

IN THE HIGH COURT OF LESOTHO

In the Matter of :

R E X

vs

1. TSEKO NYATSO
2. TSAKAJOE PULUNGOANE
3. PALO TS'OSANE
4. RAMAQHANAKA MOKHOMATHE

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai

on the 26th day of November,

1990.

The accused have pleaded not guilty to a charge of murdering 'Matanki Ramothamo, it being alleged that on or about 18th September, 1988 and at or near Ha Ntlama in the district of Berea they each or some or all of them unlawfully and intentionally killed the deceased.

It is significant that during the hearing of this trial Mr. Fosa, who represents the accused in this matter, informed the court that the defence would admit the depositions of 'Mapeete Molapo, Mohobane Mautsoe, 'Mantahlil Ntlama, D/Tpr. Mosuhli and Dr. Muwazi who were, respectively, P.W.5,7,8,9 and 10 at the proceedings of the Preparatory Examination. Mr. The<sup>s</sup>sane, counsel for the crown, accepted the admissions made by the defence

2/ counsel.

counsel.

In terms of the provisions of S.273 of the Criminal Procedure and Evidence Act, 1981 the depositions of 'Mapeete Molapo, Mohobane Mautsoe, 'Mantahli Ntlama, D/Tpr. Mosuhli and Dr. Muwazi became evidence and it was unnecessary, therefore, to call the deponents as witnesses in this trial.

It is also worth mentioning that at the close of the crown case the defence applied for the discharge of accused 2, 3 and 4 on the ground that the evidence adduced by the crown had failed to establish a prime facie case for the accused to answer. The application was opposed by the crown who contended that the evidence did establish prima facie case in respect of No. 2' accused. It conceded, however, that no prima facie case had been established against Nos. 3 and 4 who should, therefore, be acquitted and discharged.

I considered the evidence adduced by the crown and found that there was not an iota of competent evidence which a court of law, properly advising itself, could convict Nos. 3 and 4 accused. They were accordingly acquitted and discharged at the close of the crown case.

As regards No.2 accused I found that there was evidence indicating that he had taken the police to a spot behind his house from where he dug in the ground and produced certain weapons allegedly used in the fatal assault on the deceased. The questions that

3/ immediately .....

immediately arose were: who had buried the weapons behind No.2's house; why were they buried and how did he know that they were buried behind his house? Without going into the question of its credibility, it seemed to me that the evidence did establish prima facie case for No.2 accused to answer and the application for his acquittal and discharge at the end of the crown case could not be properly allowed. It was accordingly refused.

I, however, pointed out that the fact that the court had turned down the application did not necessarily mean that No.2 accused was compelled to go into the witness box and testify in his defence. The defence was perfectly entitled to tell the court that it was closing its case in which event the court would be bound to deal with the question of credibility of evidence and determine whether or not it had been established beyond a reasonable doubt that the accused had committed the offence against which he stood charged. The defence counsel told the court that in that event it would call accused 2 to testify in his defence.

The court heard the evidence of P.W.1. D/L/Sgt Seboka, who testified that on 19th September, 1988 he was stationed at T.Y police station when he received a certain report following which he proceeded to Ha Ntlama. He was in the company of two other police officers viz. D/Tper Matete and D/Tper Seboka who were, however, both not called to testify in this trial.

4/ At Ha Ntlama .....

At Ha Ntlama P.W.1 was taken to a spot next to the village tap where the deceased's dead body was found lying on the ground. It was dressed in a blue jersey with white strips, an off white petticoat and lying in a pool of blood. On examining the body for injuries P.W.1 found that it had sustained multiple wounds on the head, chest, arms, hips, buttocks and knee. He counted altogether a total of 31 open wounds and an abrasion on the right knee.

The body was conveyed to T.Y. Government hospital mortuary for post mortem examination. It sustained no additional injuries whilst being transported from Ha Ntlama to the mortuary. I shall return to P.W.1's evidence later in this judgment.

The evidence of Dr. Muwazi was to the effect that she was the medical doctor who, at about 2.30 p.m. on 22nd September, 1988 performed an autopsy on a dead body of a female African adult. The body was identified before her as that of the deceased by a police officer.

According to D/Tper Mosuhli, on the morning of the day in question, 22nd September, 1988, he and P.W.1 went to the mortuary at T.Y Government hospital where the latter showed him the body of the deceased. He confirmed that he was the police officer who, on the afternoon of the same day, 22nd September, 1988, identified, before Dr. Muwazi, the body of the deceased..

5/ In the .....

In the post-mortem examination report Dr. Muvazi confirmed that the external examination of the deceased's body revealed that it had sustained multiple deep wounds inflicted by the use of sharp instruments such as swords. On opening the body the medical doctor found that there was pericardium haemorrhage resulting in the death of the deceased.

I am prepared to accept as the truth the unchallenged medical evidence that the deceased's death was due to internal bleeding as a result of the multiple injuries that had been inflicted upon her with sharp weapons such as swords. The question that arises for the determination of the court is whether or not Nos. 1 and 2 accused are the persons who had inflicted the injuries on the deceased and, therefore, brought about her death.

In this regard the court heard the evidence of P.W.3, Lebohang Malibetsa, who testified that the deceased was his maternal grand mother. On the night of 18th September, 1988 he, the deceased, his younger brother and sister were sleeping in the same house at Ha Ntlama when he heard some foot steps behind the house. As he got up and put on the light P.W.3 heard some one violently knocking on the door with a hard object and angrily calling out: "open here or else we shall set you on fire, together with the children, inside the house." He had no difficulty in

6/ identifying ....

identifying the voice of the person who spoke at the door as that of No.1 accused who was his relative and lived in the same village as he did.

As No. 1 accused uttered the words mentioned above P.W.3 heard grass being pulled from the thatched roof of the house. He went to the door and opened it. some people he could not recognise them ran away leaving the grass burning outside the door of the house. P.W.3 quickly pushed the burning grass to the forecourt of the house and extinguished the fire. Whilst P.W.3 was busy putting out the fire the deceased screamed out and ran away in the direction towards the home of one Pholo, leaving the young children inside the house.

After extinguishing the fire P.W.3 tried to follow the deceased but could not find her. He then returned and went to report what had happened to one Thabo Keta, a next door neighbour who was, however, not called as a witness. The two went to report to one Makukuno, the chief's right hand man in the village. In turn, Makukuno instructed P.W.3 and his companion to go and report to one Tsoloane, another of the chief's right hand man in the village. From Tsoloane's place P.W.3 and Thabo Keta proceeded to the Chief's place where they found Makukuno already waiting on the forecourt. A report was then made to the chief. On the instructions of the chief they were joined by other village men with whom they proceeded to search for the deceased. During the search they found the

7/ deceased .....

deceased lying next to the village tap some distance away from the house of Pholo. P.W.3 himself did not go close enough to see if the deceased were still alive. He, however, went with members of the search team to Pholo's house where a report was made. From Pholo's house they went to a hillock in the village where Makukuno said he would raise a general alarm.

On the way to the hillock they met A2 who was walking towards his house in the village. When Makukuno asked him where he came from at that time of the night, A2 replied that he had been to the home of one 'Masetho to announce the news that his sister, 'Maneo, had given birth to a child. Makukuno expressed his suspicion that A2 could have been to 'Masetho's home to announce the birth of a child by his sister, 'Maneo, as alleged, because he knew that it was a week or so since the latter had given birth to a child.

In any event, P.W.3 and his party parted with A2 and continued on their way to the hillock from which the alarm was raised. Thereafter P.W.3 returned home and took his younger brother and sister to the home of one Mokhoatha.

In his testimony P.W.4, Makukuno Tsosane, told the court that he was the chief's right hand man at Ha Ntlama. According to him, after P.W.3 and Thabo Keta had reported that the former's family had been attacked he referred them to Tsoloane, another of the

8/ chief's .....

chief's right hand man in the village whilst he himself proceeded to the chief's place and reported the matter to chieftainess 'Mantahli Ntlama. On the instructions of the chieftainess he went to wake up Lesaoana Moshoeshoe and Mohobane Mautsoe with whom he waited for the arrival of P.W.3 and Thabo Keta at the chief's place.

P.W.4 denied, therefore, P.W.3's suggestion that he was present when the village men (Lesaoana Moshoeshoe and Mohobane Mautsoe) were waken up. He conceded, however, that, after P.W.3 and Thabo Keta had arrived at the chief's place, he Lesaoana Moshoeshoe and Mohobane Mautsoe left with them to search for the deceased in the village.

The evidence of P.W.4 was confirmed by chieftainess 'Mantahli Ntlama and Mohobane Mautsoe. I am prepared to reject as false P.W.3's story in as far as it is contradicted by the evidence of P.W.4 corroborated by that of chieftainess 'Mantahli Ntlama and Mohobane Mautsoe.

P.W.4 confirmed that during the search for the deceased, he and his party found her lying next to the village tap, a short distance from the house of one Pholo Khabo. According to P.W.4 the deceased was already dead. He then left the search team and went to wake up Pholo Khabo. As he and Pholo were going to where the deceased's body was, they met A2 who was coming from a downwards direction. It could have been at about 10 p.m. He confirmed the evidence of P.W.3 that he then

9/ questioned .....



questioned A2 about where he came from at that time of the night. In his reply A2 initially said he was from 'Masetho's home where he had gone to announce the news that his sister 'Maneo had given birth to a child. When he told him that he (P.W.4) knew that 'Maneo had given birth to a child about a week ago A2 then somersaulted and said he was from A1's parental home where they had been drinking beer. Although not entirely satisfied with A2's explanation about his walking about in the village at that time of the night P.W.4 and Pholo let him go.

According to P.W.4 as he and Pholo were talking to A2 the members of the search party, including P.W.3, were not there. They were waiting at a distance of about 10 paces (indicated) away. P.W.4 denied, therefore, the evidence of P.W.3 that he was present when he (P.W.4) met and questioned A2 about his movements at night. He conceded, however, that because he and A2 were not whispering as they talked to each other P.W.3 could have followed their conversation.

In his evidence P.W.4 told the court that after A2 had left, he and Pholo went to join the members of the search team. He then detailed Lesaoana Moshoeshoe to go to the hillock and raise an alarm in response to which many villagers came to the spot where the deceased was lying dead. P.W.4 denied, therefore, P.W.3's evidence that it was he (P.W.4) who went and raised the alarm from the

10/ hillock .....

hillock in the village.

The evidence of both P.W.3 and P.W.4 was, however, contradicted on this point by the evidence of Mohobane Mautsoe according to whom he was the one who actually raised the alarm on the instructions of P.W.4. I am inclined to accept as the truth the unchallenged evidence of Mohobane Mautsoe and reject as false the contradictory stories of both P.W.3 and P.W.4 on this point.

It is common cause that after they had been alarmed, the villagers gathered at the scene of crime where a night virgil was kept over the body of the deceased through the night. On the following day, 19th September, 1988, the police were sent for. As it has already been pointed out earlier, P.W.1 and the other two police officers attended the scene of crime.

Now, coming back to his evidence P.W.1 testified that after he had examined the body of the deceased for injuries and following certain information he cautioned and interrogated A1 and A2. After they had given explanations regarding the death of the deceased the accused took him to the home of A2. He was in the company of the other two police officers, P.W.4 and two other villagers.

At his home A2 went behind the house from where he dug in the ground and produced two home made swords one of which had its handle wrapped with a rubber band.

Its blade<sup>d</sup> had what appeared to be blood stains. The accused then took him to the home of A.1 At his home A1 produced a sharpened iron rod. There was nothing of interest on the iron rod. Asked about the clothes he had been wearing on the previous day A1 produced a shirt and a pair of greenish trousers which had what appeared to be blood stains on the buttocks. Because of the blood stains on them, P.W.1 took possession of the sword with a rubber band on its handle and the greenish pair of trousers. He subsequently caused them to be sent to a forensic biologist, 'Mapeete Molapo together with the deceased's jersey and petticoat, for examination.

This is confirmed by 'Mapeete Molapo, the forensic biologist, whose evidence was to the effect that on 29th September, 1988 she subjected to a forensic test the deceased's jersey and petticoat as well as the sword and the pair of trousers produced by A2 and A1, respectively. Her findings were that the blood stains on the jersey, petticoat and the sword were of a human being-group O. The blood stain on the green pair of trousers was, however too small to determine the species of its origin and group.

It is common cause that from A1's home, P.W.1 and his party, returned to the scene of crime from where the body of the deceased together with A1 and A2 were conveyed in a police vehicle to T.Y. town. On the way to

12/ T.Y. ....

T.Y. P.W.1 met A4. He cautioned and interrogated him. Following his explanation A4 was also taken to T.Y. together with A1 and A2. In T.Y. the body of the deceased was left at the mortuary whilst the three accused viz. A1, A2 and A4 were taken to the police station. A 3 was subsequently brought to T.Y. police station where he joined the other three accused.

P.W.1 told the court that he considered the statement which A2 had made at Ha Ntlama to amount to a confession. After they had come to T.Y. police station A1 repeated the same statement. He then asked him whether he would be prepared to repeat the statement even before a Magistrate to which question A1 replied in the affirmative. Arrangements were then made for A1 to go to a Magistrate before whom he confessed that he and the other three accused had planned to kill the deceased for having bewitched his younger brother, Manyarela, who was buried on 17th September, 1988. He himself participated in the killing of the deceased by kicking her with booted feet at the time the other accused were assaulting her with swords.

P.W.2, 'Mantsebo Machaha, the magistrate, confirmed that on 21st September, 1988 No. 1 accused appeared before her and made a confession. Although the admissibility of that confession was challenged on the ground that it was not freely and voluntarily made I have, in a separate judgment, found that it was freely

and voluntarily made and, therefore, admissible evidence.

The two accused gave evidence on oath in their defence. Although he conceded to have planned, together with the other accused, the killing of the deceased for having bewitched his late brother, A1 told the court that when they came to her house he heard the deceased calling out the name of her son, Rabelete. He was afraid of Rabelete. When he heard the deceased calling out his name he immediately ran away and never participated in the assault on her. He only learned afterwards that the deceased had been assaulted.

As it has already been stated earlier in this judgment, on 21st September, 1988 A1 made a confession in which he clearly told the magistrate that he had participated not only in the planning of the deceased's death but in the actual assault on her as well. I am convinced that his evidence before this court, that he never participated in the assault on the deceased, is but an after-thought which I have no hesitation in rejecting as false.

In his evidence A2 told the court that he neither participated in the plan to kill the deceased nor did he assault her. He conceded, however, that on the night of 18th September, 1988 he met P.W.4 in the village and told him that he was from the home of 'Masetho where he had gone to announce that his sister, 'Maneo, had given birth to a child. As he was illiterate he did not know the time when the child was born.

14/ He, however, ....

He, however, called his brother Majoooa Mokhomatha who testified, as D.W.2, that the child was born at about 2.30 a.m. on the night of the 18th September, 1988.

Well, if the evidence of D.W.2 that his sister, 'Maneo, gave birth to a child at 2.30 a.m. on the night of 18th September, 1988 were to be believed, it is obvious that A2 was telling a lie, both at the time he spoke to P.W.4 and in his evidence before this court, when he said he had been to 'Masetho to announce the news that his sister had given birth to a child. According to P.W.4 and P.W.3, who are both literate, it was around 10p.m. on the night of 18th September, 1988 when P.W.4 met and questioned A2 about his nocturnal movements. At that time the child had, according to D.W.2, not yet been delivered. That being so, A2 could not have been to the home of 'Masetho to announce the birth of a child which was not yet born. I am of the opinion that both A2 and D.W.2 were simply not being honest with the court. I have no hesitation in rejecting as false their evidence on this point.

A2 conceded that after he had been interrogated by P.W.1 he took the latter to his house from where he produced the two swords. According to him the swords had been pinned on a stoep behind the house. He denied, therefore, the evidence of P.W.1 that the swords had been buried in the ground from where he (A2) dug them out. Although A2 denied to have dug the

15/ swords from .....

swords from the ground behind his house, the evidence of P.W.1 that he did, was corroborated by that of P.W.4. I am inclined to accept as the truth the evidence of P.W.1 corroborated by P.W.4 that A2 had in fact buried the swords in the ground behind his house from where he dug them out.

The reason advanced by A2 for keeping the two swords not in the house but at the spot from where he produced them behind the house was that they might be stolen in the house because the door thereof did not close properly. He, however, conceded that his other property was kept in that house.

I must say I find the reason advanced by A2 for hiding the two swords behind the house in the manner described by P.W.1 and P.W.4 whilst his other property was still kept in that same house totally unconvincing. Regard being had to the medical report that the deceased had been assaulted with swords; A2 was, around the time the deceased was assaulted, seen in the vicinity of the place where the dead body of the deceased was found, his contradictory replies to P.W.4's question about his nocturnal movements and that he had buried in the ground his swords one of whose blade had blood stains falling within the deceased's blood group O, leave no doubt in my mind that the real reason why he hid the swords in the ground behind his house was because A2 knew that he was one of the people who had used the swords in the deceased's brutal assault which he wanted to cover away.

16/ That being .....

That being so, the question I have earlier posted viz. whether or not the two accused are the persons who have inflicted the injuries on the deceased and brought about her death must, therefore, be answered in the affirmative.

The question whether or not in assaulting the deceased to death the accused had the requisite subjective intention to kill is a matter of inference to be drawn from either their words or acts. As it has already been pointed out earlier, in his confession A1 told the magistrate that he had planned or premeditated the death of the deceased. There can be no doubt, therefore, that in assaulting the deceased he had direct intention to kill.

A1's confession cannot be used as evidence against A2 who is his co-accused. I have, however, found that there is circumstantial evidence indicating that A2 had participated in the assault perpetrated on the deceased.

In brutally assaulting the deceased on the upper parts of her body A2 and A1 were, in my view, aware that death was likely to occur. They nonetheless acted reckless of whether or not it did occur. That granted, I come to the conclusion that in assaulting the deceased as they did, the accused had the requisite subjective intention to kill. In the case of A1 it was direct intention whilst in the case of A2 it was intention in the legal sense.



In the result, I have no alternative but to find both accused guilty of murder as charged.

My assessor agrees.

B.K. MOLAI  
JUDGE.

23rd November, 1990.

For Crown : Mr. Thetsane  
For Defence: Mr. Fosa.

EXTENUATING CIRCUMSTANCES

We are enjoined by S.296 of the Criminal Procedure and Evidence Act, 1981 to state the existence or otherwise of extenuating circumstances.

There is evidence indicating that A1 believed that the deceased had bewitched his younger brother, Manyarela, and was, therefore, responsible for his death. As regard A2 I have found, on evidence, that he had intention to kill, in the legal sense i.e. there is no evidence that he premeditated the death of the deceased.

In my view, there are, in this case, extenuating circumstances viz. the belief in witchcraft and the absence of premeditation. The proper verdict is, therefore, that the accused are guilty of murder with extenuating circumstances.

My assessor agrees with this finding.

SENTENCE: Thirteen (13) years imprisonment.

B.K. MOLAI

JUDGE

26th November, 1990.

For Crown : Mr. Thetsane,

For Defence: Mr. Fosa.