

IN THE HIGH COURT OF LESOTHO

In the Matter of:

R E X

v

MOLATOLI TSIBELA

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 17th day of October, 1990.

The accused person is before me on two charges viz. murder and attempted murder. The following allegations are disclosed by the body of the charge sheet:

Count I : " In that upon or about: the 26th day of December, 1988 and at or near Ha Mokoto in the district of Thaba-Tseka, the said accused, did unlawfully and intentionally kill Joel Nkuoatsana."

Count II " In that upon or about the 26th day of December, 1988 and at or near Ha Mokoto in the district of Thaba-Tseka the said accused did, unlawfully and with intent to murder, assault one Thabang Nkuoatsana by stabbing him with a knife."

It may be mentioned that at the commencement of the hearing of this trial Mr. Peete who represents the accused in this matter informed the court that the defence would not dispute the depositions of Dr. Ka Renzi and Nathnael Nkwoatsana who were P.W.11 and P.W.7, respectively, at the proceedings of the Preparatory Examination. In addition the defence would admit the medical report compiled in respect of Thabang Nkwoatsana, the complainant in Court II. The admissions made by the Defence counsel were accepted by Mr. Thetsane, counsel for the crown.

In terms of the provisions of S.273 of the Criminal Procedure and Evidence Act, 1981 the depositions of Dr. Ka Renzi and Nathnael Nkwoatsana, as well as the medical report compiled in respect of the complainant in court II became evidence. It was unnecessary, therefore, to call the deponents, and the Doctor who had compiled the medical report in respect of the complainant in Court II, as witnesses in this trial.

Briefly stated the court heard the evidence of P.W.5, Tper Chabeli, who testified that on 27th December, 1988 he received a certain report following which he proceeded to the village of Ha Mokoto. He was accompanied by Tper Fobo who was, however, not called as a witness in this trial. After they had come to the village of Ha Mokoto they were taken to a rondavel in which he found the dead body of the deceased. On examining it for injuries he found that the body had sustained a single stab wound on the right side of the neck. He

3/ conveyed the .....

conveyed the body of the deceased, in a police vehicle to the mortuary and assured the court that it sustained no additional injuries on the way.

In his evidence P.W.7, D/Tper Ramone told the court that on 28th December, 1988 he went to Paray Hospital where he found P.W.2, Thabang Nkuoatsana, ill in bed. He had ~~sustained~~ a wound on the back and could not speak properly. On 30th December, 1988 he proceeded to Ha Mokoto and carried out investigations. He too was taken to a spot in the veld where he noticed a pool of blood which was, however, already dry. I shall return to the evidence of P.W.5 and P.W.7 later in this judgment.

The evidence of Dr. Ka Renzi was to the effect that during December, 1988 he was a medical Doctor stationed at Queen Elizabeth II hospital here in Maseru. He recalled that on 29th December, 1988 he performed an autopsy on a dead body of a male African adult. The body was identified before him as that of the deceased, Joel Nkuoatsana, by Nathnael Nkuoatsana and Sello Nkuoatsana.

That was confirmed by Nathnael Nkuoatsana who told the court that the deceased was his own son. On the day in question, 26th December, 1988, he was at a place called Ha Ramalapi. In the morning of the following day 27th December, 1988, he was still at Ha Ramalapi when he received a certain report from a driver of an ambulance. As a result of that report he got into the ambulance and found P.W.2, one of his sons who had sustained some

4/ injuries. ....

injuries. The ambulance took him and P.W.2 to Paray hospital where the latter was admitted. He noticed that P.W.2 had a deep stab wound above the kidney region and another wound on the elbow. He reported the matter to Thaba-Tseka police with whom he returned to his home at Ha Mokoto.

On arrival at home Nathnael Nkuoatsana found that the deceased, Joel Nkuoatsana, had passed away. The body of the deceased was then conveyed to Paray hospital, from where it was transported to Queen Elizabeth II hospital in Maseru on 28th December, 1988. He accompanied the deceased's body which did not sustain any injuries whilst it was being transported from Ha Mokoto to the mortuary at Queen Elizabeth II hospital.

According to the evidence of Dr. Ka Renzi his post-mortem examination revealed that the deceased had sustained a 3 cm x 2.5 cm deep wound on the right side of the neck severing the internal carotid artery and jugular vein. On these facts the medical doctor formed the opinion that death was due to severe bleeding technically known as *haemorrhagic shock*.

The medical report compiled on behalf of P.W.2 revealed that he was, on 27th December, 1988, admitted at Paray hospital with two stab wounds, one on the right elbow and another on the left side of the thorax. He was developing pneumo-thorax and pneumonia. In the opinion of the medical Doctor an instrument such as a knife could have been used to inflict the injuries on P.W.2.

5/ I can think .....

I can think of no good reasons why the findings of the medical doctor that the deceased died of haemorrhagic shock resulting from the injury he had sustained on the neck, as well as the unchallenged medical report that P.W.2 had sustained two stab wounds should not be accepted as the truth. The next salient question for the determination of the court is whether or not the accused is the person who inflicted the injuries on both P.W.2 and the deceased, thus causing the latter's death.

It is not really disputed that, at all material times, a certain Motlalehi owned a field at a place called Phula-Ntso outside the village of Ha Mokoto. In 1988 the field was, however, used by the accused who had cultivated some crops therein. On the day in question, 26th December, 1988, two boys viz. P.W.1, Realeboha Nkuoatsana, and P.W.4 Hape Nkuoatsana were herding cattle, donkeys, horses and goats next to the field.

According to P.W. 1 whilst he and P.W.4 were herding the animals, one of the cattle entered into the field. No damage of any sort was, however, caused as the field had recently been re-ploughed following the destruction of the first crop by the worms. The evidence of P.W.1 that only one cattle had trespassed into the field is, however, disputed by the accused

6/ according .....

according to whom, on the afternoon of the day in question, he left the village of Ha Mokoto to attend to his horse which had been tethered outside the village. When he came within the view of Phula-  
Ntso, the accused noticed a number of cattle grazing in his field. He hurried to the place intending to impound the cattle.

As he approached the field the accused saw the cattle being driven therefrom. They were clearly three in number. He denied, therefore, the evidence of P.W.1 that only one cattle had trespassed into the field. The accused further told the court that he had cultivated on that field maize, pumpkin and barley crop. In his evidence that following the destruction of the first crop by worms the field had recently been re-ploughed and there was no crop that could have been damaged by animals, P.W.1 was, therefore, not being honest with the court.

P. W.1 was, in his evidence corroborated by P.W.4. It may, however, be convenient to mention, at this juncture, that P.W.4 is only 12 years old. Despite his tender age I, however, found P.W.4 to be so intelligent that he could appreciate the meaning and religious sanction of an oath which was duly administered to him. On account of his youthful age the evidence of P.W.4 must nonetheless be approached with utmost caution.

7/ As Hoffmann .....

As Hoffmann puts it at page 416 of his invaluable work, South African Law of Evidence (2nd ed.) ;

"The danger is not only that children are highly imaginative but also that their story may be the product of suggestion by others."

Although the evidence of P.W.1 and P.W.4 that the accused's field had been re-ploughed following the destruction of the first crop by worms was corroborated by D.W.3., Thoola Tsibela, the latter told the court that there was a maize crop growing on the field. He was corroborated in this regard by P.W.6, Makalla Monyane, the chief of Ha Mokoto. Both P.W.6 and D.W.3 told the court that on 27th December, 1988 they were amongst the people who actually conducted an inspection of the damage caused by the animals that P.W.1 and P.W.4 had been herding next to the accused's field. They found that there was a maize crop growing on the field. According to P.W.6 the maize crop could have been about 2" high. Judging by the hoof prints P.W.6 and D.W.3 found that three cattle had, in fact, trespassed into the field and eaten only three maize plants.

I must say I observed all the witnesses as they testified from the witness box in this trial. P.W.6 who is the chief of Ha Mokoto impressed me as a truthful witness who gave his evidence in a straightforward manner. I am prepared to accept his story that there was at the material time a maize crop growing on the

8/ accused's .....

accused's field and three cattle were found to have trespassed therein damaging three maize plants. That granted, it necessarily follows that the evidence of P.W.1 and P.W.4 on this point must be rejected as false.

It is common cause that on arrival at the place where P.W.1 and P.W.4 were herding animals the accused demanded three of the cattle so that he could impound them for having trespassed into his field. Notwithstanding the explanation of P.W.1 and P.W.4 that only one had run into the field the accused selected away three of the cattle. According to P.W.4 as he did so the accused actually instructed him to go home and report to his elder brothers that he was impounding the animals. This is, however, denied by the accused. The accused's denial is, in a way, corroborated by P.W.1 according to whom he was the one who actually sent P.W.4 home to report that the accused was impounding the animals.

I am inclined to accept as the truth the accused's evidence corroborated by that of P.W.1 that he did not instruct P.W.4 to go home and report to his elder brother that he was impounding the animals. That being so, it stands to reason that the uncorroborated evidence of P.W.4 that he did ~~must~~ be rejected as false.

It is common cause from the evidence of P.W.2 P.W.4 and, indeed, their mother 'Mamota Nkuoatsana, who

9/ testified as .....



testified as P.W.3 in this trial that on arrival at home P.W.4 found his elder brothers (the deceased and P.W.2) outside the house where they were preparing to go to a mill. He reported to them that the accused was impounding the cattle. He then went inside the house and reported to P.W.3. The deceased and P.W.2 were instructed by P.W.3 to go to the veld and ask accused not to drive the cattle to the pound but wait for her so that they could inspect the damage allegedly caused by the animals and settle the matter amicably. The deceased and P.W.2 immediately left for the veld whilst P.W.3 followed them in the company of P.W.4.

According to P.W.4 when he and P.W.3 came to the veld he was walking ahead of the latter. He noticed the accused driving away three of the cattle one of which was yellowish in colour. He heard P.W.2 calling at the accused saying : "Hei Mohlomphehi! what is happening to the cattle?" The accused replied: "Ntate, your cattle have damaged crops." P.W.2 then asked the accused to wait for the cattle's owner who was already approaching. The accused told P.W.2 that he wanted his father and neither his mother nor P.W.2 himself, a fact which is, however, denied by the accused.

At that stage the three cattle which the accused had been driving away turned back. The accused then caught hold of the yellow cattle by the tail saying he was impounding it. As it was being held

10/ by the .....

by the tail the yellow cattle ran towards P.W.2 who, however, raised up his blankets to scare it away. The cattle ran away from P.W.2 and took a downwards direction. As there were fields in the direction towards which the yellow cattle was going P.W.2 ran alongside the cattle in an attempt to stop it. The cattle then ran straight towards the deceased with the accused still holding on to its tail. The deceased also scared it away with his blankets. The evidence of P.W.4 is, in all material respect on this point confirmed by P.W.1 and P.W.2.

The accused's version is, however, slightly different. According to him whilst he was driving the three cattle to the pound at his home village the deceased and P.W.2 came and stopped them. The deceased actually drove back two of the cattle whilst P.W.2 drove back the third one which was yellowish in colour. As he was next to the yellow cattle the accused caught it by the tail and tried to prevent it from going back with the other two cattle. He confirmed the evidence of P.W.1, 2 and 4 that the cattle then ran downwards with P.W.2 running fast on its side.

According to the accused there were no fields in the direction towards which the yellow cattle was running and the sole purpose of P.W.2 running alongside that cattle was to prevent it from being driven home or impounded. As P.W.2 ran alongside it the yellow cattle

11/ turned .....

turned towards the two cattle that were being driven back by the deceased. When he saw it approaching him the deceased went towards the yellow cattle and scared it away with his blankets.

In my view, the evidence of P.W.1,2 and 4 that as it ran downwards P.W. 2 ran alongside the yellow cattle to prevent it from trespassing into the fields is rather unconvincing. The accused was at the time admittedly running after that cattle in an attempt to drive it home where he was to impound it. The accused would surely stop the yellow cattle from trespassing into the fields, if there were any at all in the direction towards which it was running. There was, therefore no need for P.W.2 to run alongside that cattle. The only reasonable explanation why he did so is, in my view, the accused's story that P.W.2 and the deceased were preventing him from impounding the three cattle. Consequently I have no hesitation in rejecting as false the evidence of P.W.1, 2 and 4 that the deceased and P.W.2 did not interfere with the accused as he tried to impound the animals.

It is common cause from the evidence of P.W.1, 2, 4 and indeed, the accused himself that when the deceased scared it away the accused stopped running after the yellow cattle. According to P.W.1, 2 and 4 the accused then went to, and delivered three blows at, the deceased, with a knife. The deceased warded off two of the blows with his blanket which got torn

12/ in the process .....

in the process. The third blow, however, landed on the neck of the deceased who ran away bleeding profusely. The accused then turned to P.W.2 and chased after him. As P.W.2 was running away, the accused threw the knife at, and stabbed, him on the elbow. P.W.2 stumbled and fell to the ground. Before he could rise the accused picked up the knife which had dropped to the ground and stabbed him on the back. The accused then jumped about boasting that he had killed the young of a devil. P.W.3 was, in the meantime, screaming and holding to the deceased's wound in an attempt to stop the bleeding. According to P.W.2 when P.W.3 asked the accused why he was cruelly killing her children the latter insulted her by her mother's private parts and threatened to kill her. He (P.W.2) had to advise P.W.3 to keep quiet so as to avoid being assaulted by the accused.

In her evidence P.W.3 told the court that she came to the place where the accused was impounding her animals at the stage when the latter was chasing after P.W.2. She pleaded with the accused, who was wielding a knife, not to harm the child. At that stage the deceased, who was following her, threw away his blanket. She noticed that he was bleeding profusely from the right side of his neck. She immediately returned to the deceased and pressed on his injury in an attempt to stop the bleeding. According to her it was at that time that P.W.3 saw the accused throwing a knife at and

13/ stabbing .....

stabbing P.W.2 who fell to the ground. The accused then caught up with P.W.2, picked up the knife which had dropped to the ground and again stabbed him on the back. After he had thus been stabbed by the accused, P.W.2 got up on his own. She did not know what then happened to P.W.2 because she was busy attending to the deceased who was still bleeding profusely. She next saw P.W.2 at Paray hospital where he had been admitted with injuries on the back and elbow.

According to P.W.3 the accused had on a previous occasion threatened that the soldiers would invade her family around Christmas and New Year festivities. When she asked him whether what he did on that day was what he had meant by saying the soldiers would harm her family, the accused insulted and threatened her with violence. She, however, ignored the accused and raised an alarm as a result of which one 'Makhutsana came to the scene.

'Makhutsana testified on behalf of the defence as D.W.2. She confirmed that on the afternoon of the day in question she was in her house in the village of Ha Mokoto when she heard the alarm raised by P.W.3. She immediately went out and found P.W.3 some distance away from the house. She was holding the deceased who was obviously dying from a bleeding injury on his neck. On arrival D.W.2 pushed P.W.3 away from the deceased and placed her hand on the

14/ latter's .....

latter's bleeding wound. Despite her effort to stop the bleeding the deceased passed away. According to D.W.2 she found neither P.W.1, P.W.2, P.W.4 nor the accused in the vicinity of the spot where P.W.3 was attending to the deceased. She did not, therefore, hear the accused hurling insults at any one of them.

In his evidence, the accused further testified that when he saw the deceased going to and scaring it away with his blankets he stopped running after the yellow cattle. He asked the deceased what he was doing but there was no reply. When he looked back the accused noticed that P.W.2 was approaching him with a knife in his hand. He looked to the side of the deceased and found that he too was holding up a knife with which he delivered a blow at him. He dodged and warded off the blow with his arm. The deceased's knife, however, tore his lumber jacket on the left side of the chest before dropping to the ground. He picked up the deceased's knife and put it in his pocket.

According to the accused when the deceased delivered the blow at him he remembered that he too had a knife on his waist. He quickly pulled it out and stabbed the deceased once only in self-defence. He denied, therefore, the evidence that he tried on three occasions to stab the deceased whose blanket got torn in the process.

15/ After....

After stabbing the deceased the accused turned to P.W.2 who then ran away. He chased after him. As he was running away P.W.2 stumbled and fell to the ground. The accused confirmed that he then caught up with, and stabbed P.W.2 on the back. He, however, denied that he ever threw a knife at P.W.2 nor did he jump about boasting that he had killed the young of a devil.

According to him when he realised that he had injured the deceased and P.W.2 the accused was very confused. He abandoned the idea of impounding the animals that had damaged his crops and returned home. As he walked home the deceased and P.W.3 were throwing stones at, and insulting him. None of the stones hit him. He first went to the chief's place intending to report what had happened. The chief was, however, not in. He then went to his home to report to his father and elder brother, Thoola. His father was also not in. He however, noticed his elder brother seated outside his house. He went to him and reported what had happened.

D.W.3, Thoola Tsibela, confirmed that whilst he was sitting outside his house, on the day in question, the accused came and reported what had happened between him and the deceased and P.W.2. The accused also showed him his lumber jacket which had a tear on the chest region, allegedly caused by a blow delivered by the deceased with a knife. He did not, however, show him any knife that had been used by either the deceased

16/ or himself .....

or himself during the fight.

After the accused had made the report D.W.3 immediately proceeded to the scene of crime where he found P.W.3 and D.W.2 with the deceased. The deceased was already dead. He waited at the scene of crime until P.W.6, the accused and many other people had arrived. At about dusk on that day the body of the deceased was taken to his house.

D.W. 3 further confirmed the evidence that in December, 1988 the field used by the accused had been ploughed for the second time following the destruction of the first crop by the worms. He gave a lie, therefore, to the accused's story that the field had not been ploughed twice in 1988.

He confirmed that on the following day, 27th December, 1988, he and many other people including P.W.6 and Nathnael Nkuoatsana went to the accused's field and inspected the damage allegedly caused by P.W.3's animals. He noticed hoof prints of three cattle which had damaged only three maize plants.

According to the accused, after D.W.3 had left for the scene of crime, he entered into his house. Shortly thereafter he went outside and hid his knife underneath a stone on the forecourt before returning into the house. Whilst he was sitting in the house the chief's messengers came to call him. He was too frightened to go to the chief. Later on, the chief's

17/ messengers .....



messengers again came to call him. He then went to the chief (P.W.6) at the scene of crime where he found the deceased already dead. P.W.6 and many other people had also gathered there. He gave an explanation of what had happened and produced the deceased's okapi knife as the one he had used to inflict the injuries on the deceased and P.W.2. He conceded, however, that his explanation that he had used the deceased's knife to stab him and P.W.2 was a lie.

After the body of the deceased had been carried from the scene of crime to his house he (accused) left on horseback to surrender himself to the police at Thaba-Tseka police station. When he came to a place called Liphokoaneng on his way to the police station he hid the deceased's okapi knife underneath a stone. The reason for so doing was because he was not sure what the reaction of the police would be if he brought the knife to the police station. He eventually surrendered himself to the police at Thaba-Tseka.

P.W.8, D/L/Sgt Mongaula confirmed that in the afternoon of 27th December, 1988 the accused surrendered himself to him at Thaba-Tseka police station and voluntarily reported that he had fought with P.W.2 and the deceased. In the course of the fight he had stabbed P.W.2 and the deceased with the latter's knife. He did not, however, know if the knife had remained at the spot where the fight was taking place. The accused who was wearing a lumber jacket which had a tear on the chest region did not hand over any weapon. However, because of the

18/ explanation .....

explanation made by the accused and the tear he noticed on his lumber jacket, P.W.8 examined him for injuries. He found none. He then detailed police officers to proceed to Ha Mokoto and, inter alia, look for the knife which the accused had allegedly used on P.W.2 and the deceased.

Now, coming back to their evidence, P.W.5 and P.W.7 told the court that on the day they went to Ha Mokoto they were then taken to the spot where the accused had allegedly assaulted the deceased and P.W.2. They noticed a pool of blood which was, however, already dry. They, in vain, looked for the knife that the accused had allegedly used. However, on their return to the police station P.W.5 and P.W.7 met the accused who took them to a place called Liphokoaneng where he produced and handed over to them an okapi knife. The knife had been hidden underneath a stone at Liphokoaneng. P.W.5 and P.W.7 took possession of the okapi knife and it has since been in the police custody. They detected nothing of interest on that knife.

According to P.W.8, on 4th January, 1989 the accused took him to his house at Ha Mokoto and produced a black long knife that could not be clasped. He confirmed the accused's evidence that the knife had been hidden underneath a stone on the forecourt of his house. The accused handed over to him the knife which P.W.8 took possession of and returned to the police station.

19/ It has, however, .....

It has, however, disappeared whilst in the police custody. It is common cause that the accused was subsequently charged as aforementioned.

Considering the evidence as a whole, it seems to me, it is not really disputed that the accused did on 26th December, 1988, stab the deceased and P.W.2 with a knife. The question I have earlier posted viz. whether or not he is the person who inflicted the injuries on both P.W.2 and the deceased, causing the latter's death, must, therefore, be answered in the affirmative.

The accused has, however, raised the private defence of self-defence. He told the court that he was standing between P.W.2 and the deceased both of whom were attacking him with knives. He had, therefore, no chance to run away.

According to the accused when the deceased delivered a blow at him with a knife, he warded off the blow with his arm. The knife, however, tore his lumber jacket before dropping to the ground. At the time he saw the deceased delivering the blow, the accused remembered that he too had a knife on his waist. He quickly pulled it out and simultaneously stabbed the deceased on the neck in self-defence. He picked up the deceased's knife from the ground and put it in his pocket before turning to P.W.2 who, however, took to his heels. As he chased after him P.W.2 stumbled and fell to the ground. Before P.W.2 could rise, the accused caught up with and stabbed him on the back again in self-defence. He did not, however, disarm P.W.2 of the

20/ knife.

knife.

The accused's evidence in this regard is denied by P.W.1, 2 and 4 according to whom the deceased and P.W.2 were not armed with knives or any weapons at the material time. The accused merely rushed and delivered three blows with his knife at the deceased when the latter scared away the yellow cattle that was running straight to him. The deceased warded off two of the blows with his blanket which sustained holes in the process. The third blow, however, landed on the deceased's neck.

After stabbing the deceased the fatal wound on the neck, the accused turned to P.W.2 who had been standing some distance away. As P.W.2 ran away the accused threw his knife at, and stabbed, him on the elbow, a fact which was, however, denied by the accused.

P.W.1, 2 and 4 confirmed the accused's evidence that as he was running away P.W.2 fell to the ground. Before he could rise, the accused caught up with, and stabbed P.W.2 on the back.

I have already found in this judgment that three cattle that P.W.1 and 4 were looking after had trespassed into the accused's field, damaging his crops. The accused went to impound them, and rightly so in my opinion. I have further found that as the accused was driving them to the pound, the deceased and P.W.2 went to prevent him from doing so. They had no right to do that. Naturally,

21/ the accused .....

the accused must have been offended by the action of the deceased and P.W.2. It seems to me reasonable, therefore, to accept as the truth the evidence of P.W.1,2 and 4 that the accused then attacked the deceased and P.W.2. That being so, I reject as false the accused's story that P.W.2 and the deceased were the first to attack him. I also find as incredible the accused's evidence that when the deceased delivered a blow at him with a knife he could have warded off the blow with his arm and simultaneously pulled out a knife with which he stabbed him. The truth is in the evidence of P.W.1, 2 and 4 that when he went to the deceased the accused was already wielding his knife with which he stabbed the deceased.

It is to be observed, however, that although P.W.1, 2 and 4 told the court that the first two blows delivered by the accused inflicted holes on the deceased's blanket, a fact which was, however, denied by the accused, the blanket was neither shown to the police nor produced before the court. The inference to be drawn from failure to do so is that the blanket would not have supported the crown evidence. I accept, therefore, the accused's story that he did not deliver the first two blows at the deceased as P.W.1, 2 and 4 wished the court to believe. I reject as false the version of P.W.1,2 and 4 on this point.

Although in his evidence the accused told the court that the deceased attacked him with the

okapi knife which he took possession of it is significant that he never showed the knife to his brother, D.W.3, to whom he first came immediately after stabbing the deceased and P.W.2 nor did he show it to the police when he surrendered himself at the police station. His story that he was afraid to show the knife to the police is simply unconvincing. If he had shown the knife to the police surely that would have given credence to his story that the deceased had been attacking him with the knife and he had to defend himself.

I must say I have had the occasion to look at the tear on the lumber jacket that the accused was wearing at the time he was allegedly stabbed by the deceased. The tear is rugged and does not appear to have been made by the use of a sharp instrument such as a knife.

By and large, I am not convinced that the deceased was armed with a knife with which he stabbed the accused as the latter wishes the court to believe. I am prepared to accept the evidence that it was the accused who first used a knife to attack the deceased who was not armed with any weapon simply because he (accused) was provoked by the deceased and P.W.2 preventing him from impounding the animals that had trespassed into his field and damaged the maize crop. However, assuming the correctness of my finding that the deceased was not armed with a knife, or any weapon for that matter, the provocation was not such that it could reduce murder to a lesser offence. By using a knife on the deceased, in the circumstance of this case, the accused cannot properly be heard to say he acted in self-defence.

As regards the second count it is common cause that at the time the

/ accused .....

accused stabbed him P.W.2 was not only running away but had even fallen down. He was, therefore, not posing any danger to accused's life. Self-defence simply does not avail the accused.

When he went to the deceased and stabbed him on the neck with as lethal a weapon as a knife, the accused was, in my view, aware that death was likely to occur. He nonetheless acted reckless of whether or not it did occur. That granted, I am of the opinion that in assaulting the deceased as he did the accused had the requisite subjective intention to kill, at least in the legal sense.

As regards the second count there is evidence that shortly after the accused had stabbed him P.W.2 got up although with some difficulties. The accused was still around at the time and must have seen him. If he really intended to kill him there was nothing to prevent the accused from returning to P.W.2 and finishing him. He did not. That, in my view, is not consistent with the contention that the accused had the requisite intention to kill P.W.2. I accept, however, that in stabbing P.W.2 with the knife as described by the evidence the accused intended to cause him grievous bodily harm.

In the result, I find the accused guilty of murder as charged in the first count. On the second count I come to the conclusion that the accused has

24/ committed .....

committed assault with intent to do grievous bodily harm which is a competent verdict of attempted murder. He is accordingly convicted of assault with intent to do grievous bodily harm.

My assessor agrees with this finding.

B.K. MOLAI  
JUDGE.

17th October, 1990.

For Crown : Mr. Thetsane

For Defendant: Mr. Peete.



EXTENUATING CIRCUMSTANCES

Having convicted the accused of murder we are enjoined by the provisions of S. 296 of the Criminal Procedure and Evidence Act, 1981 to state the existence or otherwise of any factors tending to reduce the moral blameworthiness of his act.

I have found on evidence that the accused was lawfully impounding animals that had trespassed into his field and damaged crops when the deceased and P.W.2 unlawfully interfered by preventing the animals from being driven to the pound. In my view the action of the deceased and P.W.2 was provocative. Although the provocation was not such that it could reduce the murder of the deceased to a lesser offence it is a factor to be properly considered for purposes of extenuating circumstances.

I have also found that in assaulting the deceased in the manner he did the accused had intention to kill in the legal sense i.e. he did not plan or premeditate the death of the deceased. It is trite law that the absence of premeditation is a factor to be properly considered in determining the existence or otherwise of extenuating circumstances.

In the result, I come to the conclusion that there are, in this case, extenuating circumstances viz. provocation and the absence of premeditation.

My assessor agrees.

SENTENCE:

In mitigation of his sentence I am informed that the accused has no record of previous conviction and I take it, therefore, that he is a first offender. I have also been invited to consider a number of factors in mitigation of the accused's sentence. They have been eloquently tabulated by the defence counsel and there is, therefore, no need for me to go over them again. Suffice it to say I take them all into consideration.

I am, however, not prepared to turn a blind eye to the fact that the accused has been convicted of serious offences calling for commensurately serious punishment. A punishment that will really deter the accused from a repetition of this sort of a thing and serve as a reminder to people of his mind that the courts of law do not encourage them to take the law into their hands.

The accused is accordingly sentenced to serve a period of 8 years imprisonment on count I and 5 years imprisonment on count II. The sentences are to run consecutively.

B.K. MQLAI  
JUDGE

19th October, 1980

For Crown : Mr. Thetsane,  
For Defence: Mr. Peete.