

IN THE HIGH COURT OF LESOTHO

In the matter between:-

R E X

and

BUTI MAKOTOKO	1st Accused
SAJENE SELLO	2nd Accused
LIKOTSI NTS'ASA	3rd Accused
RAFUTHO MOTHABI	4th Accused
KOMOTO MOTHABI	5th Accused

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola  
on the 27th day of August, 1990.

The accused are charged with murder, it being alleged that on the 4th day of November, 1987, and at or near Ngope Tsoeu in the district of Maseru, the said accused did, one or each or all of them unlawfully and intentionally kill Makhamoqa Kotelo.

The accused pleaded not guilty.

The Crown has one eye-witness by the name of Litihare Jeke (P.W.1). Her evidence is that on the 3rd November, 1987 she had a "stockfel" party at her home. At this kind of a party different kinds of liquor are sold. P.W.1 was assisted by the wife of A1, 'Malethola and one Nthabiseng in the selling of the liquor. The party was attended by many people including the deceased and one Thapelo who had a illicit love affair with the wife of A1. At some stage P.W.1 left her house and went to 'Mamothibe's place. On her way she met A1 who asked her the whereabouts of his wife. She told him that she was at her (P.W.1's) home. At about 4.00 p.m. or 5.00 p.m. P.W.1 was returning to her house when she found A1 at the gate of her yard. He asked her to tell his wife that they should go home.

She told A1's wife her message but the latter was not ready to go because she was still selling beer as Nthabiseng, who was supposed to take over from her, was still suckling her baby. She decided to get out of the house in order to report to A1 what his wife had said, but as soon as she appeared at the door A1 threw a stone at her and hit her on the belly. She bent down holding her belly with her hands. A1 threw another stone and hit her on the forehead. She fell back into the house and on Thapelo who sat near the door. He pushed her away and he and the deceased rushed out of the house. Thapelo asked A1 why he was fighting or attacking the owner of the house. There was no answer. Immediately after that she heard the cracking of sticks

and when they came out one Mokharitsane had already fallen down. They caught hold of the deceased and Thapelo and dragged them back into the house. Not long after that stones started being thrown at the house. The throwing of stones became so intense that the door and windows were destroyed. Chairs and a radiogram were broken. In an attempt to stop the stones from coming into the house they put a drum at the doorway. A4 and others were still in the house and A4 had taken Nthabiseng's baby and was hiding himself at the corner of the house.

After a long time the acting headman Tumo Jase arrived and he ordered the people who were throwing stones to stop. They complied. P.W.1 says that she and other people got out. The deceased and Thapelo remained in the house. Tumo suggested that they (deceased and Thapelo) should be handcuffed and be taken to the chief's place. A5 said it was useless to handcuff them because they were going to kill them. Tumo suggested in the alternative that the house should be guarded for the whole night so that on the following morning they could be escorted to the chief's place. One 'Mamapoko said it was not fair that they should be guarded before wounds were inflicted upon them because a person they had assaulted, i.e. Makhharitsane could die anytime because of the wounds he sustained. Tumo gave up and said there was nothing he could do because the men had beaten him or were not prepared to obey his orders. The men dug a big hole on the wall at the back of the house. P.W.1 says that after that she heard that the deceased and Thapelo had got out and there was a cracking of sticks near her house.

She approached the spot where there was a cracking of sticks. She stood about eight (8) or ten paces away and saw that the deceased was already lying on the ground. There was a group of about six (6) men who were standing near him. She identified A1, A2 and A5. Many people had gone down in pursuit of Thapelo. A5 saw her and invited her to come so that they could kill her with him. A2 said they should go and burn the blankets of the deceased and those of Thapelo. As it was dark she did not see the blankets referred to. A5 said they should take a stick and poke it into the anus of the deceased to see if he was still alive. She then saw when A2 took a big stone (Exhibit 4) and hit the head of the deceased with it. She saw in the morning that the deceased's skull had been crushed. That night she slept at the home of one 'Matusetso because A5 had threatened to beat her up. He had uttered the threatening words when they left the deceased saying they were going to burn his blankets.

Under cross-examination P.W.1 deposed that she did not partake of any liquor that day because party was at her home and decided to remain sober throughout the party. She says that she identified the accused, i.e. A1, A2 and A5 by their voices because it was dark and cloudy. However, when the clouds cleared she saw the three accused and identified them well as his co-villagers. It was when the sky was clear that she saw when the A2 crushed deceased's skull with a stone. She also saw that A1 was wearing the same clothes he was wearing during the day.

Tsele Makepe (P.W.3) testified that on the evening in question a report was made to him that people were fighting at the home of P.W.1. When he arrived there he was briefed by the acting headman Tumo Jase (P.W.4). He went to the forecourt and talked to the people who were alleged to be in the house. As he was speaking A2 said he was going into the house to handcuff those people. As soon as he entered he was struck with a stick on the head. He staggered out and collided with the walls of the house. He (P.W.3) caught hold of him and led him away from the house. His head was covered with blood. He suggested that torches should be found so that they could light through the door and the hole at the back of the house. The plan worked because when he lit through the hole the deceased and Thapeio came out through the door. When he came to the front of the house he saw a group of about six (6) near the flat-roof house; the others were chasing another person and he joined in the chase. After they had failed to catch that man he returned to P.W.1's place and he saw A1 coming out of P.W.1's house carrying a sling bag. He (A1) said it was his bag which his wife took away when she ran away with the devil they had killed. P.W.3 asked him whether they had already killed a person. A1 did not answer that question. From there he went to his home because he did not want to associate with people who had already killed a person.

On the following morning he returned to the scene of the fight and found A1 and A2. A1 expressed his sorrow that an innocent man had been killed while the culprit had gone scot-free.

The evidence of the acting headman Tumo Jase (P.W.4) does not carry the Crown case any further regarding the identity of the killers of the deceased. He arrived at the scene of the fighting and found that there was commotion and disorderliness. He succeeded in stopping the throwing of stones at the house. A5 and others were saying Mokhiritsane had been assaulted so severely that he could die any moment and that was the reason why they wanted the deceased and Thapelo to get out of the house. He confirms that after A2 was struck with a stick on the head he accompanied him to the gate and ordered him to go home. He also joined the people who were chasing Thapelo but they failed to catch him. When they returned to the scene of the fight he found that the deceased had been killed. His skull was crushed.

The post-mortem examination report signed by Dr. E.N. Tlale was handed in by consent of the defence. The cause of death is stated as being head injuries. The following injuries were observed: Fractures of mandible left side, left temporal, mastoid, parietal and occipital bones. Brain tissue was mixed with bone fragments.

The defence of A1 is complete denial of what the Crown witnesses have said about him. He admits that he was present at the home of P.W.1 when the fighting started. He was standing at the gate waiting for his wife so that they could go home but in vain because his wife refused to come out of the house. After the arrival of the acting headman his wife came out with the

others and she ran away towards <sup>her</sup> maiden home. He chased her. Having failed to catch her he returned to the scene of the fighting and found that deceased had already died. The acting headman instructed all the men to guard the dead body until the following morning. He denies that he took part in the killing of the deceased; he also denies that he took part in the throwing of stones.

A2 testified that he went to P.W.1's place because an alarm had been raised that there were people who were fighting and the instructions of the chief were that those people must be arrested. A short while after his arrival there he attempted to go into the house but was struck on the head with sticks by the deceased and Thapelo. After that he went to his home and never returned to the home of P.W.1. He denies that he crushed deceased's head with Exhibit 4. He denies that he uttered the words attributed to him by P.W.1.

A5's defence is a complete denial of the Crown's evidence against him. The reason why he went to the scene of the crime was that he heard a lot of noise coming from that area. On his arrival there people started running down the slope. He joined them because he was under the impression that they were running away from something. He later learned that they were in fact chasing a person. On their return from pursuing that person the chief instructed all the men to guard the dead body of the deceased. He denies the evidence of the Crown that he made the utterances attributed to him by P.W.1 and P.W.4.

The defence closed its case without calling A3 and A4 to give evidence.

I have already stated above that there is only one eye-witness. The other witnesses purport to corroborate her by referring to certain utterances made by some of the accused either during or after the commotion and disorderliness. Section 238 (1) of the Criminal Procedure and Evidence Act 1981 provides that any court may convict any person of any offence alleged against him in the charge on the single evidence of any competent and credible witness. The most important words in the above section are competent and credible.

RElying on the abovementioned section, Miss Moruthoane, Crown Counsel, submitted that A1, A2 and A5 were implicated by P.W.1 who had a good knowledge of the voices of the accused because she lived in the same village with them. She also saw the accused during the interval when the moon was not covered by the clouds. A1 is implicated by P.W.3. She submitted that the question of mistaken identity does not arise in the present case.

It is trite law that 'even where the witness is honest the possibility of a mistake in identifying the accused, where identity is in issue, demands that the greatest circumspection should be employed in considering the identification (R. v. Hlatywayo, 1953 (1) P.H., H74). The Court should carefully consider the evidence - the positive assurance of identity by



an honest witness is not sufficient. Where the light was relatively poor at the locus in quo, and the witness had relatively little opportunity for careful observation and the witness was in a state of shock then the possibilities for mistake are too great to justify a conviction'. (R. v. Thulo, 1958 (1) P.H. H90 (A.D.)). See also Swift's Law of Criminal Procedure, 2nd edition by Harcourt at p. 476.

In the South African Law of Evidence by Hoffmann, 1st edition at p.25 the law is stated as follows:

"The accuracy of a witness' observation depends first, of course, upon his eyesight. Second, it will be affected by the circumstances in which he saw the person in question; the state of the light, how far away he was, whether he was able to see him from an advantageous position, how long he had him under observation."

In the instant case the witness (P.W.1) was not identifying strangers but people who lived in the same village with her. That she knew their voices very well was never challenged by the defence. At one time A5 was actually talking to her directly and threatening to kill her together with the deceased if she drew nearer. Under those circumstances I am satisfied that P.W.1 was in a good position to identify the accused by their voices. She was only about eight (8) or ten paces from the accused.

In addition to identifying the accused by their voices she saw the three accused assault the deceased. She explained that although it was dark and cloudy, there were times when the

clouds cleared from the moon and the moonlight enabled her to see the accused very well. I have no doubt that from the distance of about ten paces she was able to identify the three accused. One may ask why she did not identify the two or three people who were with the three accused. The answer is simple - we were told that amongst the people who were at P.W.1's place there were some strangers from neighbouring villages.

P.W.1 did not just have a fleeting glance at the accused. She observed them for some considerable time because she was not passing but standing and watching them and one of them even spoke to her threatening to kill her with the deceased.

The defence criticized the evidence of P.W.1 on the ground that she has a bias against the accused, particularly A1 because Thapelo is her brother. This is the man who has run away with A1's wife and on some occasions Thapelo and A1's wife used P.W.1's house as a meeting place. This allegation is based on speculation and no evidence because even on that fateful day A1 and P.W.1 met and he asked her to call his wife. There was no hostility between them. A1 was the first to show hostility towards P.W.1 by hitting her with stones when she attempted to report back to him. I am satisfied that P.W.1 is and was never harbouring any bias or hostile intent against any of the three accused. The impression I had of her was that she was honest and truthful.

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It was argued that P.W.1 must have been in a state of shock to such an extent that she could not make a proper identification. I do not think that she was in that kind of state of shock; she was standing not far from the accused and watching what they were doing.

The evidence of P.W.3 tends to corroborate the evidence of P.W.1 in that A1 made a statement to P.W.3 which amounts to a confession or admission that he and others had killed the deceased. P.W.3 says that when he met A1 carrying a sling bag, the latter said: "This is my bag which my wife took away with her when she ran away with the devil we have killed." A1 was referring to the deceased who was lying dead not far from where they were. This admission corroborates P.W.1's evidence that A1 and his companions killed the deceased. On the following morning A1 again expressed his sorry that the innocent man had been killed instead of the culprit. His intention was to kill the man who had ran away with his wife.

A1's story cannot be reasonably possibly true. He could not wait at the gate for his wife from 5.00 p.m. to 9.00 p.m. and then remain inactive when stones were being thrown at the house against the very man who had deprived him of his wife. He had every reason to throw stones at Thapelo and the deceased and to kill them. It seems to me that the whole uprising and disorderliness was caused by A1 who threw the first stone that hit P.W.1. Thapelo and the deceased apparently angered the villagers when they assaulted Mokharitsane.


A2's version that immediately after he was assaulted he found a stick on the ground and used it to support himself and went to his home, is a lie. He was never seen by anybody going to his home. On the following morning he was found by P.W.3 at the scene of the crime. Being at the scene of the crime would not incriminate him in anyway because the chief had instructed them to guard the dead body until the police arrived. The making of a false statement may throw an unfavourable light upon a fact previously neutral, which can then become an item of corroborative evidence (Corfield v. Hodgson (1966) 2 All E.R. 205).

As far as A5 is concerned he is implicated by P.W.1 and his unruly behaviour just before the deceased was killed tends to corroborate P.W.1's evidence. He was one of those people who defied the acting headman Tumo Jase by saying that because those people inside the house had severely assaulted Mokharitsana they must be killed. His evidence that he did not do anything when he arrived at the scene of the crime is false and I have rejected it.

I come to the conclusion that A1, A2 and A5 had a common purpose to kill the deceased because they were seen assaulting him and lastly A2 crushed his head with Exhibit 4. They had the requisite intent in the form of dolus eventualis.

For the reasons stated above I find A1, A2 and A5 guilty of murder. A3 and A4 are found not guilty.

My Assessor agrees with me.

  
J.L. KHEOLA  
JUDGE


27th August, 1990.

EXTENUATING CIRCUMSTANCES

The Court found the following as extenuating circumstances:

1. There was no premeditation.
2. The intention proved was that known as dolus eventualis.
3. There was an element of provocation in that the deceased and his colleague Thapelo resisted arrest and assaulted A2 and one Mokharitsane.

SENTENCE:- In passing sentence the Court took into consideration the following factors: all the accused are first offender; there was an element of provocation on the part of the deceased and Thapelo. However, the offence is aggravated by the fact that the accused defied the chief's orders and actually carried out their acts almost in his presence. The Court cannot allow people to take the law in their own hands. Each accused person is sentenced to seven (7) years' imprisonment.

  
J.L. KHEOLA

JUDGE

28th August, 1990.

For the Crown - Miss Moruthoane

For the Defence - Mr. Fosa and Mr. Lerotholi.