assault, rather than that of the appellant.

In this regard, counsel for the appellant relied strongly on the following wellknown passage from the judgment of De Villiers JP in R v Mokoena 1932 OPD 79 at 80 namely that:

> "the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by s 284 of Act 31 of 1917, but in my opinion that

section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect".

However, in a number of subsequent cases it was pointed out that although these cautionary remarks were apposite they must be related to the context in which they were made. They do not constitute a rule of law and should not obscure the ultimate purpose of the court's enquiry, namely whether the guilt of the accused has been proved beyond reasonable doubt. (See: R v Mokoena 1956 (3) SA 81(A) at 85, S v T 1958 (2) SA 676(A) at 678, and S v Sauls and Another 1981 (3) SA 172(A) 108). In S v Sauls, Diemont JA observed:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 (the first Mokoena case) may be a guide to a right decision but it does not mean

"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"

(per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham). It has been said more than once that the

exercise of caution must not be allowed to displace the exercise of common sense".

In the present instance, it is quite clear from the record that even though PW2's evidence might not have been entirely satisfactory, her account of the assault upon the deceased has been corroborated in a number of material respects. Firstly it will be recalled that PW2 said, in evidence, that when the appellant reprimanded the deceased for carrying on walking when he called on her to stop, she replied: "What is it you want from me because I have nothing to say to you, because the only person I have something to say to is your brother." The appellant admitted, in cross-examination, that that correctly reflects the tenor of the deceased's reply on the occasion in question. PW2 was also able to describe and identify the weapons used in the assault, namely a stick with a metal-capped tip and a brown Okapi knife. The appellant also conceded that PW2 had correctly described the sequence and nature of the first two blows that he had struck at the deceased, namely, that he first hit her on the temple with the stick and then stabbed her on the thigh with the knife.

The main attack on PW2's reliability as a witness was directed at her evidence of the number and nature of the wounds inflicted by the appellant. It will be recalled that PW2 said that she ran off to call for help after the deceased had been stabbed three times, and that when she later returned to the scene of the assault she noticed that there were about twelve wounds on the

deceased's body. The appellant, as I have already mentioned, stated that he only stabbed the deceased once, and that he then ran away. On this issue there is, therefore, a very real conflict between PW2's testimony and that of the appellant. Referring to the criticism at the trial of PW2's evidence on this issue, Molai J. said in his judgment: "One other point on which the evidence of Maliphapang was subjected to criticism was that on her return from the village where she had gone to raise the alarm she counted twelve wounds on the body of the deceased. It must be born in mind that Maliphapang had just witnessed a vicious attack on the deceased who was her friend and close relative. When, on her return from the village, she found her friend dead she must have been too frightened and confused to be able to count the wounds on the deceased. She may have noticed that the deceased had sustained multiple injuries. I am not convinced, however, that she actually counted twelve wounds on the deceased at that stage." In the light of the appellant's evidence as to the number of injuries inflicted, it is necessary to consider whether PW2's evidence on this issue has been corroborated by any of the other crown witnesses. In this regard, I refer briefly to the evidence of the following Crown witnesses who also testified as to the injuries sustained by the deceased, namely, Headman Makoanyane Letele (PW3), Detective Trooper Khanyapa (PW4), and Dr. Lineo Matsela (P.W.1).

PW3's evidence is to the following effect.

He is the headman of Ha Letele. As a result of a report that he received during the late afternoon of 5 September 1986, he went

to Moeeling where he found the dead body of the deceased. At that stage a large number of people had already gathered there. He sent for the police and together with a number of other villagers, he remained with the body of the deceased throughout the night. On the following day PW4 arrived. In PW3's presence, PW4 then examined the body of the deceased for injuries and made a note of them. PW3 then noticed that there were a multiplicity of injuries on the deceased's body - on the forehead, the kidney region, the buttocks and the legs. Although PW3 did not actually count the number of injuries, he was quite certain that they were more than ten in number. PW4 confirmed that on the day in question he went to the scene of the crime in response to a message received from PW3. In the latter's presence, he undressed the body of the deceased and examined it for injuries. He noted the following injuries in his police notebook namely: A wound on the left temple which appeared to have been caused by a sharp object; a deep wound on the left thigh which also appeared to have been made by a sharp object; a superficial wound just below the heart region; a wound in the kidney region; six "thin" (superficial) wounds on the left buttock; six other "thin" (superficial) wounds just below the knee; and a wound on the left toe. PW4 also noticed abrasions on the deceased's arms and a pool of blood under her body. To sum up thus far. PW3 and PW4 corroborated PW2's evidence that the deceased had sustained multiple injuries. As against their evidence, the trial court was faced with the testimony of PW1, a medical practitioner, who was on duty at Queen Elizabeth II Hospital in Maseru on 8 September 1986. She conducted a post-mortem examination on the

body of the deceased on that day. PW1 said that she found two wounds on the deceased's body, namely, a laceration on the left frontal region of the skull, and a penetrating wound on the left thigh which ruptured the femoral artery, resulting in a severe loss of blood. According to PW1, the bleeding from this artery was the cause of the deceased's death. PW1 also stated, quite emphatically, that the aforementioned wounds were the only injuries on the body, and that the laceration on the left frontal region could not have been caused by the appellant's stick, but by some sharp instrument.

In his evaluation of the evidence of the Crown witnesses who testified about the number of wounds on the deceased's body, the learned trial Judge observed: "The evidence of Dr. Matsela (PW1) was, however, not consistent on this point, with the evidence of Chief Makoanyane (PW2) and Detective Trooper Khanyapa (PW4) both of whom impressed me as reliable witnesses. I am convinced that Dr. Matsela (PW1) did not conscientiously examine the wounds on the body of the deceased. Both Chief Makoanyane (PW3) and Detective Trooper Khanyapa (PW4) were testifying to the truth when they told the court that there were far more than just two wounds on the body of the deceased." Judging by the very meager particulars in the post-mortem examination report, I also have some doubts as to the thoroughness of the post-mortem examination. PW1 may have considered it unnecessary to make a note of the other wounds mentioned by PW4 because of their relatively superficial nature.

I now come to the trial court's views of the appellant and his testimony. The trial Judge described the appellant as "a shameless liar." Having carefully considered his evidence, I fully agree with this assessment. I am quite satisfied that the appellant was deliberately untruthful when he denied that PW2 was present when he attacked the deceased. In this regard, I fully agree with the following passage in Molai J's judgment, namely: "In my view, the fact that she (PW2) knew the sequence of the blows that he (the accused) delivered on the deceased with the stick and the knife is a clear indication that Maliphapang (PW2) was present and actually witnessed the assault which the accused perpetrated on the deceased. That being so, I reject as false the accused's story that when he assaulted the deceased Maliphang (P.W.2) was not there and accept as the truth the latter's version that she was present and actually witnessed the accused's assault on the deceased." In my opinion the appellant's explanation of why he ran off after stabbing the deceased, and why he failed to tell his sister that in stabbing the deceased, he had simply acted in self-defence, if that had indeed been the position, is untruthful and totally unacceptable.

The next question for consideration is whether the court a quo erred in finding that the appellant had "assaulted the deceased with the requisite subjective intention to kill." It is common cause that there is no evidence on record, that when he assaulted the deceased, the appellant had any actual or direct intention to kill her. However, the court found that the appellant had what is often referred to as intention in the legal sense or dolus eventualis. As regards this

aspect of the case, Molai J. said: "In my judgment when he brutally assaulted the deceased as he did the accused was aware that death was likely to result. He nonetheless, acted reckless whether or not death did occur."

Referring to dolus eventualis, Holmes, J.A. said in S. v. Mini 1963 (3) 188 (A) at 190 F: "On the question whether the appellant intended to cause death, the law to be applied is settled and clear. If a person foresees the possibility of death resulting from his deed and nevertheless does it reckless whether death ensues or not, he has in law the intention to cause death ..... It is not necessary that he should have the desire to cause death." A finding that an accused had the requisite legal intention to cause death may, like any other finding of fact, be one based on inference from established facts and circumstances.

In the present case there is no direct evidence as to the appellant's subjective state of mind at the time of the assault. His evidence was quite correctly rejected as false. It is necessary, therefore, to consider whether an inference can be drawn from the proved facts that the appellant foresaw the possibility of death resulting from stabbing the deceased, and was reckless of the result. One must look at all facts. In this regards Holmes J.A. pointed out in the Mini case, at 190 H, "that regard must be had in the main to factors indicating what was in the accused's mind before he struck the blow, and to some extent to what was in his mind as he was striking. On this branch of the enquiry the fact that the wound turned out to be fatal is irrelevant. One must also guard against deducing ex post facto from the mere fact that the wound was not deep, that foresight and recklessness

in question were absent. ..... The depth or nature of the wound may throw some light on the degree of force used as the blow was being struck; but correlated and equally cogent considerations are the nature of the weapon about to be used, the degree of control over the extent and effect of its use, the physique of his victim, and the part of the body aimed at."

In the present instance the relevant facts and considerations are as follows:

1. The appellant was about 23 years of age at the time of the incident, and he had been working on the mines of the Witwatersrand for some time.

2. There is no evidence that on the afternoon in question the appellant was not in his sound and sober senses. On the appellant's own evidence he had been drinking some grape beer, but he had not been affected by it.

3. The appellant's action was not an entirely impulsive act, on the blinding spur of the moment, leaving him no time to think of its possible effect. The appellant had been following the deceased and PW2 and he started attacking the deceased as he caught up with them.

4. The appellant first hit out at the deceased, with the stick, striking her on the left temple. From this it appears that what he had in mind was more than than a mere non-dangerous tap on the head.

5. The blow on the head was followed by the attack with the Okapi knife, a sharp-pointed and lethal weapon. In all, seventeen stab wounds were inflicted, most of them admittedly of a superficial nature. However, one of these superficial stab wounds was in the region of the kidneys, and another below the heart region. The appellant was aware that he was wielding a very dangerous instrument, and to borrow a phrase from Holmes J.A., "he was not a surgeon about to operate carefully on an anaesthetised and immobile patient."

6. And then, of course, there is the very first and fatal stab wound, which, as I have already mentioned, has been described as a deep penetrating wound on the left thigh, rupturing the femoral artery and resulting in a massive loss of blood.

7. And finally, there is the very callous conduct of the appellant after the assault when he failed to go to the assistance of the deceased and simply left her to bleed to death.

In these circumstances it seems to me that, as a matter of logic and common sense, the only reasonable inference is that the appellant did foresee the possibility of death resulting from what he was doing. And he did it reckless of the consequences.

Thus, even if the Appellant did not actually intend to bring about the deceased's death, he had in law the intention to cause it. He was therefore rightly convicted of murder with extenuating circumstances.

In the result the appeal is dismissed.

(Signed) .....
J.J. TRENGOVE
JUDGE OF APPEAL

I agree (Signed) .....
W.P. SCHUTZ
PRESIDENT

I agree)Signed) .....
L.W.H. ACKERMANN
JUDGE OF APPEAL

DELIVERED at MASERU this 27th day of JULY, 1990

FOR THE APPELLANT : Mr. Monyako
FOR THE RESPONDENT : Miss Moruthoane.