CRI/T/47/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

PHUMO PHUMO

Held at Quthing

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 17th day of August, 1990.

The accused pleaded not guilty to the charge of murder of Tsokolo Phafoli whom the crown alleges the accused killed intentionally and unlawfully on 29th March 1987. The offence took place at Ha Khoro in the Mafeteng district.

The defence admitted the P.E. depositions of

P.W.1 Dr. Prempeh

P.W.4 'Manneheng KHoete

P.W.5 Mosuoe Sebinane

P.W.7 D/Sgt. Khoele

P.W.8 Lethusang HLalele

Exhibit A the post mortem report prepared by P.W.1 was also admitted.

/The

The crown accepted admission of these depositions as well as admission of exhibit A.

The admitted evidence of P.W.1 shows that the body of the deceased was examined on 31st March 1987.

In the opinion of P.W.1 the cause of death was fractured skull and haemorrhagic shock. The fracture of the skull itself could have been caused by a blow with a heavy object. The other injuries could have been caused by a sharp object. P.W.1 further indicated that some other injuries could have been caused by a sharp object. He also thought that the lacerations and abrasions were caused through use of moderate force. The doctor indicated that the blunt instrument used namely a stick must have been heavy.

The court has weighed exhibit 1 the stick before it and is in no doubt that the doctor was correct in saying the stick used must have been heavy because I found that it in fact is very heavy.

The deceased is said to have been 70 years of age and P.W.1 thought as much. The deceased was described as of slender frame of body.

The external appearances revealed multiple lacerations of left upper arm and forearm, abrasions of left wrist, laceration of left ear and left post auricular region. There was a haematoma on left side of the neck and post auricular region. The deceased's lungs are said to have been congested.

Of all these injuries the accused in his evidence revealed that he recollects causing only one which is behind the left ear. He made a demonstration of how he caused it but the force he revealed was far from producing a heavy blow which in the opinion of the doctor was accountable for the fracture of the skull.

The admitted evidence of P.W.4 shows that this witness

/in

in response to a scream that she heard she saw the accused assaulting the deceased with a stick and further that at that time the deceased was lying down.

While P.W.4 hurriedly made for Seabata's place to report she saw P.W.3, P.W.2 and Seabata hurriedly making for the scene. Because P.W.4 was far she did not hear the accused's reply to P.W.3's question to him about why the accused was assaulting the deceased.

P.W.3 in her evidence fills this gap by supplying an answer that the accused said he was assaulting the deceased because he had blown off the roof to his house. In this respect P.W.3 is in a sense corroborated by D.W.3 (in this Court) who was P.W.6 Tamolo Qhala at P.E.

D.W.3 supports the consistency of the accused's answer to the question why the accused was assaulting the deceased. D.W.3 said the accused said D.W.3 should look at the walls of his house and told him the deceased was responsible for blowing away those roofs. Needless to say P.W.3's evidence as to the answer proffered by the accused regarding this question was not denied in these proceedings. Because this aspect of the matter was not challenged it seems to me to be the only palpable reason why the accused assaulted the deceased.

An attempt was made to show that the assault occurred because the deceased tried to intercept a donkey which had eaten some vegetables from the accused's garden. It is said the donkey was intercepted while being driven to the chief's place to be impounded so that compensation from the deceased could be claimed on its release.

If this could be so, it is strange that at the time when the assault was taking place and when the accused had an opportunity to inform the inquirers-more than one in number - could not tell them this story.

It was argued that the accused when applying for bail he did in fact indicate at paragraph 7 that he assaulted the

/deceased

deceased because of reasons he supplied today.

But at the time he was applying for bail it was months after the event. He had by then long offered to the eye witnesses what was upper most in his mind as justifying the assault, namely that the deceased had blown off the roof from the walls of his house.

When he applied for bail the accused had had ample time to formulate what his defence was going to be and he fabricated one. It is therefore dismissed as an after-thought fabricated at the stage he applied for bail and hopefully expected to hold sway in this court.

It is true that nobody saw when the fight started. But there is evidence of some screams being heard around the time. P.W.2 and P.W.3 went to the scene from a distance estimated as a kilometer away. But D.W.3 who struck me as very honest and unbiased estimated this distance at only 200 metres away. Knowing the usual difficulties that ordinary Basotho women pose with regard to giving reasonable estimations of distances it is not to be unexpected that the distance was much shorter than they estimated.

D.W.2's evidence on the point tends to show that the distance between these two points was less than 300 metres which is the distance where he claims he was from the scene as he was standing on the hill when he observed the stick fight between the accused and the deceased.

But because his evidence was an absolute tissue of lies there is not much point in taking any portions of it as corroborating either version. It is therefore rejected in its entirety. None of the crown witnesses saw him at the scene where he said he came and removed the accused from the deceased. The reliable defence witness Tamo Qhala says D.W.2 is lying when he claims he came to remove the accused from the deceased. He butressed his testimony by showing that he would have seen D.W.2 if he removed the accused from the deceased.

/D.W.2

D.W.2 made a huge pretence of the fact that he left the scene together with the accused. He said when he did so the deceased was up on his feet and talking. The accused with whom he claimed he had left said the deceased was lying on the ground when he himself last saw him as he left. In this regard the accused's version is in agreement with the Crown's version. This sets D.W.2 alone as an arrant liar.

One of the women who gave oral evidence said she was able to see the hands of the deceased as he lay on the ground. None of the deceased's hands held anything. Had there been anything held in the deceased's hands she would have seen it. The fact that no stick belonging to the deceased was found anywhere near the scene gives support to this woman's version which stands in stark contrast to that of D.W.2 who said when the deceased went down towards the stream driving the donkey after unkraaling it he did not know if the deceased was holding anything but that when he came running to the scene he saw that he was holding a stick with which he engaged the accused in a stick fight. D.W.2's invention finally stands in stark isolation by its falsehood when compared with the Crown version that deceased's face was covered in blood, whereas D.W.2 who pretended he came nearer to the deceased than anyone else and thus had an advantage to observe him better said he saw no blood on the deceased at all. The Crown version is that the deceased was unable to walk thus he was carried from the scene in a blanket. D.W.2 pretends that the deceased just walked away from the scene. D.W.3 denies D.W.2's story and supports that of the Crown. Strangely the people that D.W.2 claims he found at the scene saw no stick held by the deceased yet D.W.2 insists he saw one.

In any case credible evidence shows that the accused's alleged refrain from assaulting the deceased amounted to nothing else but substitution of the interveners for the deceased because he attacked those who intervened.

The accused claimed that during his fight with the deceased the deceased hit him with a stick on the inner right wrist with the result that his stick even fell away.

/But

But this important aspect of the matter was not put to the eye witnesses yet Schutz P. in C of A (CRI) 7 of 1989 Naro Lefaso vs Rex (unreported) at 7 et seq said

> "The need for the defence to put the salient parts of the defence case to the relevant crown witnesses has been stressed by this Court over and over again. One reason for putting the defence version is to give the crown witnesses a chance to counter it .....From an accused person's point of view failure to reveal his version before he gives evidence leads to the natural inference that he has concocted a version at the last minute."

The accused even assuming his story about the donkey to be true strangely felt that he should take it to the chief - a plausible move which he presumably embarked upon - to avoid bloodshed yet when possibility of bloodshed loomed large he failed to proceed to the chief to report who would, hopefully provide a remedy.

Even though he realised that the deceased had laid helplessly on the ground after he had belaboured him the accused never bothered either that evening or the following day to find out how the deceased had fared.

His reason for making no attempt to secure the welfare of the deceased on the day of the incident or report to the chief is that he was going to see his wife who was in hospital. This is strange because his initial plan for the day was to go to the chief to take the donkey there and perhaps afterwards to go to see his wife who was at least in good hospital hands.

The following day he failed to do either of the two things because then he was going back to the mines in the Republic. This attitude smacks of callousness of the first magnitude.

The accused claims that the deceased was armed with a stick. But credible evidence shows that this claim is not true. Coupled with the fact that the accused was seen belabouring the deceased at least three times even when the

/deceased

deceased was lying on the ground it would seem that the accused's claim of self-defence has no merit whatsoever. The accused was not seen assaulting the deceased after he had applied for bail but before. It would be illogical therefore to disregard testimony of what he was heard saying in place of what he subsequently fabricated in his affidavit prepared at the stage when he was applying for bail. He cannot therefore make capital out of the fact that the fabrication he embarked on when applying for bail has persisted to this day. A lie which is consistent with a prior lie does not turn either of the two into the truth. The statement in the bail application was never tested. There was no need to test it because all that need be shown at that stage in order to grant the accused bail was that he would stand trial and not abscond. Needless to state, at the time he applied for bail the statements by Crown witnesses who testified to the events had already been in the possession of the investigating officers who came to the scene on the day of the events. The fact that the accused's false averment was not tested against the Crown witnesses' statements is no proof that it must have been true. The testing has been conducted in this Court which has come to the conclusion that the averment is false and therefore deserves to be rejected.

Even assuming that the accused's story that the deceased attacked him is true absence of the stick supposedly wielded by the deceased proves that the accused was lying in his claim that there was any such stick. The number of injuries observed by the medical evidence disprove the accused's story that he knocked the deceased only once.

This Court has time and again drawn attention to the importance of Broadhurst v. Rex 1964 AC 44 at 457 that save in one respect an accused who gives false evidence is in the same position as one who gives none at all and that in reaching a conclusion on proved facts in a case where the jury can make inferences regarding the accused's conduct or state of mind the fact that the accused has given false evidence serves as a factor in strengthening an inference of guilt. Of course the

/ onus

onus rests on the Crown throughout to prove its case beyond reasonable doubt.

Of course the fact that an accused person has been proved a liar, cannot per se lead to the conclusion that he is lying because he is guilty, regard being had to the fact that he is speaking, so to speak, from the shadow of the gallows. But in other circumstances that factor can swing the balance against him. See CRI/T/80/71 R. vs Mapefane (unreported)at d by Jacobs C.J. as he then was.

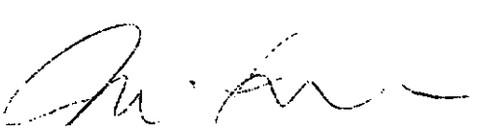
One would have expected that a man who was motivated by claim of right as the accused seeks this Court to believe, would act differently than he did after the assault. He could have gone to report his misfortune to the authorities instead of disappearing only to surface months and months after the event when he got arrested.

I have considered the merits and demerits of either side. The defects in the Crown's case consist mainly as to the relative distances referred to in evidence. But I have no doubt that the Crown testimony as to what its witnesses saw is truthful. I have no hesitation in rejecting the accused's version as false beyond all doubt.

The accused cannot seriously make merit of the fact that he heeded D.W.3's intervention or the deceased's plea that he refrain from assaulting the deceased because at that point, in my view, the actus reus had been accomplished. Needless to say the intention is to be gathered from the heavy stick used on the vital part of the body resulting in the fractured skull, saying nothing of the various other injuries reflected in Exhibit "A" and the belabouring on a defenceless old man lying on the ground as testified by eye witnesses.

The accused ought, as a reasonable man, to have realised that assaulting a man of slender frame so advanced in age even would result in fatal consequences despite which he went on regardless. For this reckless conduct the accused is found guilty of murder as charged.

My assessors agree.



J U D G E

17th August, 1990

For Crown : Mr. Mokhobo

For Defence: Mr Monyako

JUDGMENT ON EXTENUATION

Extenuating Circumstances have been summarised by Holmes J.A. in S. vs Letsolo 1970(3) S.A. 476 A at 476 E to 477 as follows :

> These "..... have more than once been defined by this Court as any facts, bearing on the commission of the crime, which reduce the blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial Court has to consider
>
> (a) whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive),
>
> (b) whether such facts in their cummulative effect, probably had a bearing on the accused's state of mind doing what he did;
>
> (c) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused's doing what he did"

The accused gave evidence in an endeavour to prove on a balance of probabilities that even though legally speaking his act is reprehensible but subjectively speaking moral factors exist which are sufficient to palliate the full rigour of punishment that would otherwise be mandatory.

He stated that it was sometime after his roofs were blown off that he came home from the Republic of South Africa where he works.

He only learnt when he and the deceased were fighting how the roofs got blown off.

He had hit the deceased and as the latter fell he said the accused should pardon him as he would presently tell the accused who the culprits were.

The accused stopped assaulting the deceased then. The deceased enumerated the names of the culprits. These were 'Mantsebeng, 'Matsibela, 'Mamokoto and the other staying with

/the deceased

the deceased .

It should be clear from this testimony that the deceased did not include himself. The accused says he was hurt to learn about the culprits' involvement but did not continue belabouring the deceased.

The accused is insistent that his assault on the deceased was prompted by the question of the donkey which had destroyed his crops and was intercepted by the deceased when the accused was taking it to the chief. Yet he stopped beating the deceased from whom he learnt without any prompting the names of the culprits who had blown the roof of his house.

Needless to say the main judgment dismissed as groundless this question of the donkey.

When asked by Counsel for the Crown if the accused was aware that the deceased did not include himself among the culprits, the accused stated that he thought the deceased had included himself because among the culprits was one who stayed with the deceased.

But he later resiled from this.

He said when the deceased talked as alleged the person who was present was D.W.3. The others such as P.W.2, P.W.3 and Seabata were approaching. But Seabata was already near.

The accused believes D.W.3 could have heard the deceased's statement.

Strangely though, it is in evidence that D.W.3 even though he was so close he had cause to ask the accused why he was belabouring the deceased.

The accused's story is made even the more difficult to understand by the fact that in evidence he said he had stopped beating the deceased when D.W.3 asked him to stop. Yet on the other hand he said he had stopped when the deceased offered to say who the culprits were. He left it to the Court to resolve this issue.

To my mind if indeed the accused stopped beating the deceased when the latter made the offer to say who the culprits were, then the deceased was inventing any story which might help

/stop

stop the accused from beating him further while he was on the ground;a frail man of seventy who was unarmed when being thus assaulted.

It is difficult for me to understand what in the middle of a beating could have prompted the deceased to offer the names of the culprits. The accused suggests that perhaps it was the pain.

The only reasonable cause that to my mind might have prompted the deceased to give these names is that the deceased was asked to account for the agency other than natural that blew the roofs of his house or houses off. But the accused in his testimony said he had not known until at the end of the belabouring that the misfortune he suffered was through human agency. Moreover he said he does not believe people can cause roofs to be blown off.

Assuming then that the accused embarked on this heartless act because he believed in witchcraft which in evidence he has indicated he does not, the words of Isaacs J.A in Piet Mdluli and Mandie Alfred Mdluli vs the King CRI.APP No. 7/79 (Swaziland C.A. decision) (unreported) at 6 and extracted from Mbombo Dlamini and Others vs R. 1970-76 Swaziland Law Reports p.42 by Schreiner P as he then was would be appropriate, namely

> "It is wrong to believe that belief in witchcraft can never constitute an extenuating circumstance, but it is also wrong, even though it would be merciful, to say that belief in witchcraft always extenuates ....."

I have searched my mind and considered C. of A (CRI) No.3 of 1987 Tseliso Mona and Another vs Rex (unreported) and R. vs Fundakubi and Others 1948(3) SA 810 in an attempt to find out if killing based on a belief that the deceased has killed one's relative by witchcraft constitutes extenuation whether equally killing because of a belief that the deceased has destroyed property can extenuate.

Even having exercised my mind seriously on this question which is strictly not in issue I have not been able to find

/that

that any extenuating circumstances exist in this case. I have also had regard to the fact that there is abundance of authority for the view that dolus eventualis does not necessarily extenuate. It does not do so in this case.

My assessors are firmly of the same opinion.

Indeed as Counsel for the Crown in addresses interposed

> "How can the accused then say he attacked the deceased and felt provoked when he only learnt about who destroyed his property after he had attacked the deceased".

I agree further with the final question put to the accused in the proceedings at the extenuation stage that :

> "Your reason for killing the deceased was not because he had blown off the roof to your house but some other reason you concealed .....? No"

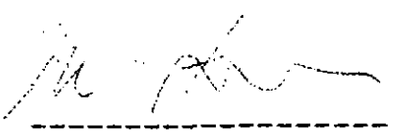
The accused's Counsel in addresses did concede that the story for the accused may be difficult to follow.

He was, in part, no doubt placed in a cleft stick by his acknowledgement, not in so many words, that the element of provocation sought to be relied upon and that had been canvassed during proceedings was an integral and inseparable part of the version that was rejected.

Will the accused say why death sentence should not be imposed: Because I did not intend that the deceased should die.

The sentence of this Court is that you be removed from where you are to a place of custody where on an appointed day. you will be hanged by the neck until you are dead.

May God have mercy on your soul.



J U D G E

17th August, 1990